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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al., Plaintiffs, v. WILBUR L. ROSS, et al., Defendants.	Case No. 20-CV-05799-LHK **ORDER GRANTING PLAINTIFFS' MOTION FOR STAY AND PRELIMINARY INJUNCTION** Re: Dkt. No. 36

Plaintiffs National Urban League; League of Women Voters; Black Alliance for Just Immigration; Harris County, Texas; King County, Washington; City of Los Angeles, California; City of Salinas, California; City of San Jose, California; Rodney Ellis; Adrian Garcia; National Association for the Advancement of Colored People; City of Chicago, Illinois; County of Los Angeles, California; Navajo Nation; and Gila River Indian Community (collectively, "Plaintiffs") sue Defendants Commerce Secretary Wilbur L. Ross, Jr.; the U.S. Department of Commerce; the Director of the U.S. Census Bureau Steven Dillingham, and the U.S. Census Bureau ("Bureau") (collectively, "Defendants") for violations of the Enumeration Clause and the Administrative Procedure Act ("APA").

Before the Court is Plaintiffs' motion for stay and preliminary injunction ("motion for preliminary injunction"). Having considered the parties' submissions; the parties' oral arguments at the September 22, 2020 hearing and numerous case management conferences; the relevant law; and the record in this case, the Court GRANTS Plaintiffs' motion, STAYS the Replan's September

30, 2020 and December 31, 2020 deadlines, and preliminarily ENJOINS Defendants from implementing these deadlines.

I. BACKGROUND

A. Factual Background

The 2020 Census is "a 15.6 billion dollar operation years in the making." Defendants' Opp. to Plaintiffs' Motion for Stay and Preliminary Injunction at 1 ("PI Opp."). As a result, after nearly a decade of preparation, Defendants adopted a final operational plan for the 2020 Census in December 2018 called the Operational Plan Version 4.0. However, in March 2020, shortly after the beginning of data collection, the COVID-19 pandemic upended Defendants' Operational Plan and necessitated more time for census operations. Accordingly, on April 13, 2020, Defendants adopted the COVID-19 Plan, which elongated the schedule for data collection and processing and the Secretary of Commerce's reports of population "tabulations" to the President and the states. *See* 13 U.S.C. § 141(b), (c). On August 3, 2020, Defendants announced the Replan, which reduced the COVID-19 timeframes for data collection and processing by half.

Below, the Court first describes census data collection, data processing, and reporting in general terms. The Court then details the deadlines for these operations under the Operational Plan Version 4.0; the COVID-19 Plan; and the Replan.

1. Deadlines for data collection, data processing, and the Secretary's reports to the President and the states.

As relevant here, there are four key deadlines in the 2020 Census. First is the deadline for self-responses to census questionnaires. At the end of the self-response period, the Census Bureau stops accepting responses to the census.

Second is the deadline on which Non-Response Follow-Up ("NRFU") ceases. NRFU refers to the process of "conduct[ing] in-person contact attempts at each and every housing unit that did not self-respond to the decennial census questionnaire." Fontenot Decl. ¶ 48. "The NRFU Operation is entirely about hard-to-count populations." ECF No. 37-5 at 219. NRFU is thus "the most important census operation to ensuring a fair and accurate count." Thompson Decl. ¶ 15.

Together, self-responses and NRFU comprise the census's data collection.

Third is the deadline for data processing after data collection. Data processing refers to the Bureau's "procedures to summarize the individual and household data that [the Bureau] collect[s] into usable, high quality tabulated data products." Fontenot Decl. ¶ 66.

Lastly, at the end of data collection and processing, the Secretary of Commerce issues two reports pursuant to the Census Act: (1) "the tabulation of total population by States" for congressional apportionment to the President by December 31, 2020, *see* 13 U.S.C. § 141(b); and (2) a tabulation of population for redistricting to the states by April 1, 2021, *see id.* § 141(c).

2. The Operational Plan Version 4.0, adopted in December 2018, provided a total of 54 weeks for the 2020 Census.

Defendants' sole declarant, Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the U.S. Census Bureau,[1] describes the Bureau's extensive work over nearly a decade to develop the Operational Plan Version 4.0 (hereafter, "Operational Plan"). For example, Associate Director Fontenot discusses eight significant census tests the Bureau performed in 2013, 2014, 2015, 2016, and 2018 to improve their field operations. Fontenot Decl. ¶ 71. Associate Director Fontenot describes partnerships with stakeholders such as organizations, tribes, and local governments. *E.g.*, Fontenot Decl. ¶¶ 12, 28. The Operational Plan reflects the conclusions of subject-matter experts such as statisticians, demographers, geographers, and linguists. *See, e.g.*, ECF No. 37-5 at 79, 144 (2020 Census Operational Plan—Version 4.0).

Under the Operational Plan adopted in December 2018, self-responses spanned 20.5 weeks from March 12 to July 31, 2020. NRFU spanned 11.5 weeks from May 13 to July 31, 2020. Data processing spanned 22 weeks from August 1 to December 31, 2020. These operational dates would culminate in the Secretary of Commerce issuing his reports by the statutory deadlines. Specifically, by December 31, 2020, the Secretary would report "the tabulation of total population

[1] For an organizational chart of the Census Bureau, *see* Census Bureau Organizational Chart, https://www.census.gov/about/who.html, ECF No. 150-3. Director Steven Dillingham and Deputy Director Ron Jarmin head the Bureau, and their direct reports are Associate Directors.

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by States" to the President for the purpose of Congressional apportionment. By April 31, 2021, the Secretary would report the tabulation of population to the states for the purpose of redistricting. 13 U.S.C. § 141(b).

3. COVID-19 pandemic causes suspension of census operations.

Six days after the self-response period began on March 12, 2020, the Bureau announced on March 18, 2020 that it would suspend all field operations for two weeks because of the COVID-19 pandemic. *See* Press Release, U.S. Census Bureau, *U.S. Census Bureau Director Steven Dillingham on Operational Updates* (Mar. 18, 2020), https://www.census.gov/newsroom/press-releases/2020/operational-update.html.

The Bureau foresaw an eight-week operational delay, according to an internal Bureau document dated March 24, 2020 and sent by the Bureau Deputy Director's Chief Advisor, Enrique Lamas, to senior staff. The document stressed the importance of maintaining an uncompressed schedule. Reasons for maintaining an uncompressed schedule included completing the workload remaining and operations that ensured a complete count of all population groups:

- The document stated that "staff had covered only about 10% of the workload when [the Bureau] had to stop." DOC_7087.
- The document further noted that operations "focused on counting populations not living in traditional housing, such as nursing home residents, college students, the military, prisoners, the homeless, and the transitory populations are being planned and will be conducted as it is safe for Census employees and the public to engage in face-to-face activities. These operations and our nonresponse follow-up operation, all need to be completed before the Census Bureau can begin processing the data to ensure that we have a complete count of the population and not undercount specific population groups." DOC_7088.

In line with the Bureau's expectation of a long delay, the Bureau announced another two-week suspension on March 28, 2020. Press Release, *Census Bureau Update on 2020 Census Field Operations* (Mar. 28, 2020), https://www.census.gov/newsroom/press-releases/2020/update-on-2020-census-field-operations.html. Further delays followed.

Ultimately, the Bureau's projected eight-week delay was nine weeks plus phased restarts.

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1 The Chief of Staff to Secretary Ross, Michael Walsh, analyzed the issues for the Secretary on May
2 8, 2020. He wrote that "[p]ursuant to OMB guidance, the Census Bureau *completely* suspended
3 decennial field operations for 47 days between March 18 and May 4," and then resumed
4 operations in phases thereafter. DOC_2287 (emphasis in original) ("Operational Timeline"
5 memo). Walsh flagged issues with two operations especially important to avoiding undercounts,
6 enumerator onboarding and "Update Leave":

7–10
- Onboarding enumerators "entails recruitment, selection, acceptance and gathering of any additional information, fingerprinting, background checks, onboarding, and training" approximately 340,000–500,000 enumerators. *Id.* "The suspension of field operations curtailed preparation for this [onboarding], as much of it required personal contact." *Id.* After onboarding, enumerators "visit non-responding households and conduct in-person interview to obtain census responses." DOC_2287.

11–16
- Update Leave, as Walsh wrote, "helps reach 5 million homes in the USA in rural and remote areas that lack city-style mail." *Id.* Update Leave reaches those homes by having Census "field staff hand-deliver questionnaires," *id.* at 6, to "areas where the majority of the housing units do not have mail delivery . . . or the mail delivery information for the housing unit cannot be verified." Fontenot Decl. ¶ 46. Before the complete suspension of operations, "approximately 10% of the initial [Update Leave] workload had been completed." DOC_2287. By contrast, "[u]nder initial projections, 100% of the Update Leave workload should have been completed by April 17." *Id.*

17 The May 8, 2020 Operational Timeline memo also foresaw problems with "[d]ata processing and
18 integrity." *Id.* (emphasis omitted). "[T]he pandemic has made impacts that will require additional
19 processing and expertise because populations have temporarily shifted." *Id.* As a result, the memo
20 suggested that the 2018 Operational Plan's provision of 152 days (about 22 weeks) for data
21 processing was not enough. *Id.*

22 As field operations began restarting under the COVID-19 Plan detailed below, the Bureau
23 encountered COVID-related challenges. In particular, the Bureau had trouble retaining
24 enumerators and conducting in-person visits in NRFU. On retaining enumerators, Associate
25 Director for Field Operations Tim Olson wrote to other senior officials on July 23, 2020 that "[the
26 Bureau] had a huge quit rate from training to deployed in field (and this does not mirror past
27 censuses at all – it is MUCH higher, almost a debilitating higher quit rate). And this translate[d]
28

into much slower production in the field because we have less than half the number of enumerators (38%) we need to get the job done." DOC_7737.

Issues with NRFU visits were flagged in a June 10, 2020 presentation sent by the Chief of Staff to Director Dillingham, Christa Jones, to Deputy Director Jarmin and the Chief of Staff to the Deputy Secretary of Commerce, Dan Risko. DOC_6545. On a slide titled "Risks and Challenges Due to COVID-19," the presentation stated that COVID-19 had "le[]d to new risks and unknowns for the operation." *Id.* Four risks stood out: (1) a lower case resolution rate because respondents "may be less likely to answer their door"; (2) challenges with staffing and training; (3) a complex schedule; (4) and a "de-scoped" early NRFU operation that presumably had been delayed by COVID. *Id.*

By July 30, 2020—by which time the Bureau had already been directed to create the Replan, as discussed below—enumerator staffing was still low. DOC_8623. Many cities across several Area Census Offices had roughly 50% shortfalls in enumerator staffing compared to the Bureau's internal target. *Id.* Plaintiffs' affidavits allude to similar issues with finding enumerators. In Monterey County, California, for instance, the pandemic made it harder to hire and retain enumerators "because traditional applicant groups like senior citizens have concerns about the risk of catching COVID-19." Gurmilan Decl. ¶ 13.

4. The COVID-19 Plan, adopted on April 13, 2020, provided 71.5 weeks for the 2020 Census.

As a result, on April 13, 2020, the Bureau issued an adjustment to its Operational Plan to account for the impact of COVID-19 (the "COVID-19 Plan"). ECF No. 37-3 (April 13, 2020 statement of Secretary of Commerce Wilbur Ross and Census Bureau Director Steven Dillingham). The COVID-19 Plan extended the deadlines. Specifically, first, the COVID-19 Plan expanded the deadlines for self-responses from 20.5 weeks to 33.5 weeks (March 12 to October 31, 2020) to account for the pandemic's disruptions to Bureau operations and the public's ability to respond to the census. Second, NRFU likewise expanded from 11.5 weeks (May 13 to July 31, 2020) to 12 weeks (August 11 to October 31, 2020).

Third, given the pandemic's effects on "the quality of the data, especially for groups that are less likely to self-respond (often hard to count populations)," post-data collection quality control was deemed especially important. ECF No. 37-7 at 18. Data processing for congressional apportionment thus expanded from 22 weeks (August 1 to December 31, 2020) to 26 weeks (November 1, 2020 to April 30, 2021). The processing was to include an independent review of the final address list, analysis by subject-matter experts, and the remediation of software errors. Fontenot Decl. ¶ 89.

Lastly, the press release announcing the COVID-19 Plan stated that "the Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts." ECF No. 37-3 at 3. The COVID-19 Plan would thus "extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021, and redistricting data to be delivered to the states no later than July 31, 2021." *Id.*

Although these delays would result in the Bureau missing statutory deadlines, the President of the United States and Bureau officials publicly stated that meeting the December 31, 2020 deadline would be impossible in any event. On the day the COVID-19 Plan was announced, President Donald J. Trump stated, "I don't know that you even have to ask [Congress]. This is called an act of God. This is called a situation that has to be. They have to give it. I think 120 days isn't nearly enough." ECF No. 131-16 at 4.

On May 26, 2020, the Bureau's Associate Director for Field Operations, Timothy Olson, stated that "[w]e have passed the point where we could even meet the current legislative requirement of December 31. We can't do that anymore. We -- we've passed that for quite a while now." Nat'l Conf. of Am. Indians, 2020 Census Webinar: American Indian/Alaska Native at 1:17:30–1:18:30, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY.

Likewise, on July 8, Associate Director Fontenot, Defendants' sole declarant, confirmed that the Bureau is "past the window of being able to get" accurate counts to the President by December 31, 2020. U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at

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20–21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

The Bureau's internal view on missing the statutory deadlines was similar. Days after announcing the COVID-19 Plan, the Bureau prepared for a call on April 28, 2020 with Congressman Jamie Raskin, Chair of the House Oversight Subcommittee on Civil Rights and Civil Liberties, which has jurisdiction over the census. In preparation for that call, the Bureau's Chief of Congressional Affairs, Christopher Stanley, circulated a memo to Director Dillingham and other senior officials. *See* DOC_2224. The memo answered possible questions about missed deadlines.

Two questions and answers ("Q&As") stood out. The first Q&A contemplated that any data collection after August 14 would make meeting the deadlines infeasible. The Q&A asked why the Bureau couldn't "collect data after August 14 and still deliver redistricting data on time?" DOC_2227. The answer was that the Bureau had "examined [the] schedule and compressed it as much as [the Bureau] c[ould] without risking significant impacts on data quality. Given the important uses of census data collection processing, it is vital that [the Bureau] not shortcut these efforts or quality assurance steps." *Id.*

The second Q&A asked whether "delaying the apportionment data [was] constitutional?" The answer was that "[t]he proposal underwent a constitutional review, and we believe it is constitutional and that the adjusted schedule will help us fulfill the constitutional requirement of a complete and accurate census. . . . In history, especially for the many of the earlier censuses, data collection and reporting the counts shifted beyond the zero year." DOC_2228. By "counts shifted beyond the zero year," the Bureau presumably was referring to census reports that had been made in the calendar year after the statutory deadline. Those reports were for the censuses of 1810, 1820, 1830, and 1840. ECF No. 203 (explaining examples); *see, e.g.*, Act of Sept. 1, 1841, ch. 15, § 1, 5 Stat. 452, 452 (second *post hoc* extension of September 1, 1841 for original deadline missed by over nine months). In those censuses, after one or more deadlines had passed without the enumeration having been completed, Congress extended the relevant deadlines after the fact. *See*

ECF No. 203.

On May 8, 2020, Secretary Ross's Chief of Staff, Michael Walsh, sent the "Operational Timeline" memo to the Secretary. The Operational Timeline memo found that:

> If the Census Bureau could fully restart today, under ideal conditions . . . the earliest you could finish NRFU, even with the ability to restart immediately every state, is approximately September 1, 2020. By finishing NRFU on September 1, 2020, apportionment counts could not be delivered until January 31, 2021, already after the statutory deadline. Redistricting information would be provided to states by April 30, 2021, already after the statutory deadline.
>
> **Based on the initial suspension of field activities in line with OMB guidance, the Census Bureau can no longer meet its statutory deadlines for delivering apportionment and redistricting data, even conducting operations under unrealistically ideal conditions.**

DOC_2288 (emphasis in original) (bullet points omitted).

All the above operational concerns were ultimately reflected in the census response data. As of June 2020, "self-response rates var[ied] widely across states and counties," with "markedly different operational environments and challenges" facing the Bureau "from one locale to another." ECF No. 37-7 at 6 (citing self-response rates "below 3 percent" in counties in Alaska, Texas, Utah, and South Dakota).

5. The Replan, adopted on August 3, 2020, reduced the time for the 2020 Census from 71.5 weeks to 49.5 weeks.

On July 21, 2020, President Trump issued a memorandum declaring the United States' policy to exclude undocumented immigrants from the congressional apportionment base.

On July 23, 2020, Associate Director Fontenot started an email thread with several senior Bureau officials, including Deputy Director Ron Jarmin and Associate Director for Field Operations Timothy Olson. Associate Director Fontenot began the thread by stating that on July 27, he would tell the Department of Commerce about the "reality of the COVID Impacts and challenges":

> On Monday at DOC [Department of Commerce] I plan to talk about the difference between goal and actual case enumeration (Currently a shortfall (11 % goal vs 7% actual) and attribute it to the higher drop out rate and (ideally with reasons) and

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> what we are going to do to address the technology drop outs.)
>
> I think it is critical to lay the groundwork for the reality of the COVID Impacts and challenges.
>
> Does anyone have any problems with my approach?

DOC_7737. In response, Associate Director Olson "agree[d] that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about." DOC_7738. Those reasons are not in the administrative record.

Associate Director Olson then "sound[ed] the alarm" on "deliver[ing] apportionment by 12/31" in the strongest possible terms:

> We need to sound the alarm to realities on the ground – people are afraid to work for us and it is reflected in the number of enumerators working in the 1a ACOs [Area Census Offices]. And this means it is ludicrous to think we can complete 100% of the nation's data collection earlier than 10/31 and any thinking person who would believe we can deliver apportionment by 12/31 has either a mental deficiency or a political motivation.

Id. One reason that accelerating the schedule would be "ludicrous," Associate Director Olson stated, was the "awful deploy rate" of enumerators about 62% below target. *Id.* Driving that shortfall was "almost a debilitating higher quit rate":

> Another tack is to provide crystal clear numbers by the 1a ACOs that shows the awful deploy rate - field selected the right number (big number) to training, training show rate was on par with prior censuses (albeit a few points lower ... but overall in line with past censuses). And then we had a huge quit rate from training to deployed in field (and this does not mirror past censuses at all - it is MUCH higher, almost a debilitating higher quit rate). And this translates into much slower production in the field because we have less than half the number of enumerators (38%) we need to get the job done.

DOC_7737.

On the same day as Associate Director Olson's email (July 23, 2020), the Chief of Decennial Communications and Stakeholder Relationships, Kathleen Styles, shared a so-called "Elevator Speech" memo with GAO official Ty Mitchell and senior Bureau officials. *See* DOC_8026 (sending to GAO). The purpose of the Elevator Speech, Chief Styles wrote, was "to explain, in layman's terms, why we need a schedule extension." The Speech begins with a "High

Level Message," which in its entirety reads:

> Curtailing census operations will result in a census that is of unacceptable quality. The Census Bureau needs the full 120 days that the Administration originally requested from Congress to have the best chance to produce high quality, usable census results in this difficult time. Shortening the time period to meet the original statutory deadlines for apportionment and redistricting data will result in a census that has fatal data quality flaws that are unacceptable for a Constitutionally-mandated activity.

DOC_8070.

On July 31, 2020, the Bureau removed from its website the October 31, 2020 deadline for data collection without any announcement or explanation. *Compare* ECF No. 37-8 (July 30 Operational Adjustments Timeline), *with* ECF No. 37-9 (July 31 Operational Adjustments Timeline).

By August 1, 2020, the Bureau had prepared several versions for a presentation to Secretary Ross on Monday, August 3, 2020 ("August 3 Presentation"). The parties identify one version as a key document. ECF Nos. 161 at 2 (Defendants' identification of DOC_10275), 190 at 6 (Plaintiffs' identification of same). The Presentation's very first slide, titled "Overview," concludes that "to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved":

> Due to COVID-19 impacts, the conclusion of field operations for the 2020 Census was previously scheduled to end on October 31. In order to meet the statutory date of December 31, 2020 for apportionment, field operations must now conclude no later than September 30, 2020. Accelerating the schedule by 30 days introduces significant risk to the accuracy of the census data. In order to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved.

DOC_10275–76.

On August 3, 2020, the Bureau issued a press release announcing a "new plan," which the Bureau called the "Replan." U.S. Census Bureau, *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count* (Aug. 3, 2020), ECF No. 37-1 ("August 3 Press Release"). In his declaration, Associate Director Fontenot avers that the Secretary approved the Replan on the day it was announced. Fontenot Decl. ¶ 85.

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In the words of the August 3 Press release, the Replan "accelerate[d] the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce." ECF No. 37-1. The time for the 2020 Census was reduced from 71.5 weeks to 49.5 weeks. Specifically, self-response compressed from 33.5 weeks to 29 weeks, with the deadline advancing from October 31 to September 30. Fontenot Decl. ¶ 100. NRFU compressed from 11.5 weeks to 7.5 weeks, with the deadline advancing from October 31 to September 30. Lastly, data processing was halved from 26 weeks to 13 weeks, with the deadline advancing from April 30, 2021 to December 31, 2020.

As of August 3, 2020, less than 63% of households had responded to the 2020 Census. ECF No. 37-1.

6. The Government Accountability Office found that the Replan increases the risks to obtaining a complete and accurate 2020 Census.

In June 2020, the Government Accountability Office ("GAO") issued a Report on the 2020 Census entitled, "COVID-19 Presents Delays and Risks to Census Count," in which the GAO noted, among other things, that staffing shortages were experienced at the Bureau's call centers and at the Bureau's contractor responsible for printing the six mail-in self-response forms.[2] ECF No. 37-7 at 8 (GAO, COVID-19 Presents Delays and Risks to Census Count (June 2020)). The Report also noted that as of June 1, 2020, counties in Alaska, Texas, Utah, and South Dakota had

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[2] The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts take judicial notice of information, such as reports of the Government Accountability Office ("GAO"), Census Scientific Advisory Committee ("CSAC"), and Department of Commerce Office of Inspector General ("OIG"), which are found on government agency websites. *See Paralyzed Veterans of Am. v. McPherson*, 2008 WL 4183981, at *5–6 (N.D. Cal. Sept. 9, 2008) (citing circuit and district court cases). However, to the extent any facts in the documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) ("A court may take judicial notice of matters of public record . . . . But a court may not take judicial notice of a fact that is subject to reasonable dispute.") (internal quotation marks omitted), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

reported self-response rates below 3 percent. *Id.* at 9.[3]

In August 2020, the GAO issued a Report on the 2020 Census entitled "Recent Decision to Compress Census Timeframes Poses Additional Risks to an Accurate Count." https://www.gao.gov/assets/710/709015.pdf. The Report stated: "Delays to data collection operations, public reluctance to participate in door-to-door interviews, and compressed timeframes for data collection and processing response data may affect the accuracy, completeness, and quality of the count." *Id.* at ii (cover memo). The Report also noted that implementation of untested procedures and continuing challenges such as COVID-19 could "undermine the overall quality of the count." *Id.* at 1.

7. The Bureau's Scientific Advisory Committee unanimously supports extension of the census schedule.

Associate Director Fontenot's September 22, 2020 declaration states: "In the midst of major West Coast fires and air quality issues that have accelerated since September 11, and the current impacts of Hurricane Sally across the states of Louisiana, Mississippi, Alabama, the Florida panhandle area, parts of Georgia, and South Carolina, I stated publicly on September 17, 2020 in the Census Scientific Advisory Committee meeting that I did not know whether Mother Nature would allow us to meet the September 30 date." ECF No. 196-1 ¶ 14.

The next day, on September 18, 2020, the Census Scientific Advisory Committee ("CSAC") unanimously concluded that the Census schedule should be extended. *See* Allison Plyer, Census Scientific Advisory Committee Chair, *Recommendations and Comments to the Census Bureau from the Census Scientific Advisory Committee Fall 2020 Meeting* (September 18, 2020), https://www.documentcloud.org/documents/7213520-Recommendations-and-Comments-

[3] The reports of the GAO, CSAC, and OIG are not in the administrative record. However, the Court is permitted to go outside the administrative record "for the limited purpose of background information." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The Court thus considers those reports for background information alone. The Court does not consider the reports for APA analysis. That said, many of the documents on which the OIG Report is based are included in the partial administrative record, which is the basis of the Court's APA analysis.

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to-the-Census.html#document/p2/a581794. Specifically, the CSAC found the following:

> To ensure a successful completion of the 2020 Census in a way that is consistent with its mandate of counting everyone once and in the right place, and based on its scientific and methodological expertise, CSAC recommends that the 2020 Census operational timeline be extended per the Bureau's April 2020 request. Counting everyone once and in the right place, using untested and never-before-used technologies, that must work together with precision, requires time. When the weather isn't right, we postpone the launching of rockets into space. The same should be true of the decennial enumeration, the results of which will impact apportionment, redistricting, funding decisions, legal mandates and regulatory uses of decennial Census data over the next decade.

Id. at 2.

8. The Commerce Department's Office of Inspector General found that the Replan increases the risks to obtaining a complete and accurate 2020 Census.

On September 21, 2020, the Department of Commerce's Office of Inspector General ("OIG") released a report entitled "The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census." Final Management Alert No. OIG-20-050-M (Sept. 18, 2020), https://www.oig.doc.gov/OIGPublications/OIG-20-050-M.pdf. The Report drew upon Bureau and Commerce Department documents that were produced to the OIG (the "OIG production" stated below), as well as interviews with senior Bureau officials and Director Steven Dillingham. *Id.* at 2. The report made two findings. First, "[t]he decision to accelerate the Census schedule was not made by the Census Bureau." Information Memorandum for Secretary Ross from Peggy E. Gustafson at 1 (Sept. 18, 2020). Second, "[t]he accelerated schedule increases the risks to obtaining a complete and accurate 2020 Census." *Id.*

On the first finding, the report detailed that:

> As of mid-July 2020, the Bureau still viewed the statutory extension as necessary in order to conduct the 2020 Census completely and accurately. This view is consistent with previous public statements made by senior Bureau officials that the Bureau would no longer be able to meet the December 31, 2020, statutory deadline.
>
> Then, in the late afternoon of Wednesday, July 29, 2020, a senior Department official told the Bureau to put together options for meeting the apportionment deadline of December 31, 2020, and brief the Secretary on those options on Monday morning, August 3, 2020.

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Id. at 7. On the second finding, the report detailed that "senior Bureau officials believed that the largest risk to data collection posed by the accelerated plan was the decreased time to recover from possible external contingencies affecting local areas or regions." *Id.* at 8.

As of September 21, 2020, the Census Bureau had resolved 99% of housing units in only four states. ECF No. 196-1 ¶ 13. The Bureau had stated internally in its August 3 Presentation that "[i]n order to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved." DOC_1026.[4]

B. Procedural History

The procedural history of this case highlights why the instant Order is based on a stipulated but incomplete administrative record. At first, Defendants stated that no administrative record existed. Defendants then disclosed that there are documents that were considered by agency decisionmakers at the time of the decision to adopt the Replan. The Court subsequently ordered production of the administrative record. Despite the order, Defendants did not produce the administrative record. Because of the exigency of the motion for preliminary injunction and the imminent September 30, 2020 deadline for data collection, the parties stipulated to an incomplete administrative record for purposes of the instant motion. The Court details each event in turn.

1. At first, Defendants stated that no administrative record existed.

On August 18, 2020, Plaintiffs filed suit to challenge the Census Bureau's August 3, 2020 Replan, which advanced the 2020 Census deadlines for self-responses to Census questionnaires, Non-Response Follow-Up ("NRFU") field operations, data processing, and reporting Census counts to the President and the states.

To allow Plaintiffs to effectively challenge the Replan, including the September 30, 2020 end of data collection, the parties stipulated to a briefing schedule and hearing date of September

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[4] The Court notes these later extra-record developments for context, but does not weigh them in its APA analysis. *But cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) ("It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. . . . [B]ut we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.))).

17, 2020 on Plaintiffs' motion for preliminary injunction. ECF No. 35. Pursuant to that schedule, Plaintiffs filed a motion for a preliminary injunction on August 25, 2020 based on their claims under the Enumeration Clause and the APA. ECF No. 36.

On August 26, 2020, the Court held a case management conference, at which Defendants repeatedly denied the existence of an administrative record. *E.g.*, ECF No. 65 at 9:22–24 (The Court: "Is there an administrative record in this case?" Defendants: "No, Your Honor. On behalf of the Defendants, no, there's not."), 10:17–18 ("[A]t this point there is no administrative record."). Rather, Defendants suggested that the only document that provided the contemporaneous reasons for the Replan was the Bureau's August 3, 2020 press release. *Id.* at 20:6–7 ("[A]t this point I'm not aware of any other documents, but I would propose that I check with my client . . . ."). Even so, the Court instructed Defendants that "[i]f there's an administrative record, it should be produced. [The Court] will need it to make a decision in this case." *Id.* at 10:13–14.

2. Defendants then disclosed that there are documents considered by agency decisionmakers at the time the Replan was adopted.

At the September 4, 2020 hearing on the September 3, 2020 motion for a temporary restraining order ("TRO"), ECF No. 66, Defendants reiterated their position that no administrative record existed. ECF No. 82 at 10:21–23, 33:13–15. However, Defendants disclosed that there were documents considered by agency decisionmakers at the time the Replan was adopted. Defendants stated:

> The Census Bureau generates documents as part of its analysis and as part of its decisions and as part of its deliberations. And there are documents that the Replan was not cooked up in a vacuum, it was part of the agency's ongoing deliberations. And so certainly there are going to be documents that reflect those documents [sic].

Id. at 33:2–7. That said, Defendants stated they would only have to submit the documents "if there is an administrative record on final agency action, which is there is [sic] none here." *Id.* at 33:14–16. In Defendants' view, the lack of final agency action meant that "the documents that fed into the operational plans and the operational decisions are internal documents that are subject to the deliberative process privilege." *Id.* at 32:13–16.

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Only a few minutes later, however, Defendants retracted their assertion of deliberative process privilege. *Id.* at 36:15–17 ("[T]o be clear, we are not asserting the deliberative process privilege because there is no record and there's nothing to consider."). Defendants conceded that "[i]f there is final agency action that is reviewable and the APA applies, we would have an obligation to produce the administrative record." *Id.* at 35:24–36:1. However, Defendants urged the Court to rely solely on Associate Director Fontenot's declaration that Defendants would file that evening with Defendants' opposition to the motion for preliminary injunction. *E.g.*, *id.* at 16:21–23 ("We will not be filing documents in addition to the declaration."). Indeed, when Defendants filed their opposition that night, Defendants' only evidence was Associate Director Fontenot's declaration. ECF No. 81. After full briefing and the hearing, the Court issued a TRO on September 5, 2020. ECF No. 84.

3. The Court ordered production of the administrative record.

At the September 8, 2020 case management conference, Defendants again stated that "there is no administrative record in this case because there is no APA action." ECF No. 98 at 62:15–16. Even so, Defendants confirmed their statements from the TRO hearing that the Replan is "indeed codified." *Id.* at 21:7. The Replan simply was "not necessarily codified in one particular document." *Id.* at 21:9–10. Accordingly, Plaintiffs asked the Court to order Defendants to produce the administrative record. *E.g.*, *id.* at 44:10–13.

After full briefing, the Court issued its Order to Produce the Administrative Record, which addressed threshold arguments before ordering production. ECF No. 96. However, because of the competing need to resolve the motion for preliminary injunction as quickly as possible, the Court ordered a narrowed portion of the administrative record to be produced on September 13 and 16, 2020, before the September 17, 2020 preliminary injunction hearing. *Id.* at 21. Given these production deadlines, the Court continued the deadline for Plaintiffs' reply in support of their motion for preliminary injunction from September 10 to September 15, 2020.

4. Despite the Court's order, Defendants did not produce the administrative record.

Twelve hours before the production deadline on September 13, 2020, Defendants produced 58 unredacted documents and 14 heavily redacted documents. ECF No. 105; *see* ECF No. 177 (providing number of documents in September 13 Production). Many of the redacted documents contained little information other than the email metadata that Defendants included in their privilege log. *See, e.g.*, ECF No. 105-1 at 37 (DOC_225: heavily redacted email); id. at 65 (DOC_253: same); *id.* at 173 (DOC_361: same); *id.* at 177 (DOC_365: same). Defendants also stated that "[r]eview of the remaining documents remains ongoing" and that "[b]ecause review of the remaining documents remains ongoing, and due to the volume of documents involved, Defendants will be unable to produce or log any additional documents today." *Id*. Moreover, Defendants did not identify when they would complete the September 13 Production.

At the September 14, 2020 case management conference, Defendants stated that their next production would be on September 16, 2020, but that they "d[id] not anticipate" completing the September 13, 2020 Production on September 16, 2020. ECF No. 126 at 22:6. Moreover, Defendants stated that they were still collecting documents for the September 16 Production and did not know how many documents would be responsive. *See, e.g.*, *id.* at 20:6–10. Overall, Defendants stated that they would be unable to comply with the Court's Order to Produce the Administrative Record because compliance would be "a physical impossibility." *Id.* at 41:16–17.

5. The parties stipulated to an incomplete administrative record for purposes of the motion for preliminary injunction.

In response to Defendants' failure to comply with the Court's order on September 13, 2020, Plaintiffs filed the Department of Commerce Inspector General's August 13, 2020 Information Memorandum for Secretary of Commerce Wilbur Ross, which included the following Request for Information:

> To assist the OIG ["Office of Inspector General"] in its oversight responsibilities, please provide all documents or communications, including but not limited to email, instant messages, and text messages:
>
> 1. Discussing or referring in any manner to the decision to accelerate the

> 2020 Census schedule as described in the August 3, 2020 press release.
>
> 2. Detailing the persons involved, and their respective involvement, in the decision to accelerate the 2020 Census schedule.
>
> 3. Detailing the reasons for the decision to accelerate the 2020 Census schedule.
>
> Please provide all requested documents and communications by close of business Monday, August 17, 2020. You may also produce any additional documentation or information you deem relevant to this request for information.

ECF No. 111-2 at 5. Plaintiffs also noted that Associate Director Fontenot's declaration had averred that the Census Bureau had produced many documents to the OIG. ECF No. 111 at 5 (citing Fontenot Decl., ECF No. 81-1 at 36 ¶ 103). Associate Director Fontenot did not disclose the OIG's Request for Information about the Replan, but rather spoke in more general terms: "We produce a massive amount of documents and other information to the Office of Inspector General and the General Accounting Office every week, and these organizations interview Census Bureau staff on almost a daily basis." ECF No. 81-1 at 36 ¶ 103. In other words, Defendants had neither disclosed to the Court the OIG's Request for Information nor produced the OIG documents in response to the Court's Order to Produce the Administrative Record. *See* ECF No. 111-2 at 5.

Given the exigency, both parties ultimately agreed that "in the short term, focusing on the OIG documents for purposes of getting to a PI ruling and whatever appeal follows makes sense." *Id.* at 72:19–21; *see id.* at 33:14–22, 41:6–9 (Defendants' agreement). The Court thus ordered Defendants to produce the OIG documents that would constitute the administrative record or would be included in the administrative record, stayed the Order to Produce the Administrative Record until a case management conference after the impending preliminary injunction decision, and continued the preliminary injunction hearing to Tuesday, September 22, 2020. *Id.* at 71–77; *see* ECF No. 132. As the Court found, both the parties and the Court were "running out of time." ECF No. 141 at 38:6, 71:14.

On September 15, 2020, Plaintiffs filed their reply, for which they only had the benefit of Defendants' incomplete September 13, 2020 production of the administrative record as described above. ECF No. 130 ("Reply").

On September 18, 2020, Defendants produced the OIG documents. Over the weekend on September 19 and 20, 2020, after full briefing, United States Magistrate Judges Nathanael Cousins, Susan van Keulen, and Thomas Hixson resolved the parties' privilege disputes. Defendants produced the documents that the judges had deemed non-privileged on September 19, 20, and 21, 2020.[5] The resulting set of all non-privileged OIG documents comprise the administrative record for the instant motion.

The Court allowed the parties to file supplemental briefs on the motion for preliminary injunction to address Defendants' productions. Specifically, on September 20, 2020, the parties filed supplemental briefs that addressed Defendants' September 18, 2020 production. *See* ECF No. 176 ("Defs. 1st Supp. Br."); ECF No. 178 ("Pls. 1st Supp. Br."). On September 22, 2020, the parties filed supplemental briefs that addressed Defendants' September 19, 20, and 21, 2020 productions. ECF Nos. 196 ("Defs. 2nd Supp. Br."); ECF No. 197 ("Pls. 1st Supp. Br."). However, on September 22, 2020, Defendants also filed another Associate Director Fontenot declaration that discussed injunction harms to Defendants that Associate Director Fontenot did not include in his September 5, 2020 declaration in support of Defendants' opposition to the motion for preliminary injunction. ECF No. 196-1. The Court held a hearing on the motion for preliminary injunction on September 22, 2020.

II. LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that [she] is likely to succeed on the merits, that [she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [her] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The party seeking the injunction bears the burden of proving these elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). "A preliminary injunction is 'an extraordinary and drastic remedy, one that should

[5] To minimize any intrusion into Defendants' privileges, this Court only reviewed documents in the OIG Production that the United States Magistrate Judges deemed non-privileged. The Court did not itself review *in camera* the OIG Production.

not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012).

III. REVIEWABILITY

Defendants argue that Plaintiffs are not entitled to a preliminary injunction both because the instant case is unreviewable due to a number of threshold issues, PI Opp. at 4–23, and because the four relevant factors weigh against issuance of a preliminary injunction, *id.* at 23–35. The Court first considers the threshold reviewability questions before turning to the four preliminary injunction factors.

Defendants argue that the instant case is unreviewable on five grounds: (1) the Replan presents a political question; (2) Plaintiffs lack standing; (3) the Replan is not agency action; (4) the Replan is not "final"; and (5) the Replan is committed to agency discretion by law. The Court addresses each ground in turn and then briefly addresses the APA requirements that Defendants do not address, namely that Plaintiffs lack an adequate alternative to judicial review and suffer prejudice from the Replan.

A. The Replan does not present a political question.

Defendants argue that Plaintiff's Administrative Procedure Act claim is not justiciable because it presents a political question. PI Opp. at 4–9. The Court disagrees.

A "political question" is one which is "outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). Tellingly, Defendants fail to offer a case that finds that the political question doctrine bars review of decisions regarding the administration of the census. Instead, Defendants point the Court to two defining hallmarks of a political question: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving" the dispute. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *accord Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004). Defendants argue that both are present here because (1) the Enumeration Clause vests Congress with the authority to conduct "actual Enumeration," PI Opp. at 5–6, and (2) there is no evident standard by which the Court

could evaluate the Bureau's decision. PI Opp. at 6–7. Neither argument is convincing.

First, Defendants cite no case—and the Court is aware of none—in which a court declined jurisdiction over a census case on political question grounds. To the contrary, the Supreme Court and lower courts have repeatedly rejected the argument that the political question doctrine bars review of census-related decisionmaking. *See, e.g.*, *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458–59 (1992) (holding that the "political question doctrine presents no bar"); *Franklin v. Massachusetts*, 505 U.S. 788, 801 n.2 (1992) (noting that the Court "recently rejected a similar argument" in *Montana* that "the courts have no subject-matter jurisdiction over this case because it involves a 'political question'"); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (per curiam) (rejecting the Census Bureau's argument that "allegations as to mismanagement of the census made in the complaint involve a political question," and holding the case reviewable under the Constitution and APA) (quotation omitted); *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 791 (S.D.N.Y. 2018) (rejecting political question doctrine in citizenship question litigation; and collecting cases); *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980) (rejecting political question doctrine), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 674 (E.D. Pa. 1980) (same); *Texas v. Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992) (same); *District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1185 (D.D.C. 1992) (same); *City of N.Y. v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 764 (E.D.N.Y. 1990) (same); *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) (same; and stating "the court sees no reason to withdraw from litigation concerning the census"), *aff'd*, 525 U.S. 316 (1999); *see also Utah v. Evans*, 536 U.S. 452 (2002) (engaging in review without noting any jurisdictional defect stemming from political question doctrine); *Wisconsin v. City of N.Y.*, 517 U.S. 1 (1996) (same); *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000) (same), *aff'd sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001) (unpublished); *Prieto v. Stans*, 321 F. Supp. 420, 421 (N.D. Cal. 1970) (finding jurisdiction over a motion to preliminarily enjoin the census's "mail-out, mail-back procedure" and "community education and follow-up procedures").

Second, precedent supports the determination that there is a discoverable and manageable standard by which the Court can review the agency action at issue here. For example, the Census Act "imposes '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.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Franklin*, 505 U.S. at 819–820 (Stevens, J., concurring in part and concurring in judgment)) (discussing 2 U.S.C. § 2a). Similarly, the text, structure, and history of the Constitution evinces "a strong constitutional interest in accuracy." *Utah*, 536 U.S. at 455–56.

Thus, in its decision on the census citizenship question last year, the Supreme Court rejected Defendants' claim that there is "no meaningful standard against which to judge the agency's exercise of discretion." *Dep't of Commerce v. New York*, 139 S. Ct. at 2568 (quoting *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)). The standard is provided by the Census Act, the Constitution, and APA. Accordingly, it is no surprise that Defendants do not cite, and the Court could not find, a case in which the political question doctrine barred judicial review of census-related decisionmaking.

In sum, the political question doctrine does not bar the Court from reviewing the instant case.

B. Plaintiffs have standing to challenge the Replan.

"To have standing, a plaintiff must 'present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Dep't of Commerce v. New York*, 139 S. Ct. at 2565. Plaintiffs here allege—and support with affidavits—the same four injuries that the Supreme Court found supported standing in the citizenship question case: "diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources." *Id.* at 2565 (upholding findings as not clearly erroneous). The Court discusses each of Plaintiffs' four alleged injuries.

1. Plaintiffs are likely to lose federal funds that turn on census data.

The administrative record shows that the Replan will likely lead to an undercount that

results in "loss of crucial federal funds for programs that affect [Plaintiffs'] daily life." A. Garcia Decl. ¶ 4. The Supreme Court has specifically agreed that the loss of federal funding "is a sufficiently concrete and imminent injury to satisfy Article III." *Dep't of Commerce v. New York*, 139 S. Ct. at 2565. Thus, the Court agrees that the possible loss of federal funds is a sufficient injury to establish Article III standing as explained below.

Local government Plaintiffs are recipients of multiple sources of federal funding that turn on census data. King County, Washington; the City of Los Angeles; and Harris County, Texas are leading examples. The Replan's shortened schedule for data collection and processing will likely diminish each locality's funding because each locality has many hard to count persons who risk being undercounted. M. Garcia Decl. ¶¶ 7–8; Dively Decl. ¶ 5; Briggs Decl. ¶¶ 7, 11; *see also* Hillygus Decl. ¶¶ 12, 19, 39 (explaining the statistics of undercounting subpopulations). Specifically, the Court notes the following:

- In King County, three-quarters of the County's record population growth of 15% since 2010 is attributable to "populations that are less likely to self-respond to the census." Dively Decl. ¶ 5. As a result, "[s]hortening the enumeration period risks creating a population undercount." *Id.* Any undercount would reduce King County's allocation of funds "proportionately disbursed by census population counts." *Id.* ¶ 7. These funds include Community Development Block Grants, HOME Investment Partnership Program, and Emergency Solutions Grants from the U.S. Department of Housing and Urban Development. *Id.* ¶ 7. Transit Formula Grants to the Seattle region, of which King County is a part, also turn on census data, and totaled $108 million in fiscal year 2019.
- Los Angeles County is "the hardest to count in the nation." M. Garcia Decl. ¶ 7. 57% of the residents in the City of Los Angeles, which is home to roughly 4 million people, live in census block groups that are hard or very hard to count. *Id.* As a result, Los Angeles' self-response rate of 54.5% (as of August 19, 2020) is well below the city's 2010 response rate of 68% and the state's 2020 response rate of 65.9%.
- "[T]he City of Los Angeles receives tens of millions of dollars from the federal government each year based upon the ratio of population derived from the decennial census." Westall Decl. ¶ 35. In times of national emergency, cities such as Los Angeles receive relief based on census population. *Id.* ¶ 34 (discussing $20 million received under the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act).
- In Harris County, the Replan's shortening of the self-response and NRFU timelines risks causing "unprecedented undercounts in the 2020 Census." Briggs Decl. ¶ 11.

"[A]pproximately $90,529,359 of the grants expended by Harris County in FY2019 depended on accurate census data." Wilden Decl. ¶ 5. Among the grants affected are those that enable "sustainable financing of local health departments" such as Harris County Public Health, which has helped manage COVID-19 for approximately 4.7 million people. Shah Decl. ¶¶ 4, 8.

An undercount in any locality matters greatly. Even a *small* undercount of a *subset* of the hard to count population would result in the loss of federal funding. *See Dep't of Commerce v. New York*, 139 S. Ct. at 2565 ("[I]f noncitizen households are undercounted by as little as 2% . . . [states] will lose out on federal funds"). Thus, like in *Department of Commerce v. New York*, Plaintiffs that receive federal funds based on census population suffer "a sufficiently concrete and imminent injury to satisfy Article III." *Id.*

2. Plaintiffs will likely be deprived of their fair share of political representation.

Plaintiffs allege that the undercount resulting from the Replan will likely result in an unfair apportionment that will deprive local government Plaintiffs, individual Plaintiffs, and members of organizational Plaintiffs of their fair share of representation. The resulting "threat of vote dilution," whether Congressional or intrastate, is an injury in fact. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331–32 (1999).

For example, given the historically low census response rates in the City of Los Angeles and City of Salinas in California, the Replan creates a substantial risk that their residents will not be counted, and a substantial risk of diminished political representation. *See* M. Garcia Decl. ¶¶ 8–15; Gurmilan Decl. ¶¶ 6, 8–14. Specifically:

- In the City of Los Angeles, the Replan "will result in extreme inaccuracy" because it would leave "just over six weeks to complete enumeration of roughly half of the exceptionally diverse households of the nation's second-most-populous city—in the midst of a once-in-a-lifetime pandemic." M. Garcia Decl. ¶ 8; *see* Westall Decl. ¶ 36 (stating it is "likely" that undercounts will "disproportionally impact Los Angeles" and "cause the City to miss out on a portion of [] funding for an entire decade").
- Similarly, the City of Salinas comprises 38.5% of Monterey County's hard to count population, and the City's response rate is 9.5% below its response rate from the 2010 Census and 8% below the current state average. Gurmilan Decl. ¶ 6.

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The undercount wrought by the Replan will not only "compromise the success of the apportionment count" for Congressional representation, but also "severely compromise the quality of the redistricting data" for state and local representation. Louis Decl. ¶ 43; *see* Thompson Decl. ¶ 23. In fact, it is undisputed that census data is used to redraw district boundaries for federal, state, and local legislatures, and that drawing districts with unequal population can be unlawful. *See, e.g.*, Westall Decl. ¶¶ 14–29. An undercount from a truncated self-response period, lower-quality NRFU, and rushed data processing all mean that Plaintiffs' federal, state, and local political representation will be diminished. *See, e.g.*, Westall Decl. ¶¶ 27 ("[R]esidents in Council Districts with large concentrations of undercounted residents would be denied equal representation."); Soto Decl. ¶ 11 (same); Ellis ¶ 12 ("An undercount on the 2020 Census will also put me at serious risk of political underrepresentation in the U.S. Congress, and in the Texas legislature.").

3. The Replan will likely degrade census data that Plaintiffs use to deploy services and allocate capital.

The local government Plaintiffs allege that the Replan will degrade granular census data that they rely on to deploy services and allocate capital. "[B]y virtue of the Constitution and the Census Act, it is, of course, the federal government's job to collect and distribute accurate federal decennial census data." *New York v. Trump*, No. 20-CV-5770, 2020 WL 5422959, at *18 (S.D.N.Y. Sept. 10, 2020) (three-judge court); *see also* Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, § 209, Pub. L. No. 105-119, 111 Stat. 2440, 2481 (1997) ("1998 Appropriations Act") (codified at 13 U.S.C. § 141 note) ("Congress finds that . . . it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States . . . .").

The degradation of data is thus an informational injury analogous to those that have supported Article III standing. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 611 (S.D.N.Y. 2019) (finding that "degradation in the quality of census data" supported standing), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019); *see also, e.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (collecting

cases finding that "deprivation of information" supports standing); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114 (9th Cir. 2017) (finding standing partly because a statute, 15 U.S.C. § 1681e(b), requires "follow[ing] reasonable procedures to assure maximum possible accuracy" of information). For instance, King County, Los Angeles, and Harris County all rely on granular census data:

- King County, Washington uses census data to place public health clinics, plan transportation routes, and mitigate hazards. Dively Decl. ¶ 6.
- The City of Los Angeles uses "reliable, precise, and accurate population count data" to deploy the fire department, schedule trash-pickups, and acquire or improve park properties. Westall Decl. ¶ 32.
- Recently, Harris County has used census data "to estimate the impact of COVID-19 to specific communities at a granular level," which has helped the county tailor "communications in multiple languages with audience and age-specific prevention messaging and share information about availability of testing or vaccine sites." Shah Decl. ¶ 7. Inaccurate or incomplete data would "increase risk of misinterpreting the prevalence of the disease in disproportionately impacted communities." *Id.*

In sum, the Replan's harm to the accuracy of census data will harm Plaintiffs' concrete uses of the data.

4. Plaintiffs have diverted and will continue diverting resources to mitigate the undercount that will likely result from the Replan.

Plaintiffs will divert resources to mitigate the undercounting that will likely result from the Replan. The result is "concrete and demonstrable injury to [Plaintiffs'] activities—with the consequent drain on [their] resources." *New York*, 2020 WL 5422959, at *19 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see also Am. Diabetes Ass'n v. U.S. Dep't of Army*, 938 F.3d 1147, 1154 (9th Cir. 2019) (discussing *Havens Realty*, and finding injury in fact where plaintiffs "had altered their resource allocation" that they would have spent on some other organizational purpose).

The City of Salinas, Harris County, Black Alliance for Just Immigration, League of Women Voters, and National Urban League detail many examples of diverted resources:

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- The City of Salinas already promoted the October 31 deadline "on social media and in thousands of paper flyers." Gurmilan Decl. ¶¶ 11–12. Thus, "some residents who received the City's messaging will fail to respond before the R[eplan] deadline because the City has limited remaining resources to correct what is now misinformation." *Id.* ¶ 12. Moreover, the City "is still advertising for census enumerator job listings because traditional applicant groups like senior citizens have concerns about the risk of catching COVID-19. With fewer enumerators working, every extra day the City has to use [] existing staff to support the count . . . ." *Id.* ¶ 13.
- Harris County "participated in over 150 events," including "food distribution events," during which it "announced the October 31, 2020 deadline for the 2020 Census." Briggs Decl. ¶ 12. Consequently, "Harris County will be forced to expend additional resources to clear confusion about the last date for self-response during the Census, to ensure that people who have not responded are counted in time." *Id.* ¶ 16.
- The Black Alliance for Just Immigration already "publicized the October 31 deadline for self-response during digital events between April and July" and is diverting resources to publicize the new September 30 deadline. Gyamfi Decl. ¶¶ 13–14.
- The League of Women Voters "has already had to spend time and financial resources" developing and distributing public education materials on the Replan timeline. Stewart Decl. ¶ 12.
- The National Urban League has similarly had "to divert resources from other programs and projects" to "alleviate the confusion" about the change in deadlines. Green Decl. ¶ 15.

Indeed, even now, the Census Bureau boasts of how its communications program was "more integrated than ever before" with Plaintiffs such as National Urban League. Fontenot Decl. ¶ 40. Mitigating those now-counterproductive education campaigns and a likely undercount will only be harder in the midst of a pandemic. *E.g.*, M. Garcia Decl. ¶¶ 14–15; Gurmilan Decl. ¶¶ 11–14; Briggs Decl. ¶¶ 11–12, 15–17. The result that Plaintiffs have diverted and will continue to divert resources from their organization mission to mitigate the effects of the Replan.

5. Plaintiffs' injuries are fairly traceable to the Replan and redressable by a stay of the Replan.

The above harms are "concrete, particularized, and actual or imminent." *Dep't of Commerce v. New York*, 139 S. Ct. at 2565 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008)). They are also "fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Id.* (quoting *Davis*, 554 U.S. at 733). As the Supreme Court

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stressed last year, "Article III 'requires no more than de facto causality.'" *Id.* at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). "[T]he defendant's conduct need not be 'the very last step in the chain of causation.'" *New York*, 2020 WL 5422959, at *21 (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

Here, Plaintiffs' theory of standing rests "on the predictable effect of Government action on the decisions of third parties"—specifically, the predictable harms of accelerating census deadlines and curtailing key operations, without warning, after months of publicly operating under a plan tailored to COVID-19. *Id.* Accordingly, enjoining the implementation of the Replan's September 30, 2020 deadline for data collection and December 31, 2020 deadline for reporting the population tabulations to the President would redress those harms. *See, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. at 328–34 (affirming injunction against the planned use of statistical sampling to prevent apportionment harms, among others); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d at 675 (issuing injunction to prevent "the loss of political representation and the degradation of information").

All told, Plaintiffs suffer injuries in fact that are fairly traceable to the Replan and redressable by the relief Plaintiffs seek. Plaintiffs thus have Article III standing.

C. The Replan constitutes agency action.

Defendants' three remaining arguments against reviewability arise under the APA, not the Constitution. To start, Defendants argue that the Replan is not reviewable because it is not a discrete "agency action." PI Opp. at 17. They thus claim that Plaintiffs' suit is "an improper, programmatic attack on the Bureau's efforts to conduct the 2020 Census." *Id.* The Court disagrees. The Replan is agency action.

"The bite in the phrase 'final action' . . . is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 478 (2001) (citations omitted). Thus, agency action is broadly defined to include "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Each word in that definition

has its own expansive definition. A "rule," for example, includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.* § 551(4).

To be sure, a reviewable agency action must be one that is "circumscribed" and "discrete." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62–63 (2004). This requirement "precludes [a] broad programmatic attack" on an agency's operations. *Id*. at 64. Defendants thus analogize this case to *NAACP v. Bureau of the Census*, 945 F.3d 183 (4th Cir. 2019), and *Lujan v. National Wildlife Federation*, 497 U.S. 871, 893 (1990).

In *NAACP*, the plaintiffs brought a challenge in 2018 to the census "methods and means," and "design choices." *NAACP*, 945 F.3d at 186. The *NAACP* plaintiffs challenged as insufficient the numbers of enumerators, the networks of area census offices, the Bureau's plan to rely on administrative records, and partnership program staffing. *Id.* at 190. The Fourth Circuit found that "'[s]etting aside' one or more of these 'choices' necessarily would impact the efficacy of the others, and inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations." *Id.* (citing *S. Utah Wilderness All.*, 542 U.S. at 66–67). In concluding that there was not final agency action, the Fourth Circuit emphasized that its holding was "based on the broad, sweeping nature of the allegations that the plaintiffs have elected to assert under the APA." *Id*. at 192.

NAACP is inapposite for two reasons. First, the relief Plaintiffs seek here would not "inevitably [] lead to court involvement in 'hands-on' management of the Census Bureau[]." *Id.* at 191. Plaintiffs do not ask the Court to manage the Bureau's day-to-day operations or to enforce free-floating standards of "sufficiency." *See NAACP*, 945 F.3d at 191 (quoting claims of "insufficient network of area census offices," "insufficient partnership program staffing," "insufficient testing of 'new protocols,'" and more). Rather, Plaintiffs challenge the Defendants' failure to consider important aspects of the problem and lack of reasoned explanation for the Bureau's change in position. Reply at 14. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State*

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (finding that agency's explanation for rescission was not the product of reasoned decisionmaking); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (setting aside agency's "change in position" for lacking reasoned explanation).

Second, the Replan is a circumscribed, discrete agency action. Indeed, Defendants treated the Replan accordingly. Defendants named it the "Replan" or "Replanned Operational Schedule." *E.g.*, DOC_10276 (version of August 3, 2020 slide deck identified as key by the parties); DOC_8929 (July 30, 2020 email from Barbara LoPresti, Chief of the Decennial Information Technology Division, to senior officials discussing "this proposed replan"); DOC_10066 (email thread titled "Replan" with senior officials); DOC_11918 (August 3, 2020 email to the Chief of Staff for the Deputy Secretary of Commerce with subject "Revised Replan Deck").

The Secretary directed the Bureau to develop the Replan. *See, e.g.*, August 3 Press Release, ECF No. 37-1 ("directed by the Secretary"). In response to the Secretary's direction, the Bureau presented the Replan to the Secretary in a single slide deck. *See, e.g.*, DOC_10276. The Secretary made an explicit decision to adopt the Replan. Fontenot Decl. ¶ 85. Census Bureau Director Dillingham announced the Replan in a single press release on August 3, 2020. ECF No. 37-1. Defendants consistently treated the Replan as a circumscribed, discrete agency action.

Defendants' comparison to *Lujan v. National Wildlife Federation* is also misplaced. *See* PI Opp. at 17. In *Lujan*, plaintiffs challenged a "so-called 'land withdrawal review program'"—"so-called" because the term "land withdrawal review program" was "simply the name by which [the agency] [] occasionally referred to the continuing (and thus constantly changing) operations of the" agency. *Lujan*, 497 U.S. at 890. The term was "not derived from any authoritative text." Any "land withdrawal review program" in fact comprised at least "1250 or so individual classification terminations and withdrawal revocations." *Id.*

The *Lujan* plaintiffs recognized as much. In their complaint, the *Lujan* plaintiffs challenged: (1) reclassification of some withdrawn lands; (2) the return of other lands to the public domain; (3) petitioners' failure to develop, maintain, and revise land use plans; (4) petitioners' failure to submit recommendations as to withdrawals in the 11 Western States to the President;

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(5) petitioner's failure to consider multiple uses for disputed lands; (6) petitioners' failure to provide public notice of decisions; and (7) petitioners' failure to provide a detailed environmental impact statement in every recommendation or report on major federal actions significantly affecting the quality of the human environment. *Id.* at 879. Moreover, the *Lujan* plaintiffs "[a]ppended to the amended complaint . . . a schedule of specific land-status determinations" that listed several land status-determinations that were each identified by a listing in the Federal Register. *Id.*

By contrast, Plaintiffs here challenge a circumscribed, discrete agency action: the Replan. "Replan" is not an "occasional[]" informal name for "constantly changing" operations, *id.* at 890, but is a codified term for the agency action directed and adopted by the Secretary. *E.g.*, DOC_11918. Nor is the Replan a disconnected series of hundreds of individual determinations with enough independent significance to be published in the Federal Register like the program in *Lujan*. Rather, the Replan is a census operational plan that replaced the COVID-19 Plan. As *Lujan* held plainly, though, judicial "intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns." *Lujan*, 497 U.S. at 894.

Again, in sum, as Justice Scalia stated: "[t]he bite in the phrase 'final action' . . . is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power. It is rather in the word 'final.'" *Whitman*, 531 U.S. at 478 (citations omitted). It is to that finality requirement that the Court now turns.

D. The Replan constitutes final agency action.

Defendants argue that even if the Replan were agency action, "it is not 'final' agency action that is subject to judicial review under § 704." PI Opp. at 19. "To maintain a cause of action under the APA, a plaintiff must challenge 'agency action' that is 'final.'" *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2013) (citing *Norton*, 542 U.S. at 61–62).

An agency's action is final if two conditions are met. First, the action "must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or

interlocutory nature." *Bennett*, 520 U.S. at 177–78. Second, the action "must be one by which 'rights or obligations have been determined,' or from 'which legal consequences will flow.'" *Id.* (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Five years earlier, the Supreme Court found that the same two requirements applied in a census case. *Franklin*, 505 U.S. at 797 (the central question "is [1] whether the agency has completed its decisionmaking process, and [2] whether the result of that process is one that will directly affect the parties."). Courts should take a "'pragmatic' approach" to finality. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)).

The Court finds the Replan is final agency action for purposes of APA review because the Replan meets both criteria, each of which the Court addresses in turn.[6]

1. The Census Bureau completed its decisionmaking process: Defendants have adopted and implemented the Replan.

As to the first factor of final agency action, which is "whether the agency has completed its decisionmaking process," *Franklin*, 505 U.S. at 797, the Replan marks the consummation of the Bureau's and Department of Commerce's decisionmaking process because the Replan is "not subject to further agency review." *Sackett v. EPA.*, 566 U.S. 120, 127 (2012); *see also Hawkes*, 136 S. Ct. at 1813–14 (holding that an agency action was final because the determination was "typically not revisited"); *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 593 (9th Cir. 2008) (holding that an agency's action was final where "[n]o further agency decisionmaking on the issue can be expected"). The Secretary made an explicit decision to adopt the Replan. August 3 Press Release; *see* Fontenot Decl. ¶ 85. The Bureau has implemented

[6] In *Hawkes Co.*, the Supreme Court expressly reserved whether an agency action that satisfies only the first condition—consummation of the agency's decisionmaking process—can still be final. 136 S. Ct. at 1813 n.2. The Court did not reach that question in *Hawkes Co.* because the agency action under review "satisfie[d] both prongs of *Bennett*." *Id.* Similarly, the Replan satisfies both prongs. Thus, the Court need not decide whether the first condition alone would suffice to constitute a "final" agency action.

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the Replan. No further agency decisionmaking will be conducted on the Replan.

Norton v. Southern Utah Wilderness Alliance, a decision cited by Defendants, is readily distinguishable from the instant case. *See* Defs. 1st Supp. Br. at 1 (citing *Norton*, 542 U.S. at 61–62). In *Norton*, the United States Supreme Court found that the plaintiffs' challenges to the Bureau of Land Management's land use plans failed. The *Norton* Court reasoned that the plans were not a "legally binding commitment" that were enforceable under the APA. 542 U.S. at 72. Specifically, the plaintiffs claimed that BLM "failed to comply with certain provisions in its land use plans," which "describe[], for a particular area, allowable uses, goals for future condition of the land, and specific next steps." 542 U.S. at 59, 67. The Federal Land Policy and Management Act of 1976 "describes land use plans as tools by which 'present and future use is *projected*.'" *Id.* at 69 (emphasis in original) (quoting 43 U.S.C. § 1701(a)(2)).

Thus, the *Norton* Court observed that "[t]he implementing regulations make clear that land use plans are a *preliminary* step in the overall process of managing public lands—designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." *Id.* (emphasis added). As a result, "a land use plan is not ordinarily the medium for affirmative decisions that implement the agency's 'project[ions].'" *Id.* (quoting 43 U.S.C. § 1712(e)). Similarly, "the regulation defining a land use plan declares that a plan 'is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations.'" *Id.* at 69–70. In sum, by contrast to a "final" agency action, the type of land use plan challenged by the *Norton* plaintiff "is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them." *Id.* at 71.

Here, the Replan was not a "preliminary step" toward deciding the Census schedule. Nor was the Replan a "statement of priorities" that merely "guides and constrains actions." *See id.* at 69, 71. Instead, the Replan constitutes a commitment to terminate the collection of data, analyze that data, and report "[t]he tabulation of total population" to the President by December 31, 2020. 13 U.S.C. § 141(b).

Moreover, termination of data collection is practically irreversible. In his September 5, 2020 declaration, Defendants' own declarant, Associate Director Fontenot, requests that if the Court enjoins Defendants, the Court do so earlier than later because it is difficult to rehire field staff who have been terminated:

> Lack of field staff would be a barrier to reverting to the COVID Schedule were the Court to rule later in September. The Census Bureau begins terminating staff as operations wind down, even prior to closeout. Based on progress to date, as is standard in prior censuses, we have already begun terminating some of our temporary field staff in areas that have completed their work. It is difficult to bring back field staff once we have terminated their employment. Were the Court to enjoin us tomorrow we would be able to keep more staff on board than were the Court to enjoin us on September 29, at which point we will have terminated many more employees.

Fontenot Decl. at ¶ 98.

In sum, the Replan provides that all data collection, including field operations, cease by September 30, and truncated data processing begin the next day. Absent a preliminary injunction, those practically irrevocable steps are only days away. The Replan is thus the completion of Defendants' decisionmaking process on how the 2020 Census will be conducted.

2. The Replan directly affects the parties.

As to the second factor of final agency action, which is whether an agency action "will directly affect the parties," the Replan certainly does affect the parties and will continue to do so. *Franklin*, 505 U.S. at 797; *see also Bennett*, 520 U.S. at 177–78 (holding that, "[a]s a general matter," a final action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'" (citation omitted)). The Court analyzes the Replan's effect on the Plaintiffs and Defendants then distinguishes Defendants' main case, *Franklin v. Massachusetts*.

a. The Replan's undercount will directly affect and harm Plaintiffs.

The Replan "will directly affect" Plaintiffs and result in "legal consequences." *Franklin*, 505 U.S. at 797; *Bennett*, 520 U.S. at 177–78. Specifically, the Replan will directly affect Plaintiffs in three ways: (1) by undercounting hard to count populations; (2) barring governmental

Plaintiffs' constituents and organizational Plaintiffs' members from participating in the 2020 Census after September 30, 2020; and (3) exposing those same people to violations of federal law and fines.

First, the Replan will likely undercount hard to count populations in the decennial census. This undercount necessarily affects the Secretary's "tabulation of total population by States" and the President's apportionment calculations, which "must be based on decennial census data alone." *New York*, 2020 WL 5422959, at *26 (discussing text, legislative history, and the Executive's longstanding understanding of 13 U.SC. § 141(a) and 2 U.S.C. § 2a(a)). In other words, the Replan will likely result in an undercount in both the numbers that the Secretary reports to the States and the numbers that the President—who must draw on "decennial census data"—reports to Congress.

That undercount, as discussed in the Court's standing analysis above, injures Plaintiffs in legally cognizable ways. For instance, an undercount harms the "crucial representational rights that depend on the census," *Dep't of Commerce v. New York*, 139 S. Ct. at 2569, and deprives local government Plaintiffs of federal funds they are entitled to, *cf. City of Kansas City, Mo. v. U.S. Dep't of Hous. & Urban Dev.*, 861 F.2d 739, 745 (D.C. Cir. 1988) (discussing procedural rights arising under Community Development Block Grants, which at least King County and Los Angeles receive). These harms and others will last through 2030, if not later. Congress has determined as much by finding that:

> the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted.

1998 Appropriations Act, § 209(a)(8), 111 Stat. at 2480–81. Thus, because the Replan will likely result in an inaccurate enumeration, the Replan is an action from which legal consequences will flow.

Second, the Replan bars people who seek to participate in the Census—such as

governmental Plaintiffs' constituents and organizational Plaintiffs' members—from participating after September 30, 2020. *See Sackett*, 566 U.S. at 126 (holding that an agency action determined rights and obligations of property owners where it "severely limit[ed] [the owners'] ability to obtain a permit . . . from [the agency]"); *Alaska, Dep't of Environmental Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (holding that an agency action determined rights and obligations where its effect was to halt construction at a mine facility). These people will be unable to participate despite their potential reliance on the Census Bureau's previous, widely publicized representations that they could participate until October 31, 2020. For example:

- The League of Women Voters has over 65,000 members across 800 state and local affiliates. Stewart Decl. ¶ 4. Thus, "[w]hen the Census Bureau extended the deadline for counting operations to October 31, 2020," the League of Women Voters "published blog posts advertising the new timeline," "shared numerous letters with [] state and local affiliates providing information about the new timeline," and "publicized the deadline in letters and [emails]." *Id.* ¶ 11.
- The City of Los Angeles is home to about 4 million people. M. Garcia Decl. ¶ 7. The City "conducted a public education campaign publicizing the October 31, 2020 date for self-response." *Id.* ¶ 14. For example, the City announced the date in bus shelter posters and social media toolkits. *Id.*
- National Urban League has 11,000 volunteers across 90 affiliates in 37 states. Green Decl. ¶ 4. "[W]hen the Census Bureau announced its extension of the timeline for collecting responses to the 2020 Census, the National Urban league informed all members of the 2020 Census Black Roundtable that the deadline had become October 31, 2020. The members in turn conveyed to their own networks and constituents, causing a cascading effect." *Id.* ¶ 14.

Third, the Replan exposes the same people—people who believe that October 31, 2020 is still the Census deadline—to fines and violations of federal law. By way of background, the Census Act imposes a "clear legal duty to participate in the decennial census." *California v. Ross*, 362 F. Supp. 3d 727, 739 (N.D. Cal. 2018) (Seeborg, J.) (citing 13 U.S.C. § 221). Specifically, 13 U.S.C. § 221(a) provides that any adult who "refuses or willfully neglects . . . to answer, to the best of his knowledge, any of the questions on" the census "shall be fined not more than $100." 13 U.S.C. § 221(a). "[E]ach unanswered question" risks an additional fine. *Morales v. Daley*, 116 F.

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Supp. 2d at 809; *accord United States v. Little*, 317 F. Supp. 1308, 1309 (D. Del. 1970) ("Presumably there could be a separate violation for each unanswered question."). The 2020 Census form has nine questions for the first person in a household and seven questions for each additional person. *See* U.S. Census Bureau, *2020 Census Questionnaire* (last revised Mar. 7, 2020), https://www.census.gov/programs-surveys/decennial-census/technical-documentation/questionnaires/2020.html. The resulting liability for "refus[ing] or willfully neglect[ing]" to answer an entire Census questionnaire is thus significant. 13 U.S.C. § 221(a).

Because of the excellent publicizing of the COVID-19 Plan, the Replan increases the risk that people will incur that liability. Before the Replan was announced on August 3, 2020, the Bureau and its partners (such as Plaintiff National Urban League) advertised for months that the deadline for census responses was October 31, not September 30, 2020. *See supra* Section III-B-4. Now, some people may refuse to respond to the questionnaire—or an enumerator's non-response follow-up—on the misunderstanding that they still have another month to comply. This "increase [in] *risk* of incurring penalties in a future enforcement proceeding" still "constitute[s] 'legal consequences' under *Bennett*." *Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 957–59 (D.C. Cir. 2019) (emphasis in original) (holding also that "the agency's exercise of prosecutorial discretion" is not enough to render agency action non-final).

b. The Replan directly affects Defendants by binding them for 10 years to a less accurate tabulation of total population.

For Defendants, the Replan gives rise to legal consequences because it effectively binds Defendants—for the next decade—to a less accurate "tabulation of total population by States" under the "decennial census." 13 U.S.C. § 141(b). The Replan does this by committing Defendants to compressing census self-response from 33.5 weeks to 29 weeks; Non-Response Follow Up ("NRFU") from 11.5 weeks to 7.5 weeks; and data processing from 26 weeks to 13 weeks. *See, e.g.*, *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 319–20 (D.C. Cir. 2011) ("[T]he Guidance binds EPA regional directors and thus qualifies as final agency action.").

The result of this significant compression in these extraordinary times will be inaccuracies

in the "tabulation of total population." Inaccuracies in the tabulation harm constitutional and statutory interests. *See, e.g.*, *Evans*, 536 U.S. at 478 (finding a "strong constitutional interest in accuracy"); 1998 Appropriations Act, § 209, 111 Stat. at 2481 ("Congress finds that . . . it is essential that the decennial enumeration of the population be as accurate as possible . . . ."). Those constitutional and statutory harms—and Defendants' choice of speed over accuracy—will endure until 2030.

A less weighty and more easily revocable constraint on the Government was found final in *Hawkes Co.*, 136 S. Ct. at 1814. There, an internal memorandum of agreement between two federal agencies provided that the Army Corps of Engineers could issue "jurisdictional determinations" ("JDs") that were generally "binding on the Government" for five years. *Id.* The Supreme Court held that the JDs were final agency action under *Bennett v. Spear* even though (1) the JDs could be appealed and "revisited," *see id.* at 1813–14; and (2) the JDs' source of authority, the memorandum of agreement, never went through notice and comment and was represented as *non*-binding by the United States. *See id.* at 1817 (opinions of Kennedy, J., concurring; and Ginsburg, J., concurring in part and concurring in the judgment). By contrast, here (1) Defendants do not waver in their commitment to end data collection by September 30, 2020 and to report population data to the President by December 31, 2020; and (2) there is no doubt that the Replan will bind the United States to this Census and "tabulation of total population" until 2030.

Thus, because the Replan determines rights and obligations and gives rise to legal consequences, the Replan constitutes final agency action.

c. *Franklin v. Massachusetts* shows why the Replan is final agency action.

To argue that the Replan does not constitute final agency action, Defendants rely on the Supreme Court's decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). PI Opp. 19–20. That case concerned the Secretary of Commerce's transmission of the census report to the President. *Franklin*, 505 U.S. at 797–98. There, the data presented to the President—the allocation of overseas military personnel to states based on their "home of record"—was still subject to

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correction by the Secretary. *Id*. In addition, the President could instruct the Secretary to reform the census. *Id*. at 798. The Secretary's report to the President thus was a "moving [target]" or a "tentative recommendation," rather than a "final and binding determination." *Id.* It carried "no direct consequences for the reapportionment." *Id*. Based on these characteristics, the transmission of the census report was not final agency action. *Id*. at 798.

Franklin underscores why the Replan constitutes final agency action. The Replan is neither a "tentative recommendation" nor a decision that will be reviewed by a higher official. *Id.* Rather, the Secretary directed the Bureau to develop the Replan on July 29, 2020 and approved the Replan on August 3, 2020. Moreover, as a practical matter, no time remains for agency reconsideration. The Replan's field operations will irreversibly wind down on September 30, 2020. Fontenot Decl. ¶ 98.

The Replan also has "direct consequences for the reapportionment." *Id.* The Replan determines when data collection will end—past which people can no longer participate in the census—and solidifies an undercount that will carry through to Congressional reapportionment, federal funding, and more for a decade. By contrast, in *Franklin*, the data the Secretary reported could have had zero effect. The President could have "reform[ed] the census" and allocated already-counted servicemembers not by "home of record," but by "legal residence," "last duty station," or no "particular State[]." *Id.* at 792, 794; *see also U.S. House of Reps. v. U.S. Dep't of Commerce*, 11 F. Supp. 2d at 93 (distinguishing *Franklin* on the same ground).

In any event, "[e]ven in the [*Franklin*] Court's view, the Secretary's report of census information to recipients other than the President would certainly constitute 'final agency action.'" *Franklin*, 505 U.S. at 815 n.14 (Stevens, J., concurring in part and concurring in the judgment). That is because only the President may order the Secretary "to reform the census, even after the data are submitted to him." *Id.* at 798. Data recipients such as the states can do no such thing. Accordingly, the Secretary's reporting of "counts as they are used for intra-state *redistricting* and for *federal fund allocation* . . . is final agency action for purposes of APA review." *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 918–19 (E.D.N.Y. 1993) (emphasis in original)

(challenging guidelines that led Secretary not to adjust undercount), *vacated on non-APA grounds*, 34 F.3d 1114 (2d Cir. 1994), *rev'd sub nom. Wisconsin v. City of New York*, 517 U.S. at 12 n.7 (noting that "[plaintiffs] did not appeal the District Court's treatment of their statutory claims" to the Second Circuit). Plaintiffs here likewise challenge the Replan's undercount as it will be used in intra-state redistricting and federal fund allocation.

Last year's citizenship question cases further underscore why the Replan is final agency action. In those cases, the United States conceded that adding the citizenship question to the census questionnaire constituted final agency action. *See New York*, 351 F. Supp. 3d at 645; *Kravitz v. Dep't of Commerce*, 336 F. Supp. 3d 545, 566 n.13 (D. Md. 2018). There is no reason that a memorandum announcing the addition of a question would mark the agency "complet[ing] its decisionmaking process" and "directly affect[ing] the parties," *Franklin*, 505 U.S. at 797, but the Replan would not. In both cases, the Secretary directed the development of and adopted the Replan; the Bureau viewed the Secretary's decision as binding; and the decision directly affects the parties. In sum, the Replan is final agency action.

E. The Replan is not committed to agency discretion by law.

Defendant's last argument on reviewability is that the administration of the census—including the Replan—is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Court disagrees.

The APA creates a "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015). One exception includes those actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). However, courts have read this exception quite narrowly. This exception encompasses situations where Congress explicitly precludes review, or "'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.'" *Weyerhaeuser*, 139 S. Ct. at 370 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). This latter exception has generally been limited to "certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion . . . such as a decision not to

institute enforcement proceedings . . . or a decision by an intelligence agency to terminate an employee in the interest of national security." *Dep't of Commerce*, 139 S. Ct. at 2568 (citations and quotation marks omitted) (citing *Hecker v. Chaney*, 470 U.S. 821, 831–32 (1985) and *Webster v. Doe*, 486 U.S. 592, 600–01 (1988)).

Department of Commerce v. New York controls. There, the Supreme Court concluded that "[t]he taking of the census is not one of those areas traditionally committed to agency discretion." 139 S. Ct. at 2568. Collecting case law, the Supreme Court noted that "courts have entertained both constitutional and statutory challenges to census-related decisionmaking." *Id.* (citing, *e.g.*, *Carey*, 637 F.2d at 839, in which the Second Circuit concluded that the Bureau's decision not to use "Were You Counted" forms or to compare census records with records of Medicaid-eligible people "was not one of those 'rare instances' where agency action was committed to agency discretion"); *see also City of Los Angeles v. U.S. Dep't of Commerce*, 307 F.3d 859, 869 n.6 (9th Cir. 2002) (rejecting argument that the Bureau's decision not to adopt statistically adjusted population data was committed to agency discretion by law). The Supreme Court explained that there were meaningful standards against which to judge the taking of the census, including the Census Act, which requires that the agency "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 2568–69 (quoting *Franklin*, 505 U.S. at 819–20 (Stevens, J., concurring in part and concurring in judgment)).

Here, Plaintiffs challenge the Replan—a set of deadlines for "the taking of the census." *Id.* at 2568. Plaintiffs' claims, like those in *Department of Commerce v. New York*, arise under the Enumeration Clause and the APA. Here too, the Census Act provides a meaningful standard against which to judge Defendants' action. The Replan's change in deadlines affects the accuracy of the enumeration, as did the decision to omit certain records in *Carey* or reinstate the citizenship question in *New York*. Accordingly, the Replan is not committed to agency discretion.

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F. Plaintiffs lack an adequate alternative to judicial review and suffer prejudice from the Replan.

To avoid any doubt that the instant case is reviewable, the Court briefly addresses two remaining APA requirements even though Defendants waive one and forfeit the other. *See generally United States v. Olano*, 507 U.S. 725, 733 (1993) ("[F]orfeiture is the failure to make the timely assertion of a right; waiver is the 'intentional relinquishment or abandonment of a known right.'" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))).

The first is that "an agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court." *Hawkes Co.*, 136 S. Ct. at 1815 (citing 5 U.S.C. § 704). Defendants waived this argument at the September 22, 2020 preliminary injunction hearing, and for good reason. Tr. of Sept. 22, 2020 Preliminary Injunction Hearing, ECF No. 207, at 41:13–17 (The Court: "But you are not arguing that they have an adequate alternative to APA review in Court; is that correct?" Defendants: "That is not an argument that we have presented in our papers, Your Honor."). The effects of a census undercount now would irrevocably reverberate for a decade. Congress has reached the same conclusion. *See* 1998 Appropriations Act, § 209, 111 Stat. at 2481 (providing that if "enumeration is conducted in a manner that" is unlawful, it would be impracticable for the "courts of the United States to provide[] meaningful relief after such enumeration has been conducted").

The second APA requirement is that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706; *accord Organized Vill. of Kake v. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (en banc) ("[N]ot every violation of the APA invalidates an agency action; rather, it is the burden of the opponent of the action to demonstrate that an error is prejudicial."). Defendants do not raise this argument in their briefs and so forfeit it. In any event, as the above analysis of Plaintiffs' injuries shows, *see supra* Section III-B, the Replan's violation of the APA prejudices Plaintiffs in four ways. First, Plaintiffs risk losing important federal funding from undercounting. Second, Plaintiffs state that an inaccurate apportionment will violate their constitutional rights to political representation. Third, Plaintiffs will need to expend resources to mitigate the undercounting that will result from the Replan. Lastly, local government Plaintiffs' costs will

1 increase because those Plaintiffs rely on accurate granular census data to deploy services and
2 allocate capital. Thus, an APA error would be prejudicial.

3 **IV. MERITS**

4 A party seeking a preliminary injunction must show (1) a likelihood of success on the
5 merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities
6 tips in the party's favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20.
7 The Court concludes that Plaintiffs meet all four factors and discusses each factor in turn below.[7]

8 **A. Plaintiffs are likely to succeed on the merits of their claim that the Replan was arbitrary and capricious in violation of the APA.**

9
10 Plaintiffs argue that they are likely to succeed on the merits with respect to their
11 constitutional claim, which is brought under the Enumeration Clause, Mot. at 25–28, as well as
12 their statutory arbitrary and capricious claim and pretext claim, which are both brought under the
13 APA, *id.* at 14–25. Although Plaintiffs' constitutional and statutory claims overlap substantially
14 because they both challenge the extent to which the Replan can accomplish a "full, fair, and
15 accurate" count, Plaintiffs' constitutional and statutory claims present distinct bases on which the
16 Court may grant injunctive relief.

17 Because the Court holds below that Plaintiffs are likely to succeed on the merits of their
18 APA arbitrary and capricious claim, the Court need not reach Plaintiffs' Enumeration Clause claim
19 or APA pretext claim. *See, e.g.*, *New York*, 2020 WL 5422959, at *2 (finding that the plaintiffs
20 were entitled to a permanent injunction on their statutory claim and thus declining to "reach the

21
22 [7] Under Ninth Circuit precedent, "'serious questions going to the merits' and a balance of
23 hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction,
24 so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the
25 injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th
26 Cir. 2011); *accord Short v. Brown*, 893 F.3d 671675 (9th Cir. 2018) (holding that these factors are
27 "on a sliding scale"). Thus, "when the balance of hardships tips sharply in the plaintiff's favor, the
28 plaintiff need demonstrate only 'serious questions going to the merits.'" *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019) (quoting *All. for the Wild Rockies*, 632 F.3d at 1135). In the instant case, the Court finds not only serious questions going to the merits, but also a likelihood of success on the merits.

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overlapping, albeit distinct, question of whether the [challenged action] constitutes a violation of the Constitution itself").

Before discussing Plaintiffs' APA arbitrary and capricious claim, though, the Court addresses the scope of its review. As the procedural history sets forth, Defendants have resisted producing the administrative record. Defendants also have explicitly conceded that if the Court finds that the Replan constitutes final agency action, then Defendants lose on likelihood of success on the merits. ECF No. 88 at 4. Defendants even "ask[ed] that the Court simply enter the TRO as a preliminary injunction" on September 8, 2020. ECF No. 98 at 65:18–20. Defendants have made these statements repeatedly:

- September 8, 2020 brief regarding whether Defendants must produce the administrative record:
    - "[W]ere the Court to brush past the threshold justiciability and jurisdiction bars, and conclude, contrary to the Fourth Circuit's holding in *NAACP*, that the Replan is discrete, circumscribed final agency action subject to the APA—then the appropriate course would be to consider Mr. Fontenot's declaration, and to find against the Defendants on the likelihood of success on the merits prong if that declaration is insufficient." ECF No. 88 at 4.
- September 8, 2020 further case management conference:
    - "Your Honor, we ask that the Court simply enter the TRO as a preliminary injunction at this point. I think that will serve everybody's interests best." ECF No. 98 at 65:18–20.
    - "Our position is that if the Court rejects the five threshold arguments that we have made, determines that there was final agency action and determines that an explanation was required under the APA and finds that Mr. Fontenot's declaration does not provide that explanation, then the conclusion would have to be that the Government loses on the likelihood of success on the merits prong of the PI." ECF No. 98 at 55:6–13.

Accord Tr. of Sept. 14, 2020 Further Case Management Conference, ECF No. 126 at 35:20–36:6 (conceding same); Tr. of Sept 15, 2020 Hearing on Allegations of Potential Non-Compliance with TRO, ECF No. 141 at 52:24–53:8, 62:10–13 (conceding same).

The Court has found that the Replan is reviewable final agency action. Thus, if the Court

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finds that Associate Director Fontenot's declaration is insufficient, Defendants have conceded that Defendants lose on likelihood of success on the merits.

Associate Director Fontenot's declaration is facially insufficient to serve as a basis for APA review of whether the agency action was arbitrary and capricious. APA review "is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Ca.*, 140 S. Ct. 1891, 1913 (2020). To assess those grounds, "the focal point for judicial review should be the administrative record." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Litigation affidavits are "merely 'post hoc' rationalizations which have traditionally been found to be an inadequate basis for review." *Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1972) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168–169 (1962)); *accord Cmty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990) (R. Ginsburg, Thomas, Sentelle, JJ.)) (holding that "[t]he use of an affidavit by the agency decisionmaker was manifestly inappropriate for a case" under the APA); *see also Regents*, 140 S. Ct. at 1909 (rejecting Secretary of Homeland Security's post-litigation memorandum). The Court thus views Plaintiffs' claims through the lens of the administrative record.[8]

On review of the administrative record, the Court agrees that Plaintiffs are likely to succeed on the merits of their APA arbitrary and capricious claim for five reasons: (1) Defendants failed to consider important aspects of the problem, including their constitutional and statutory obligations to produce an accurate census; (2) Defendants offered an explanation that runs counter to the evidence before them; (3) Defendants failed to consider alternatives; (4) Defendants failed to articulate a satisfactory explanation for the Replan; and (5) Defendants failed to consider reliance interests. Although likelihood of success on the merits of one of the five reasons would support a preliminary injunction, the Court finds that Plaintiffs are likely to succeed on all five. Below, the Court analyzes the five reasons in turn.

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[8] As stated in the procedural history, the administrative record for the purposes of the preliminary injunction comprises Defendants' non-privileged OIG documents. United States Magistrate Judges adjudicated Defendants' assertions of privilege after *in camera* review.

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1. Plaintiffs are likely to succeed on the merits of their claim that Defendants failed to consider important aspects of the problem.

Plaintiffs argue that, by failing to adequately provide for the fulfillment of its constitutional and statutory duty to conduct an accurate enumeration, Defendants neglected to consider important aspects of the problem in violation of the APA. Mot. at 18–21.

The arbitrary and capricious standard requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In order to meet this requirement, the agency must consider the "important aspect[s]" of the problem before it. *State Farm*, 463 U.S. at 43.

The Court concludes that Defendants failed to consider "important aspect[s]" of the problem before them. *State Farm*, 463 U.S. at 43. Rather, Defendants adopted the Replan to further one alleged goal alone: meeting the Census Act's statutory deadline of December 31, 2020 for reporting congressional apportionment numbers to the President. In the process, Defendants failed to consider how Defendants would fulfill their statutory and constitutional duties to accomplish an accurate count on such an abbreviated timeline.

Defendants' constitutional and statutory obligations are "important aspects" of the problem before them. *See Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) ("Whether an agency has overlooked 'an important aspect of the problem,' . . . turns on what [the] relevant substantive statute makes 'important.'"); *see, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383–84 (2020) ("If the Department did not look to [the Religious Freedom Restoration Act's] requirements or discuss [RFRA] at all when formulating their solution, they would certainly be susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem."). Here, the relevant constitutional and statutory provisions focus first and foremost on the obligation to produce an accurate census.

As a constitutional matter, the Enumeration Clause evinces a "strong constitutional interest in [the] accuracy" of the census. *Evans*, 536 U.S. at 478. This interest in accuracy is driven by "the

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constitutional purpose of the census, [which is] to determine the apportionment of the Representatives among the States." *Wisconsin v. City of New York*, 517 U.S. at 20.

In turn, the Census Act imposes a statutory duty of accuracy. "[B]y mandating a population count that will be used to apportion representatives, *see* § 141(b), 2 U.S.C. § 2(a), the [Census] Act imposes '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.'" *Dep't of Commerce v. New York*, 139 S. Ct. at 2568–69 (quoting *Franklin*, 505 U.S. at 819–20 (Stevens, J., concurring in part and concurring in the judgment)). Congress has underscored this duty in legislation amending the Census Act. *See* 1998 Appropriations Act, § 209(a), 111 Stat. at 2480–81 (codified at 13 U.S.C. § 141 note) (finding that "it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States"). Thus, the Census Act requires the Defendants to produce an accurate census.

Defendants failed to sufficiently consider these constitutional and statutory obligations when adopting the Replan. As the administrative record shows, the Replan will decrease the census's accuracy and undercount historically undercounted individuals. The Replan cuts Non-Response Follow Up ("NRFU") from 11.5 weeks to 7.5 weeks. The Replan cuts data processing from 26 weeks to 13 weeks. The effect of this shorter timeframe will be particularly pronounced due to the pandemic. COVID-19 has not only made it more difficult to hire enumerators, but also made it more difficult for enumerators to conduct safe and effective NRFU. ECF No. 37-7 at 8, 18. After all, the goal of NRFU is to "conduct in-person contact attempts at each and every housing unit that did not self-respond to the decennial census questionnaire." Fontenot Decl. ¶ 48.

The record before the agency demonstrates the effect of these significant cuts on census accuracy. Several internal Bureau documents are especially illustrative.

First, a March 24, 2020 set of talking points explained the effect of reducing operations on accuracy. These talking points were circulated by Enrique Lamas, Chief Advisor to Deputy Director Ron Jarmin, to senior Bureau officials as late as July 21, 2020 on "urgent" notice. DOC_7085–86. "Call me please," he wrote to Senior Advisor for Decennial Affairs, James B.

Treat. DOC_7075. The talking points stated: "The 2020 Census operations are designed to cover specific populations for a complete count of the population. If specific operation are cut or reduced, the effect would be to miss specific parts of the population [and] lead to an undercount of specific groups. That is why operations like Update Leave targeting rural populations or group quarters enumeration are critical to full coverage and need to be done in specific orders." DOC_7086.

A set of April 17, 2020 talking points regarding the COVID-19 Plan, which were drafted by Assistant Director for Decennial Programs Deborah Stempowski, stated: "We have examined our schedule and compressed it as much as we can without risking significant impacts on data quality." DOC_265. Bureau officials repeated this statement to Congressman Jamie Raskin, who chairs the House Subcommittee on Civil Rights and Civil Liberties, which has jurisdiction over the census. *See* DOC_2224.

On July 23, 2020, the Chief of Decennial Communications and Stakeholder Relationships, Kathleen Styles, shared a so-called "Elevator Speech" memo with GAO official Ty Mitchell and senior Bureau officials. *See* DOC_8026 (sending to GAO). The purpose of the Elevator Speech, Chief Styles wrote, was "to explain, in layman's terms, why we need a schedule extension." The Speech begins with a "High Level Message," which in its entirety reads:

> Curtailing census operations will result in a census that is of unacceptable quality. The Census Bureau needs the full 120 days that the Administration originally requested from Congress to have the best chance to produce high quality, usable census results in this difficult time. Shortening the time period to meet the original statutory deadlines for apportionment and redistricting data will result in a census that has fatal data quality flaws that are unacceptable for a Constitutionally-mandated activity.

ECF No. 155-8 at 295, 332 (DOC_8070).

The rest of the Speech makes three overarching points that are similarly grim. The first point is that "[s]hortening field data collection operations will diminish data quality and introduce risk." The main reason is that "COVID-19 presents an unprecedented challenge to field data collection. . . . Areas that are now low risk for COVID will become high risk and vice versa, and

the Census Bureau will need to adapt NRFU on an almost daily basis to conduct data collection using the Administration's gating criteria." *Id.* Other necessary adaptations include "development of systems for an outbound telephone operation," "significantly increasing selections for field positions to compensate for a much higher dropout rate from enumerator training," and finding ways to count people who lived in group quarters and in college. *Id.* "All of these adapted operations are intended to produce the most accurate census possible, and cannot be rushed without diminishing data quality or introducing unacceptable risk to either operations or field staff." *Id.*

The second point is that "[s]hortening post processing operations will diminish data quality and introduce risk." *Id.* "[I]t is not possible to shorten the schedule appreciably without directly degrading the quality of the results and introducing great risk." *Id.* The reason is that "[e]ach and every step in post processing is necessary and eliminating any step would result in a diminished data product. . . . [N]o step can be eliminated or overlap with another step." For instance:

> Some of these steps provide for quality reviews. While it may be tempting to think that quality reviews can be shortened, through decades of experience[,] the Census Bureau has learned that quality reviews are essential to producing data products that do not need to be recalled, products that stand the test of time. [The Bureau] routinely discover[s] items that need to be corrected during data review and appreciably shortening data review would be extremely unwise.

Id. Furthermore, "[t]he Census Bureau needs 30 [more] days for risk mitigation." Risks include natural disasters, "e.g., a hurricane, or a COVID outbreak," and "to account for additional processing steps and reviews made necessary by the COVID adaptations (e.g., extra time for processing responses related to college students)." *Id.*

The Elevator Speech's last overarching point is that "[c]urtailing either field operations or post-processing may result in loss of public confidence in the census results such that census results would be unusable regardless of quality." DOC_8071. Specifically, "[t]he administration already requested 120 days and Census officials have repeatedly said we need this time." *Id.* Changing tack could "result in great skepticism about the numbers and unwillingness to use them." *Id.* That is because "[t]here are always winners and losers in census results." *Id.* As a result,

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

"[c]ensus results have always been about confidence . . . confidence in the Census Bureau's ability to produce high quality, impartial data, free from political interference. In this sense being seen to produce politically-manipulated results is as much of a danger as low quality data." *Id.*

Many of the fears expressed in the Elevator Speech were borne out by the time the Replan was ordered, adopted, and announced:

- The Secretary directed the Bureau to develop a plan with an accelerated schedule within days, which led to the drafting of the Replan. *See* DOC_10183.
- The Replan shortened both data collection and data processing.
- Four days before the Replan was announced, enumerator staffing was roughly 50 percent of the Bureau's target at some sites within major regions such as the Los Angeles Region. *See* DOC_8631.
- On the date of the Replan's announcement, COVID-19 had resurged in much of the country, Hurricane Hanna had hit Texas, and Hurricane Isaias had almost made landfall in North Carolina.[9]

On July 23, 2020, the same day that the Bureau circulated the Elevator Speech, several senior Bureau officials, including Deputy Director Ron Jarmin, Defendants' sole declarant Associate Director Fontenot, and Associate Director for Field Operations Timothy Olson, conferred in an email thread. Associate Director Fontenot began the thread by stating he would soon tell the Department of Commerce about the "reality of the COVID Impacts and challenges":

> On Monday at DOC [Department of Commerce] I plan to talk about the difference between goal and actual case enumeration (Currently a shortfall (11 % goal vs 7% actual) and attribute it to the higher drop out rate and (ideally with reasons) and what we are going to do to address the technology drop outs.)

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[9] The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Accordingly, the Court takes judicial notice that Hurricane Hanna hit Texas on July 25, 2020, while Hurricane Isaias made landfall on the coast of North Carolina on August 3, 2020 at 11 pm Eastern Time. *See Hurricane Hanna*, https://www.weather.gov/crp/Hurricane_Hanna; *Hurricane Isaias*, https://www.weather.gov/mhx/HurricaneIsaias080420#:~:text=Isaias%20marked%20the%20earliest%20ninth,peak%20intensity%20of%2085%20mph.&text=Across%20eastern%20North%20Carolina%2C%20Isaias,minor%20storm%20surge%20and%20tornadoes.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

> I think it is critical to lay the groundwork for the reality of the COVID Impacts and challenges.
>
> Does anyone have any problems with my approach?

DOC_7737. In response, Associate Director Olson "agree[d] that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about." DOC_7738.

"All the reasons we know about" are not described in the administrative record. Olson does allude, however, to the reason of "political motivation." DOC_7737. In doing so, he "sound[s] the alarm" on "deliver[ing] apportionment by 12/31" in the strongest possible terms:

> We need to sound the alarm to realities on the ground – people are afraid to work for us and it is reflected in the number of enumerators working in the 1a ACOs. And this means it is ludicrous to think we can complete 100% of the nation's data collection earlier than 10/31 and any thinking person who would believe we can deliver apportionment by 12/31 has either a mental deficiency or a political motivation.

Id. One reason that accelerating the schedule would be "ludicrous," Associate Director Olson stated, was the "awful deploy rate" of enumerators about 62% below target. *Id.* Driving that shortfall was an "almost [] debilitating quit rate":

> Another tack is to provide crystal clear numbers by the 1a ACOs that shows the awful deploy rate - field selected the right number (big number) to training, training show rate was on par with prior censuses (albeit a few points lower ... but overall in line with past censuses). And then we had a huge quit rate from training to deployed in field (and this does not mirror past censuses at all - it is MUCH higher, almost a debilitating higher quit rate). And this translates into much slower production in the field because we have less than half the number of enumerators (38%) we need to get the job done.

DOC_7559.[10] The email thread thus showed senior Bureau officials' serious concerns

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[10] At the preliminary injunction hearing, Defendants had no comment on Associate Director Olson's email or other documents in the administrative record. In response to Associate Director Olson's email, for instance, Defendants stated: "to the extent that the Court does undertake some sort of APA or record review, then in an APA case the Court acts as an appellate tribunal and reviews the record[,] and the record speaks for itself." Tr. of Sept. 22, 2020 Preliminary Injunction

about the Replan only days before July 29, 2020, the day Associate Director Fontenot asserts that the Secretary ordered the development of the Replan. The staffing shortfall persisted. In the Bureau's July 30, 2020 Periodic Performance Management Reports slideshow, the Bureau acknowledged that "[s]taffing remains a challenge." DOC_9423.

Like field operations, data processing also needed more time in order to yield an accurate census. On July 24, 2020, a memo titled "2020 Decennial Census – Apportionment Data Processing" was circulated by Chief of Decennial Communciations Stakeholder Relationships Kathleen Styles to senior staff, including Associate Director Fontenot and Assistant Director Stempowski. DOC_8019. The Apportionment Data Processing memo explained that "[t]he time spent on data processing is essential to ensuring an accurate and complete count." DOC_8019. The Bureau further acknowledged that "[t]he three month delay in the largest field data collection operations, which impacted more than 35 percent of all responding households, will require additional data processing to ensure people are accurately counted in the correct location." *Id*. The Bureau explained the shortfalls to accuracy that would result if data processing were cut short:

- Actions that would condense or remove parts of [data processing] run the risk of:
  - Incorrect geographic placement of housing units or missing units that were added through peak field operations.
  - Duplicative or conflicting data for certain households.
  - Unreliable characteristic data for redistricting files.
  - Additional legal challenges of apportionment counts, redistricting results, or other data products as a result of diminished quality of decennial data.

DOC_8019.

Despite the Bureau's conclusions that it needed more time, the Bureau was directed just

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Hearing, at 13:25–14:3, ECF No. 207; *accord id.* at 18:20–19:1 (The Court: "Would [Defendants] like to comment on this document [the 'Elevator Speech']?" Defendants: "No, I don't have any further comment, Your Honor. I think for the reasons we said that the documents speak for themselves.").

1 before or on July 30, 2020[11] to create the Replan and present it to the Secretary on August 3, 2020.
2 *Cf.* Fontenot Decl. ¶ 81 ("July 29, the Deputy Director informed us that the Secretary had directed
3 us . . . ."). Although the Bureau had taken nearly a decade to develop the Operational Plan Version
4 4.0 for the 2020 Census, the Bureau developed the Replan in the span of 4 or 5 days at most. On
5 July 30, 2020, the Chief of the Population Division, Karen Battle, sent an email with the subject
6 "EMERGENCY MEETING on 12_31 Delivery of Appo__." DOC_8364. Thereafter, senior
7 Bureau officials met at 11 a.m., and again at 5:00 p.m. that day. The officials then conferred in an
8 email thread that extended to at least 10:57 p.m. DOC_8353. In the thread, the Chief of the
9 Geography Division, Deirdre Bishop, thanked fellow senior officials for "exhibiting patience and
10 kindness as we brainstormed and adjusted the schedule." DOC_8356.

11 Even as the Bureau began to develop the Replan at the Secretary's direction, the Bureau
12 continued to acknowledge that the Replan would present an unacceptable level of accuracy. On
13 July 31, 2020, the Chief of the Decennial Statistical Studies Division, Patrick Cantwell, sent an
14 email to senior Bureau officials that mentioned "global risks":

15 - "Many of these changes delay activities required for developing the remaining data
16 products following apportionment, some of them (but not all) until after 12/31/20,
17 increasing the risk that they will not be completed on time, whatever that schedule
becomes."
18 - "Many of these changes, separately or in combination, have not been previously studied or
19 analyzed for their effects on data quality. We risk decreasing the accuracy of apportionment
counts and other statistics released later."
20 - "With these changes to the original operational plan and schedule, we increase the chance
21 of subsequent data concerns. For example, it may be necessary to release tabulations later
22 that are not all completely consistent."

23 DOC_9073–74.

24

25 [11] The administrative record does not contain any communications from Deputy Director Jarmin
26 on July 29, 2020, let alone a specific communication between Deputy Director Jarmin and
Associate Director Fontenot. Because Associate Director Fontenot's declaration is not the
27 administrative record, the Court relies on the July 30 "EMERGENCY MEETING" email
discussed below and subsequent communications for the latest date of the Secretary's order.
28

In a later July 31, 2020 email chain, senior Bureau officials, including Victoria Velkoff, the Associate Director for Demographic Programs; Christa Jones, the Chief of Staff to Director Dillingham; John Maron Abowd, Associate Director for Research & Methodology; Michael T. Thieme, Assistant Director for Decennial Census Programs (Systems & Contracts), and Benjamin J. Page, Chief Financial Officer, signed off on the following document describing the Replan:

> All of the changes below, taken together, reduce the time required for post-processing such that, when combined with the operational changes above in this document, make it possible to deliver the apportionment package in time to meet the current statutory deadline. All of these activities represent abbreviated processes or eliminated activities that will reduce the accuracy of the 2020 Census. Additionally, the downstream effect of separating apportionment and redistricting processing activities could not be assessed. This results in additional risk to the delivery of the redistricting products in order to meet the statutory deadline and will have a negative impact on the accuracy of the redistricting data.

DOC_9496.

Because of the Replan's negative impact on accuracy, top Bureau staff hesitated to "own" the Replan. On August 1, 2020, Christa Jones, Chief of Staff to Director Dillingham, wrote in an email to other senior officials: "I REALLY think we need to say something on page 2 [of the Bureau's presentation on the Replan] that this is what we've been directed to do or that we are presenting these in response to their direction/request. This is not our idea and we shouldn't have to own it." DOC_10183. Jones also wrote that "I think we need to include the language about the quality that we have on the Word document. We really shouldn't give this as a presentation without making this clear up front." That Word document, "Options to meet September 30_v11," was circulated to senior Bureau officials by the Chief of the Decennial Census Management Division, Jennifer Reichert. The document stated that "accelerating the schedule by 30 days introduces significant risk to the accuracy of the census data. In order to achieve an acceptable level of accuracy, at[ ]least 99% of Housing Units in every state must be resolved." DOC_9951; *accord* DOC_8779 (another version of "Options to meet September 30" circulated by Assistant Director Stempowski on July 31, 2020, that states "[a]cceptable quality measure: 99% if HUs

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resolved (similar to 2010)").

The same significant concerns were presented to Secretary Ross on August 3, 2020 ("August 3 Presentation").[12] That presentation began, like the Elevator Speech and the "Options to meet September 30" document, with a tough assessment: "Accelerating the schedule by 30 days introduces significant risk to the accuracy of the census data. In order to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved." DOC_10276. The August 3 Presentation then described the many changes in field operations that the Replan will necessitate, such as reducing the number of NRFU visits from six to three or one.[13] *See* DOC_10281–82.

In addition to detailing those changes in field operations, the August 3 Presentation also details the Replan's impact on data processing. Among these impacts is possible harm to a different statutory deadline—the deadline for the Secretary's report of redistricting data to the states:

> Additionally, the downstream effect of separating apportionment and redistricting processing activities could not be assessed, but we anticipate it will, at a minimum, reduce the efficiency in data processing and could further reduce the accuracy of the redistricting data if there is a similar requirement to deliver that data by the current statutory deadline of March 31, 2021 [sic; should be April 1, 2021].

DOC_10281. The August 3 Presentation thus contemplated sacrificing not only the accuracy of the December 31, 2020 congressional apportionment figures, but also the accuracy and timeliness of

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[12] Like Defendants had done with the Elevator Speech, Defendants produced several versions of the August 3 Presentation as non-privileged and not pre-decisional. However, the parties identified one version, DOC_10275, as a key document. ECF Nos. 161, 190. The Court thus mainly analyzes that version of the document. *See* 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party . . . .").

[13] On September 8, 2020, Defendants sua sponte filed a notice regarding compliance with the Court's September 5, 2020 TRO. ECF No. 86. The notice attached the "Guidance for Field Managers related to Action Required following the 9/5 Court Order" in which Defendants stated that the Replan reduced the number of visits from six to one. ECF No. 86 Attachment C ("We will resume making six contact attempts to confirm vacant housing units, instead of the one contact attempt set forth in the Replan").

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the April 1, 2021 redistricting numbers.

In sum, the Bureau concluded internally that trying to get the count done by the December 31, 2020 statutory deadline would be unacceptable to the Bureau's statutory and constitutional interests in accuracy. These conclusions were consistently and undisputedly reflected in documents leading up to the August 3 Press Release, including in the contemporaneous August 3, 2020 Presentation.

However, Director Dillingham's August 3 Press Release, which is less than one and a half pages, did not consider how the Replan would feasibly protect the same essential interests that the Bureau had identified. Rather, the August 3 Press Release based its decision on one statutory deadline and the Secretary's direction. The August 3 Press Release "accelerate[d] the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, *as required by law and directed by the Secretary of Commerce*." *Id.* (emphasis added).

The August 3 Press Release then asserts that the Replan's shortening of data collection and processing will not affect census accuracy: "We will improve the speed of our count without sacrificing completeness. . . . Under this plan, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities." *Id.* To support these assertions, the August 3 Press Release tersely mentions three operational changes related to enumerators conducting NRFU; data processing; and staffing:

- [*Enumerators conducting NRFU*] "As part of our revised plan, we will conduct additional training sessions and provide awards to enumerators in recognition of those who maximize hours worked. We will also keep phone and tablet computer devices for enumeration in use for the maximum time possible."
- [*Data processing*] "Once we have the data from self-response and field data collection in our secure systems, we plan to review it for completeness and accuracy, streamline its processing, and prioritize apportionment counts to meet the statutory deadline."
- [*Staffing*] "In addition, we plan to increase our staff to ensure operations are running at full capacity."

These announcements, and nothing more, comprised the August 3 Press Release's explanation of changes that would ensure an accurate count. The August 3 Press Release thus did not grapple

with the Bureau's contemporaneous, detailed, and unqualified internal concerns.

Moreover, the Bureau's internal documents undermine the August 3 Press Release's claims of efficiency. As to enumerators and staffing, the Bureau's head of field operations had "sound[ed] the alarm" on July 23, 2020. DOC_7738. "Crystal clear numbers" showed that "people are afraid to work for us." DOC_7738. Specifically, the Bureau had an "awful deploy rate" and "less than half the number of enumerators (38%) [it] need[ed] to get the job done." *Id.* How "awards" and "additional training sessions" in the midst of a pandemic would close that 62% gap was unclear. A week later, the "High-Level Summary Status" dated July 30, 2020 confirmed the staffing shortfall. In sites and Area Census Offices across the county, the Bureau lacked about half of the enumerators "compared to [its] goal." DOC_8623.

As for data processing, senior Bureau officials had received on July 29, 2020 a "High Level Summary of the Post-Data Collection" from the Director's Senior Advisor for Decennial Affairs, James Treat. DOC_8337. The High Level Summary unambiguously concluded that:

> Any effort to concatenate or eliminate processing and review steps to reduce the timeframes will significantly reduce the accuracy of the apportionment counts and the redistricting data products. Decades of experience have demonstrated that these steps and time are necessary to produce data products that do not need to be recalled, meet data user expectations and needs, [are] delivered on time, and stand the test of time.

Id.; *accord* DOC_8086 (July 27, 2020 memo from Treat with similar language).

Similarly, in the very August 3 Presentation on the Replan, the Bureau found that a "compressed review period creates risk for serious errors not being discovered in the data – thereby significantly decreasing data quality. Additionally, serious errors discovered in the data may not be fixed." DOC_10285.

Although the Operational Plan Version 4.0 took nearly a decade to develop, the Replan was developed in four to five days. All told, in the four or five days that the Bureau developed the Replan, Defendants did not sufficiently consider how the Replan would fulfill their statutory and constitutional duty to conduct an accurate census. Rather, the Bureau followed the Secretary's orders even though "[s]hortening the time period to meet the original statutory deadlines for

1 apportionment and redistricting data w[ould] result in a census that has fatal data quality flaws that
2 are unacceptable for a Constitutionally-mandated activity." DOC_8022.

3 **2. Defendants offered an explanation that runs counter to the evidence before the agency.**

4 An agency action is "arbitrary and capricious if the agency has . . . offered an explanation
5 for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.
6 "Reliance on facts that an agency knows are false at the time it relies on them is the essence of
7 arbitrary and capricious decisionmaking." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075
8 (D.C. Cir. 2003). If an agency has offered an explanation that runs counter to the evidence before
9 the agency, the agency's action is arbitrary and capricious. *E. Bay Sanctuary Covenant v. Barr*,
10 964 F.3d 832, 851–52 (9th Cir. 2020) (concluding that an agency's rule was arbitrary and
11 capricious because the agency's reasoning "runs counter to the evidence before the agency"); *Mo.*
12 *Pub. Serv. Comm'n.*, 337 F.3d at 1075 (concluding that the agency's action was arbitrary and
13 capricious because the agency "had adopted a new rationale premised on old facts that were no
14 longer true").

15 Defendants' alleged justification for the Replan is the need to meet the December 31, 2020
16 statutory deadline for the Secretary of Commerce to report to the President "the tabulation of total
17 population by States" for congressional apportionment because Congress failed to grant an
18 extension. However, before the adoption of the Replan, the President and multiple Bureau officials
19 repeatedly stated, publicly and internally, that the Bureau could not meet the December 31, 2020
20 statutory deadline. For instance:

21 - On April 3, 2020, the day the COVID-19 Plan was announced, President Donald J. Trump
22 publicly stated, "I don't know that you even have to ask [Congress]. This is called an act of
23 God. This is called a situation that has to be. They have to give it. I think 120 days isn't
nearly enough." ECF No. 131-16 at 4.
24 - On May 7 and 8, 2020, Associate Director for Communications Ali Ahmad wrote to
25 Secretary Ross's Chief of Staff and other senior officials. Ahmad stated that "[his memo]
26 shows that if we could snap restart everywhere we would still need legislative fix. It also
then explains why we can't [snap restart] and estimates when we can start in the last
27 places, getting us to the October 31, 2020 end date for data collection, and then explains

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why we need an additional 30 for risk mitigation." DOC_365. Risks included "another system shock, such as a Hurricane hitting the [S]outh during NRFU." *Id.*

- On May 8, 2020, Secretary Ross's Chief of Staff sent the Secretary a memo that among other things stated, "**Based on the initial suspension of field activities in line with OMB guidance, the Census Bureau can no longer meet its statutory deadlines for delivering apportionment and redistricting data, even conducting operations under unrealistically ideal conditions.**" DOC_2287 (emphasis in original).
- On May 26, 2020, the head of census field operations, Tim Olson, publicly stated that "[w]e have passed the point where we could even meet the current legislative requirement of December 31. We can't do that anymore. We – we've passed that for quite a while now." Nat'l Conf. of Am. Indians, 2020 Census Webinar: American Indian/Alaska Native at 1:17:30–1:18:30, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY.
- On July 8, 2020, Associate Director Fontenot publicly confirmed that the Bureau is "past the window of being able to get" accurate counts to the President by December 31, 2020. U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 20–21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

As the Replan's adoption drew near, the Bureau found that they could potentially miss even the COVID-19 Plan's data collection deadline of October 31, 2020—to say nothing of the Replan's data collection deadline of September 30, 2020.

- On July 23, 2020, Chief of Decennial Communications and Stakeholder Relationships, Kathleen Styles, shared the "Elevator Speech" memo with GAO. *See* DOC_8026 (sending to GAO). The Elevator Speech echoed Associate Director Ahmad's concerns about natural disasters: "[t]he Census Bureau needs [] 30-days for risk mitigation[] in case we are not able to complete data collection operations everywhere by October 31 (e.g., a hurricane, or a COVID outbreak)." DOC_8022.
- Also on July 23, 2020, several senior officials stated internally that meeting the deadline was impossible. Associate Director Fontenot identified "the difference between goal and actual case enumeration[,] [c]urrently a shortfall (11% goal vs 7% actual)." DOC_7739. He thus thought it "critical to lay the groundwork for the reality of the COVID Impacts and challenges" in an upcoming meeting with the Department of Commerce. Associate Director of Field Operations Olson agreed. He concluded that "any thinking person who would believe we can deliver apportionment by 12/31 has either a mental deficiency or a political motivation." DOC_7737.

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- On July 27, 2020, the Director Dillingham's Senior Advisor for Decennial Affairs, James B. Treat, circulated a memo intended for Deputy Director Jarmin and authored by Associate Director Fontenot. The memo stated that "appreciably shortening the quality checks and reviews would be extremely unwise. Each and every step in post data collection processing is necessary." DOC_8085. Furthermore, hurricane season, early snow events, and COVID-19 all "increased the risk of our ability to complete the field data collection operations by the [COVID-19 Plan] deadline of October 31, 2020." DOC_8086.
- On July 29, 2020, the Senior Advisor for Decennial Affairs to Director Dillingham, James Treat, circulated to Associate Director Fontenot and other senior officials a "High Level Summary of the Post-Data Collection." DOC_8337. The High Level Summary repeated the Bureau's strong concerns. It stressed that "[d]ecades of experience have demonstrated that [processing and review] steps and time are necessary to produce data products that do not need to be recalled, meet data user expectations and needs, [are] delivered on time, and stand the test of time." DOC_8337.

Even less than two weeks before the Replan's September 30, 2020 data collection deadline, the Bureau expressed uncertainty about its ability to meet the September 30 deadline. One reason was that the natural disasters about which Bureau officials had warned had come to pass. On September 17, 2020 at a meeting of the Census Scientific Advisory Committee, Associate Director Fontenot, Defendants' sole declarant, stated "that [he] did not know whether Mother Nature would allow us to meet the September 30 date." ECF No. 196-1 at ¶ 14 (Fontenot's September 22, 2020 declaration). Mother Nature had wreaked "major West Coast fires," "air quality issues," and "Hurricane Sally across the states of Louisiana, Mississippi, Alabama, the Florida panhandle area, parts of Georgia, and South Carolina." *Id.*

The timing of Congressional *action* further belies Defendants' claim that Congressional inaction on the deadline justified the Replan. In the weeks and days leading up to Secretary Ross's direction to develop the Replan, Congress took major steps toward extending statutory deadlines. On May 15, 2020, the House passed a bill extending deadlines, The Heroes Act. *See* H.R. 6800, https://www.congress.gov/bill/116th-congress/house-bill/6800.[14] On June 1, 2020, the Senate

[14] The Court takes judicial notice of the congressional hearing dates. The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or

placed The Heroes Act on the legislative calendar. On July 23, 2020 at 10 a.m. Eastern, the Senate's Small Business and Entrepreneurship Committee held a hearing on The Heroes Act.

Yet during that hearing, senior Bureau officials were strategizing how to resist the Department of Commerce's ongoing pressure to accelerate census operations. On July 23, 2020, Associate Director Fontenot wrote at 10:31 a.m. that "[o]n Monday at DOC I plan to talk about the difference between goal and actual case enumeration[,] [c]urrently a shortfall (11% goal vs 7% actual). . . . [I]t is critical to lay the groundwork for the reality of the COVID Impacts and challenges." DOC_7739. Associate Director Olson responded at 11:19 a.m., "agree[ing] that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about." DOC_7738. Lastly, by 11:48 a.m., Associate Director Olson "sound[ed] the alarm to realities on the ground." *Id.*

In fact, the Commerce Department's pressure on the Bureau had started at least a few days earlier. Three days before the July 23, 2020 Senate hearing, the Bureau's Chief Financial Officer, Ben Page, asked other senior officials whether the Bureau still supported Congressional extension of the statutory deadlines. DOC_6852 (July 20, 2020 email to Director Dillingham et al.). Page wrote:

> Among the first questions I am getting is "Does the Census bureau still need the change in the statutory dates?" Can we find a time to discuss how we should respond to that question? Given that the Senate may introduce a bill today or tomorrow, I anticipate we'll need a set answer for discourse over the next 24-48 hours.

Id. The answer to Page's question was, of course, no.

By July 28, 2020, the Bureau asked Congress for $448 million for a timely completion of the Census without an extension of the statutory deadline. DOC_8037 (July 28, 2020 email from Secretary Ross's Director of Public Affairs, Meghan Burris, to Secretary Ross).

"can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). As stated above, the Court is permitted to go outside the administrative record "for the limited purpose of background information." *Thompson*, 885 F.2d at 555.

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Moreover, at the House Oversight and Reform hearing on July 29, 2020, Director Dillingham did not support extending the statutory deadline. Rather, he sidestepped questions about whether the "Administration has [] reversed direction on [the extension], and is now suggesting that they want the Census to be wrapped up quickly so that th[e] tabulation . . . could actually happen before the end of the year." Oversight Committee, *Counting Every Person* at 3:50:42–3:51:40, YouTube (July 29, 2020), https://youtu.be/SKXS8e1Ew7c?t=13880 (questions by Congressman John Sarbanes). Director Dillingham's response was that "I'm not aware of all the many reasons except to say that the Census Bureau and others really want us to proceed as rapidly as possible." *Id.* at 3:51:48–3:52:02.

Accordingly, Defendants' explanation—that the Replan was adopted in order to meet the December 31, 2020 statutory deadline because Congress failed to act—runs counter to the facts. Those facts show not only that the Bureau could not meet the statutory deadline, but also that the Bureau had received pressure from the Commerce Department to cease seeking an extension of the deadline. In other words, Defendants "adopted a new rationale premised on old facts that were no longer true": assumptions that the Bureau could possibly meet the deadline and that Congress would not act. *Mo. Pub. Serv. Comm'n.*, 337 F.3d at 1075. Thus, because Defendants "offered an explanation for its decision that runs counter to the evidence before the agency," Plaintiffs are likely to succeed on the merits of their claim that Defendants' decision is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

3. Defendants failed to consider an alternative.

In order to meet APA standards, an agency "must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (alterations in original) (quoting *State Farm*, 463 U.S. at 51). An agency that fails to consider alternatives may have acted arbitrarily and capriciously. *See Regents*, 140 S. Ct. at 1913 (concluding that the DACA Termination was arbitrary and capricious because the Secretary, confronted with DACA's illegality, failed to consider alternative actions short of terminating DACA, such as eliminating DACA benefits); *State Farm*, 463 U.S. at 43

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(holding that the National Highway Traffic Safety Administration had acted arbitrarily and capriciously by not considering airbags as an alternative to automatic seatbelts).

Defendants similarly failed to consider an alternative here: not adopting the Replan while striving in good faith to meet statutory deadlines. By adopting the Replan, Defendants sacrificed adequate accuracy for an uncertain likelihood of meeting one statutory deadline. Defendants "did not appear to appreciate the full scope of [their] discretion." *Regents*, 140 S. Ct. at 1911. Specifically, Defendants could have taken measures short of terminating the census early only to *possibly* meet the deadline. These measures could have included good faith efforts to meet the deadline coupled with an operational plan that would—at least in the Bureau's view—generate results that were not "fatal[ly]" or "unacceptabl[y]" inaccurate. Elevator Speech, DOC_8070.

Because agencies must often fulfill statutory obligations apart from deadlines, case law is replete with agency actions that missed statutory deadlines but nevertheless survived judicial review. *See, e.g.*, *Barnhart v. Peabody Coal Co*., 537 U.S. 149, 157, 171–72 (2003) (upholding the Social Security Commissioner's late assignment of beneficiaries to coal companies despite the fact that it "represent[ed] a default on a statutory duty, though it may well be a wholly blameless one"); *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 112 (8th Cir. 1997) ("Absent specific statutory direction, an agency's failure to meet a mandatory time limit does not void subsequent agency action"); *Linemaster Switch Corp. v. EPA*, 938 F.3d 1299, 1304 (D.C. Cir. 1991) (explaining that the Court did not want to restrict the agency's powers "when Congress . . . has crafted less drastic remedies for the agency's failure to act").[15]

In fact, single-mindedly sacrificing statutory objectives to meet a statutory or judicial

[15] Defendants cite *Forest Guardians v. Babbitt*, which explains that "when Congress . . . sets a specific deadline for agency action, neither the agency nor any court has discretion." 174 F.3d 1178, 1190 (10th Cir. 1999). But *Forest Guardians* addresses the question of whether a court can compel an agency's late action, not the question of whether an agency's late action can be upheld by a court. Under the Supreme Court's reasoning in *Barnhart*, the Bureau's action after the deadline would be upheld by a court. *See, e.g.*, *Barnhart*, 537 U.S. at 157, 171–72 (upholding the Social Security Commissioner's late assignment despite the fact that "represent[ed] a default on a statutory duty, though it may well be a wholly blameless one").

deadline can itself violate the APA. Examples abound because the Census Act is far from the only statute that sets a deadline for agency action. Environmental regulation and occupational safety are just two illustrative examples.

Environmental statutes have set hundreds of deadlines, of which only a fraction have been met. *See* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, Law & Contemp. Probs., Autumn 1991, at 311, 323–28 (noting that "EPA has met only about 14 percent of the congressional deadlines imposed"). For example, in *Environmental Defense Fund v. Environmental Protection Agency*, the D.C. Circuit set a "court-imposed schedule" after the EPA violated statutory deadlines for studying and designating hazardous mining wastes. 852 F.2d 1316, 1331 (D.C. Cir. 1988); *see id.* at 1319–31 (discussing interlocking deadlines). The D.C. Circuit set judicial deadlines that were years *after* the missed statutory deadlines. *See id.*[16] The D.C. Circuit's order thus allowed the EPA to continue violating the statutory deadlines so that the EPA could fulfill its other statutory duties.

Moreover, when the EPA promulgated a rule to comply with the judicial deadlines—and to stanch the ongoing violation of statutory deadlines—the D.C. Circuit set that rule aside. *See Am. Min. Cong. v. EPA*, 907 F.2d 1179, 1191–92 (D.C. Cir. 1990). The D.C. Circuit reasoned that the rule was unsupported by the data. *See id.* at 1191. It was immaterial that the rule lacked support only because the EPA felt compelled to comply with the deadlines. "That an agency has only a brief span of time in which to comply with a court order cannot excuse its obligation to engage in reasoned decisionmaking under the APA." *Id.* at 1192.

In the area of occupational safety, the Occupational Safety and Health Act of 1970 set a "statutory timetable" in "mandatory language" for rulemaking. *Nat'l Cong. of Hispanic Am.*

[16] The deadlines at issue in *Environmental Defense Fund v. EPA* were complicated. In simple terms, the statutory deadlines were for the EPA to conduct studies by October 21, 1983, and to list wastes under Subtitle C of the Resource Conversation and Recovery Act within six months of completing those studies. *See* 852 F.2d at 1319–20. The D.C. Circuit set deadlines of July 31, 1989 for completion of the studies, and August 31, 1988 for relisting of six specific wastes. *See id.* at 1331.

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Citizens (El Congreso) v. Marshall, 626 F.2d 882, 883–84 & n.3 (D.C. Cir. 1979) (discussing 29 U.S.C. § 655(b)(1)–(4), which provides that the Secretary "shall publish" rules within certain numbers of days). When the Secretary of Labor missed those deadlines, a "14-year struggle to compel the Secretary of Labor" to promulgate a rule ensued. *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 614 (D.C. Cir.), *vacated sub nom. as moot*, *Farmworkers Justice Fund, Inc. v. Brock*, 817 F.2d 890 (D.C. Cir. 1987).

As relevant here, when the Secretary of Labor first missed the deadlines, the district court ordered him to follow them. *See id.* at 884. Despite even the "mandatory language" of the statutory deadline, the D.C. Circuit reversed. The D.C. Circuit held that "the mandatory language of the Act did not negate the 'implicit acknowledgement that traditional agency discretion to alter priorities and defer action due to legitimate statutory considerations was preserved.'" *Id.* (quoting *National Congress of Hispanic American Citizens v. Usery*, 554 F.2d 1196, 1200 (D.C. Cir. 1977) (Clark, J.)). The D.C. Circuit reasoned that the Secretary could "giv[e] priority to the most severe hazards" rather than those demanded by the statutory deadline. *Id.* at 891 & n.44. Agencies cannot and should not ignore their full range of legal obligations to prioritize meeting statutory deadlines at all costs.

So too here. Secretary Ross and the Census Bureau could have given priority to avoiding "fatal data quality flaws that are unacceptable for a Constitutionally-mandated national activity." ECF No. 155-8 at 332 (Bureau's Elevator Speech). The Census Act's "mandatory language" of "shall" on deadlines did not displace Defendants' duty to consider other express statutory and constitutional interests. *Compare, e.g.*, 1998 Appropriations Act, § 209, 111 Stat. at 2481 ("Congress finds that . . . it is essential that the decennial enumeration of the population be as accurate as possible . . . ."), *and Utah*, 536 U.S. at 478 (finding a "strong constitutional interest in [the] accuracy" of the census), *with, e.g.*, 29 U.S.C. § 655(b)(1)–(4) ("shall publish" rules within certain timetable), *and Nat'l Cong. of Hispanic Am. Citizens*, 554 F.2d at 1198 (reversing order to follow deadlines and finding "traditional agency discretion to alter priorities" despite statutory deadlines because the statute provided feebly that "in determining the priority for establishing

standards . . . the Secretary shall give due regard to the urgency of the need" (quoting 29 U.S.C. § 655(g))).

Indeed, in analyzing the COVID-19 Plan—but never the Replan—the Bureau itself concluded that missing the statutory deadline was constitutional and in line with historical precedent. Bureau officials included these conclusions in their notes for their April 28, 2020 call with Congressman Jamie Raskin, Chair of the House Oversight Subcommittee on Civil Rights and Civil Liberties, which has jurisdiction over the census. DOC_2224. The notes stated that the COVID-19 proposal "underwent a constitutional review, and we believe it is constitutional." DOC_2228; *see also* DOC_1692 (preparation materials for April 19, 2020 briefing with House Oversight Committee, stating that the COVID-19 plan "went through inter-agency review, including review by the Department of Justice," and "[t]heir view is that there is not a constitutional issue with the proposal").

The notes further stated that "in history, especially for [] many of the earlier censuses, data collection and reporting in the counts shifted beyond the zero year." DOC_2228. Officials in charge of the census have previously missed statutory deadlines imposed by Congress. Assistants conducting four different censuses failed to transmit returns to marshals or the Secretary of State within the deadline imposed by Congress. In each case, only after the deadline had passed without the required transmission did Congress act by extending the statutory deadlines. This post-deadline extension took place in four censuses: the 1810, 1820, 1830, and 1840 Censuses. ECF No. 203 (explaining examples); *see, e.g.*, Act of Sept. 1, 1841, ch. 15, § 1, 5 Stat. 452, 452 (1841) (*post hoc* extension of September 1, 1841 for original deadline missed by over nine months).

Defendants' failure "to appreciate the full scope of [their] discretion" also resembles the Secretary of Homeland Security's decisionmaking in *Regents*, 140 S. Ct. 1891. There, the Secretary terminated the DACA program by relying on the Attorney General's determination that DACA was unlawful. *Id.* at 1903. The government argued that the decision was not arbitrary and capricious because it was based on the Attorney General's binding legal conclusion. The Supreme Court agreed that the Attorney General's conclusion was binding but set aside the Secretary's

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decision anyway. *Id*. at 1910. The Court held that the Secretary failed to consider the full scope of her discretion, which would have permitted her to take measures short of terminating the program to address the illegality of the program. *Id*. at 1911.

Like the Secretary in *Regents*, Defendants argue that binding law compels their decision. Similarly, the Court agrees that the Census Act's statutory deadlines bind Defendants. Even so, Defendants should have "appreciate[d] the full scope of their discretion" to preserve other statutory and constitutional objectives while striving to meet the deadlines in good faith. *Regents*, 140 S. Ct. at 1911. By not appreciating their discretion, Defendants failed to consider important aspects of the problem before them. That failure was likely arbitrary and capricious under the APA.

4. Plaintiffs are likely to succeed on the merits of their claim that Defendants failed to articulate a satisfactory explanation for the Replan.

Plaintiffs argue that the Defendants failed to articulate a satisfactory explanation for its decision to adopt the Replan. The Court concludes that Plaintiffs are likely to succeed on the merits of this claim.

An agency must "examine the relevant data and articulate a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. The agency must have "considered the relevant factors, weighed [the] risks and benefits, and articulated a satisfactory explanation for [its] decision." *Dep't of Commerce*, 139 S. Ct. at 2570. In evaluating agency action, the Court must ensure that "the process by which [the agency] reache[d] its result [was] logical and rational." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). "[T]he agency's explanation [must be] clear enough that its 'path may reasonably be discerned.'" *Encino Motorcars*, 136 S. Ct. at 2125 (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)). "[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* at 2127 (quoting *State Farm,* 463 U.S. at 43).

When an agency changes position, the agency must provide a "reasoned explanation" why

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it has done so. *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). At a minimum, this explanation must "display awareness that [the agency] is changing position" and "show that there are good reasons for the new policy." *Fox Television*, 556 U.S. at 515. In addition, "sometimes [an agency] must" "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.*

More detail is required "when, for example, [the agency's] new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id.* "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television*, 556 U.S. at 515–16); *see also Organized Vill. of Kake*, 795 F.3d at 968 ("[A]n agency may not simply discard prior factual findings without a reasoned explanation."). "It follows that an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars*, 136 S. Ct. at 2126 (alteration in original) (*quoting Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)); *see, e.g.*, *Humane Society v. Locke*, 626 F.3d 1040, 1049–50 (9th Cir. 2010) (concluding that an agency acted arbitrarily and capriciously where the agency took a "seemingly inconsistent approach" with the approach it had taken previously).

Defendants took an inconsistent approach that failed to "articulate a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. The facts before the Defendants included the COVID-19 pandemic, its significant effect on census operations, and the inability to conduct an accurate count by September 30, 2020. *See supra* Section IV-A-1 (contemporaneous statements from Bureau officials explaining how it was impossible to complete an accurate count by the statutory deadline); Section IV-A-2 (contemporaneous statements from Bureau officials explaining how they were past the point of being able to finish the count by the statutory deadline, even if they replanned the census).

Defendants never articulated a satisfactory explanation between these facts and the decision to adopt the Replan. All Defendants offer is the August 3, 2020 Press Release, which is less than one-and-a-half pages in length. *See* Tr. of August 26, 2020 Case Management Conference, ECF No. 65 at 20 (The Court: "[T]he Plaintiffs point to a press release as the reason for advancing the date and -- are there other documents that provide the contemporaneous reasons for advancing the date, other than the press release?" Defendants: "Your Honor, at this point I'm not aware of any other documents, but I would propose that I check with my client and answer that in the September 2nd filing.").[17] In less than a page and a half, the August 3 Press Release simply asserts that Defendants planned to deliver an accurate census in time for the statutory deadline. *See* Section IV-A-1 (analyzing the assertions in the press release and determining that they contradicted the facts before the Bureau). The August 3 Press Release never explains why Defendants are "required by law" to follow a statutory deadline that would sacrifice constitutionally and statutorily required interests in accuracy. ECF No. 37-1.

The August 3 Press Release stands in stark contrast to Secretary Ross's memorandum on adding a citizenship question to the 2020 Census. *See Dep't of Commerce*, 139 S. Ct. at 2569. In that memorandum, Secretary Ross outlined the four options available to him and the benefits and drawbacks of each option. *See* Ross Memorandum at 2–5, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), ECF No. 173 at 1314–17. He also explained the potential impact of each option on depressing 2020 Census response rates, drew on empirical evidence available to the Bureau, and weighed concerns voiced by census partners. *Id.* at 1317–19. Finally, he explained how his decision followed from the evidence and relevant considerations. *Id.* at 1319–20. The Supreme Court held that the memorandum provided adequate explanation because the Secretary "considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision." *Dep't of Commerce*, 139 S. Ct. at 2570.

The August 3 Press Release contains nowhere close to the same level of reasoned

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[17] Defendants did not mention any other documents in their September 2, 2020 filing. ECF No. 63.

explanation. Here, Defendants failed to explain the options before them, failed to weigh the risks and benefits of the various options, and failed to articulate why they chose the Replan. In other words, Defendants failed to "articulate a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. Specifically, Defendants failed to explain why they disregarded the facts and circumstances that underlay their previous policy: the COVID-19 Plan. The facts underlaying the COVID-19 Plan include the rapid spread of the coronavirus pandemic across the United States and its significant effect on Census operations, which are well-documented throughout the record. *See, e.g.*, DOC_2287 ("Operational Timeline" memo from Secretary Ross's Chief of Staff, Michael Walsh, to the Secretary on May 8, 2020).

In fact, in the August 3, 2020 Press Release, Defendants never acknowledged or mentioned the COVID-19 Plan or COVID-19, let alone the ongoing pandemic. It follows that this "'[u]nexplained inconsistency' in agency policy" renders the Replan arbitrary and capricious. *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Brand X*, 545 U.S. at 981).

5. Plaintiffs are likely to succeed on the merits of their claim that Defendants failed to consider reliance interests.

Plaintiffs also argue that the Replan was arbitrary and capricious in violation of the APA because Defendants failed to consider the reliance interests of their own partners, who relied on the October 31 deadline and publicized it to their communities. The Court concludes that Plaintiffs are likely to succeed on the merits of this claim.

When an agency is reversing a prior policy, the agency must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television*, 556 U.S. at 515). "It would be arbitrary and capricious [for the agency] to ignore such matters." *Fox Television*, 556 U.S. at 515. An agency reversing a prior policy must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Regents*, 140 S. Ct. at 1913.

Where an agency fails to consider reliance interests, its action is arbitrary and capricious.

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Regents, 140 S. Ct. at 1913 (holding that termination of the Deferred Action for Childhood Arrivals ("DACA") policy was arbitrary and capricious because the agency failed to consider reliance interests); *see also Encino Motorcars*, 136 S. Ct. at 2126 (declining to defer to the Department of Labor's regulation because of failure to consider the reliance interests of car dealerships when newly permitting service advisors to receive overtime pay). In fact, reliance interests should be considered even where the document giving rise to reliance expressly disclaims conferring any rights. *See Regents*, 140 S. Ct. at 1913–14 (holding that "disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance").

Defendants ignored reliance interests when Defendants developed and adopted the Replan. Defendants' COVID-19 Plan had engendered serious reliance interests on the part of municipalities and organizations who encouraged people to be counted and publicized the COVID-19 Plan's October 31, 2020 deadline for data collection.

Defendants themselves acknowledge the important role that their partners play in encouraging participation in the Census. Associate Director Fontenot describes at length the Bureau's partnerships with community organizations—including Plaintiffs such as National Urban League. He explains that the Bureau "depend[s] on [its] partners to seal the deal with communities that may be fearful or distrustful of the government"; to supplement and verify address lists; and to identify locations to best count people experiencing homelessness. Fontenot Decl. ¶¶ 40–42; *see id.* ¶¶ 12, 22. Overall, the Bureau engages in "[e]xtensive partnerships." *Id.* ¶ 28.

Accordingly, when the COVID-19 pandemic began to spread in March 2020, Defendants concluded that "[t]he virus will cause operational changes for the census, and may necessitate changes in our planned communications approach." DOC_970 (March 13, 2020 "COVID-19 Contingency Planning" sent by Program Analyst Christopher Denno to Director Dillingham et al.). Defendants thus stated that they would "[d]evelop[] talking points to share with our partners" about the pandemic. *Id*. Once Defendants adopted the COVID-19 Plan, Defendants' partners began to rely on the extended deadlines. For instance:

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- The City of Los Angeles is home to about 4 million people. M. Garcia Decl. ¶ 7. The City "conducted a public education campaign publicizing the October 31, 2020 date for self-response." *Id.* ¶ 14. For example, the City announced the date in bus shelter posters and social media toolkits. *Id.*
- Harris County, Texas "participated in over 150 events," including "food distribution events," during which it "announced the October 31, 2020 deadline for the 2020 Census." Briggs Decl. ¶ 12.
- The City of Salinas promoted the October 31, 2020 deadline "on social media and in thousands of paper flyers." Gurmilan Decl. ¶¶ 11–12.
- The League of Women Voters has over 65,000 members across 800 state and local affiliates. Stewart Decl. ¶ 4. Thus, "[w]hen the Census Bureau extended the deadline for counting operations to October 31, 2020," the League of Women Voters "published blog posts advertising the new timeline," "shared numerous letters with [] state and local affiliates providing information about the new timeline," and "publicized the deadline in letters and [emails]." *Id.* ¶ 11.
- National Urban League has 11,000 volunteers across 90 affiliates in 37 states. Green Decl. ¶ 4. "[W]hen the Census Bureau announced its extension of the timeline for collecting responses to the 2020 Census, the National Urban League informed all members of the 2020 Census Black Roundtable that the deadline had become October 31, 2020. The members in turn conveyed to their own networks and constituents, causing a cascading effect." *Id.* ¶ 14.

However, Defendants quietly removed the October 31 deadline from its website on July 31, 2020 without any explanation or announcement. *Compare* ECF No. 37-8 (July 30 Operational Adjustments Timeline), *with* ECF No. 37-9 (July 31 Operational Adjustments Timeline). Then on August 3, 2020, the Bureau advanced data collection deadlines to September 30.

As a result, people who believe they could submit their census responses in October and try to do so would not be counted. *See, e.g.*, Gurmilan Decl. ¶ 12 ("some residents who received the City [of Salinas]'s messaging will fail to respond before the R[eplan] deadline because the City has limited remaining resources to correct what is now misinformation."). Moreover, Plaintiffs' efforts to mitigate the widely advertised the Bureau's October 31 deadline and now-counterproductive education campaigns will only be harder in the midst of a pandemic. *E.g.*, M. Garcia Decl. ¶¶ 14–14; Gurmilan Decl. ¶¶ 11–14; Briggs Decl. ¶¶ 11–12, 15–17.

Accordingly, "[i]n light of the serious reliance interests at stake, [Defendants'] conclusory

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statements do not suffice to explain [their] decision." *Encino Motorcars*, 136 S. Ct. at 2127. The Replan is thus arbitrary and capricious on this ground as well.

B. Plaintiffs will suffer irreparable harm without an injunction.

As to irreparable harm, Plaintiffs identify and support with affidavits four potential irreparable harms that Plaintiffs will suffer as a result of inaccurate census data. First, Plaintiffs risk losing important federal funding from undercounting. Second, Plaintiffs state that an inaccurate apportionment will violate their constitutional rights to political representation. Third, Plaintiffs will need to expend resources to mitigate the undercounting that will result from the Replan. Lastly, local government Plaintiffs' costs will increase because those Plaintiffs rely on accurate granular census data to deploy services and allocate capital.

These harms are potentially irreparable in two ways. First, at least part of the harms may be constitutional in nature, and "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Second, to the extent the harm involves expending money or resources, "[i]f those expenditures cannot be recouped, the resulting loss may be irreparable." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers).

Plaintiffs aver that implementation of the Replan deadlines would lead to an undercount of their communities. PI Mot. at 28. Because the decennial census is at issue here, an inaccurate count would not be remedied for another decade. An inaccurate count would affect the distribution of federal and state funding, the deployment of services, and the allocation of local resources. Similar harms have thus justified equitable relief in previous census litigation. *See, e.g., Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. at 328–34 (affirming injunction against the planned use of statistical sampling in census and citing apportionment harms, among others); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d at 675 (issuing injunction and finding irreparable "the loss of political representation and the degradation of information"). Accordingly, the Court concludes that Plaintiffs have demonstrated that they are likely to suffer irreparable harm in the absence of a stay of the Replan. *Winter*, 555 U.S. at 22.

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C. The balance of the hardships tips sharply in Plaintiffs' favor.

Plaintiffs would suffer several irreparable harms without a preliminary injunction. In his September 5, 2020 declaration, Defendants' own declarant, Associate Director Fontenot, stated that the sooner the Court enjoined Defendants, the fewer field staff Defendants would terminate and not be able to rehire:

> Lack of field staff would be a barrier to reverting to the COVID Schedule were the Court to rule later in September. The Census Bureau begins terminating staff as operations wind down, even prior to closeout. Based on progress to date, as is standard in prior censuses, we have already begun terminating some of our temporary field staff in areas that have completed their work. It is difficult to bring back field staff once we have terminated their employment. Were the Court to enjoin us tomorrow we would be able to keep more staff on board than were the Court to enjoin us on September 29, at which point we will have terminated many more employees.

Fontenot Decl. at ¶ 98. Thus, Fontenot's declaration underscores Plaintiffs' claims of irreparable harm because Defendants would have difficulty rehiring terminated field staff.[18]

Furthermore, Defendants' stated reason for the August 3, 2020 Replan is to get the Census count to the President by December 31, 2020 instead of April 30, 2021 as scheduled in the COVID-19 Plan. Fontenot Decl. ¶ 81. However, the President, Defendants' sole declarant, and other senior Bureau officials have stated, even as recently as September 17, 2020, that meeting the statutory deadline is impossible. *See supra* Section IV-A-2; ECF No. 196-1 ¶ 14. These statements show that the hardship imposed on Defendants from a stay—missing a statutory deadline they had expected to miss anyway—would be significantly less than the hardship on Plaintiffs, who will suffer irreparable harm from an inaccurate census count.

Thus, the Court finds that the balance of hardships tips sharply in favor of Plaintiffs.

D. A preliminary injunction is in the public interest.

As to the public interest, when the government is a party, the analysis of the balance of the

[18] Associate Director Fontenot's untimely September 22, 2020 declaration, ECF No. 196-1, claims that the Court's TRO dictates case assignments to enumerators. Neither the Court's TRO nor the instant Order dictate case assignments to enumerators.

hardships and the public interest merge. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). As the United States Supreme Court recognized, Congress has codified the public's interest in "a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Dep't of Commerce v. New York*, 139 S. Ct. at 2569 (quoting *Franklin*, 505 U.S. at 819–820 (Stevens, J., concurring in part and concurring in judgment)) (discussing the Census Act, 2 U.S.C. § 2a). Other courts have held that "the public interest . . . requires obedience to the Constitution and to the requirement that Congress be fairly apportioned, based on accurate census figures" and that "it is in the public interest that the federal government distribute its funds . . . on the basis of accurate census data." *Carey*, 637 F.2d at 839. Thus, an injunction is in the public interest.

E. The scope of the injunction is narrowly tailored.

The Bureau has explained that data processing cannot begin until data collection operations are completed nationwide. Because the steps are sequential, the Bureau cannot grant relief to particular geographic regions and not others. Specifically, the Bureau explained in its Elevator Speech, circulated to high level Bureau officials and to the GAO, "[n]or can post processing operations begin until data collection operations are completed everywhere. There is no option, e.g., to begin post processing in one region or state of the country while other areas are still collecting data." Elevator Speech, DOC_8071.

Associate Director Fontenot's September 22, 2020 declaration affirmed this point: "[P]ost data collection processing is a particularly complex operation, and the steps of the operation must generally be performed consecutively. . . . It is not possible, however, to begin final census response processing in one region of the country while another region is still collecting data." Fontenot Decl. ¶ 19–20.

The Court is aware of the ongoing debate regarding nationwide injunctions and their scope. *See U.S. Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J.,

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concurring) (criticizing the "routine issuance of universal injunctions").[19] Nevertheless, the Supreme Court has upheld nationwide injunctions in the limited circumstance in which they are necessary to provide relief to the parties. *See, e.g., Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (leaving in place a nationwide injunction with respect to the parties and non-parties that are similarly situated). The Supreme Court has followed this practice in past cases involving the census. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. at 343–44 (affirming district court's nationwide injunction against the Census Bureau's proposed use of statistical sampling for apportionment purposes in the 2000 Census). This reflects the longstanding principle that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The Court finds that this is an instance in which the injunction must be nationwide in order to grant necessary relief to the Plaintiffs.

Moreover, although Plaintiffs' motion for preliminary injunction sought to stay Defendants' August 3, 2020 Replan and to enjoin Defendants from implementing the August 3, 2020 Replan, at the September 22, 2020 preliminary injunction hearing, Plaintiffs narrowed their request to a stay and injunction of the August 3, 2020 Replan's September 30, 2020 and December 31, 2020 deadlines. Specifically, Plaintiffs stated:

> So I want to be clear about this. Our APA action challenges the timelines in the Replan. It is very discrete in that respect.
>
> The final agency action is the announcement on August 3rd that they are going to shorten the deadlines for completing the Census, two deadlines in particular, leaving the October 31st one to September 30th for data collection and moving the April date to December 31st for reporting to the President. That is our APA

[19] *Compare, e.g.*, Hon. Milan D. Smith Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 Notre Dame L. Rev. 2013 (2020) (criticizing the rise in universal injunctions, but acknowledging that they are justified in certain contexts), *with* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. ___ (forthcoming 2020), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3599266 (arguing that the APA § 706's provision that "[t]he reviewing court shall . . . hold unlawful and set aside agency action" permits universal vacatur).

challenge, the moving and shortening and accelerating of those particular deadlines.

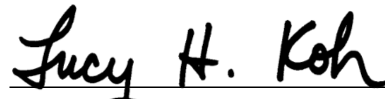
Tr. of Sept. 22, 2020 Preliminary Injunction Hearing at 23:21–24:5, ECF No. 207. Plaintiffs may narrow the scope of their requested injunctive relief. *See Vasquez v. Rackauckas*, 734 F.3d 1025, 1037 (9th Cir. 2013) (recognizing that plaintiffs "clarified and narrowed" the injunctive relief that they sought). Thus, the Court grants Plaintiffs' narrowed requested relief. By this order, the Court in no way intends to manage or direct the day-to-day operations of Defendants.

V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT, effective as of the date of this Order: The U.S. Census Bureau's August 3, 2020 Replan's September 30, 2020 deadline for the completion of data collection and December 31, 2020 deadline for reporting the tabulation of the total population to the President are stayed pursuant to 5 U.S.C. § 705; and Defendants Commerce Secretary Wilbur L. Ross, Jr.; the U.S. Department of Commerce; the Director of the U.S. Census Bureau Steven Dillingham, and the U.S. Census Bureau are enjoined from implementing these two deadlines.

IT IS SO ORDERED.

Dated: September 24, 2020



LUCY H. KOH
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United States District Court
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, *et al.*,

Plaintiff,

v.

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

Defendants.

Case No. 5:20-cv-05799-LHK

DECLARATION OF
ALBERT E. FONTENOT, JR.

I, Albert E. Fontenot, Jr., make the following Declaration pursuant to 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Executive Summary

1. I am the Associate Director for Decennial Census Programs at the U.S. Census Bureau, and I submit this declaration to:

- Explain the magnitude, complexity, and planning involved in the 2020 decennial census, including the tightly integrated nature of census operations and processing;
- Detail the changes made to the original design in light of the COVID-19 pandemic; and
- Discuss the impacts of extending field operations past their current end date of September 30, 2020.

II. Qualifications

2. I am the Associate Director for Decennial Census Programs, in which capacity I serve as adviser to the Director and Deputy Director of the Census Bureau on decennial programs. In this role, I provide counsel as to the scope, quality, management and methodology of the decennial census programs; provide executive and professional leadership to the divisions and central offices of the Decennial Census Programs Directorate; and participate with other executives in the formulation and implementation of broad policies that govern the diverse programs of the Census Bureau. I have served in this capacity since November 12, 2017.

3. I began my career with the Census Bureau after retiring from a successful 40-year career as a senior executive in the private sector with midsize manufacturing companies where I was responsible for providing visionary leadership, developing innovative corporate growth and development strategies. I served as Vice President of Marketing, Vice President of Research and Development, and, for the last 14 years, as President and Chief Executive Officer.

4. In addition to a successful corporate career I served as Adjunct Professor in the MBA program in the Keller Graduate School of Management from 2005–2013 where I taught Leadership and Organizational Development, Marketing Management, Corporate Finance, Statistics, and Marketing. I earned a BA in management and MBA in management and finance

1 from DePaul University and Doctor of Ministry in pastoral ministry from Bethel Theological
2 Seminary

3 5. I served as a as a commissioned officer in U. S. Army and was decorated in combat
4 in Vietnam. After leaving active service, I remained in the US Army reserve attaining the rank of
5 Major.

6 6. After retirement from private sector corporate management, I began my career with
7 the Census Bureau in 2009 as a Field Operations Supervisor in Southern California for the 2010
8 Census. I quickly rose through the ranks and managed the Non-response follow-up operations for
9 the 2010 Census as Area Manager responsible for census activities in Los Angeles County, the
10 State of Hawaii, San Bernardino County and Riverside County California. After 2010, I served in
11 positions of increasing responsibility as Survey Supervisor, Senior Supervisory Survey
12 Statistician, Assistant Regional Director for the Los Angeles Region, and Regional Director for
13 the Chicago Region. I moved from the field to the Census Bureau headquarters to assume the
14 position as Chief of the Field Division and subsequently Assistant Director of Field Operations,
15 Assistant Director for Decennial Census Operations, then Associate Director for the Decennial
16 Census.

17 7. From 2012–2016, I represented the Field Directorate on the team that developed
18 and wrote the Operations plan for the 2020 Decennial Census.

19 8. I have in-depth firsthand knowledge about the planning, management, and
20 execution of Census Bureau field operations and effective mission-oriented leadership. I serve as
21 the Chairman of the Census Crisis Management Team; I served as a member of the 2020 Census
22 Design Executive Guidance Group; I am a member of the Census Data Quality Executive
23 Guidance Group; and I chair the 2020 Census Operations Planning Group. Additionally, I
24 represent the Decennial Census Program in our engagement with two of the three committees that
25 advise the Census Bureau: the Census Scientific Advisory Committee and the National Advisory
26 Committee.

27

28

III. A Complex Design and Budget for the 2020 Census

9. The Census Bureau goes to extraordinary lengths to count everyone living in the country once, only once, and in the right place, including those in hard-to-count populations. This is the core mandate of the Census Bureau, and has been the most significant factor informing every decision made in designing, planning, testing, and executing the decennial Census.

10. The Census Bureau's mandate in conducting the decennial census is to count everyone living in the United States, including the 50 states, the District of Columbia, and the territories of Puerto Rico, American Samoa, Commonwealth of the Northern Mariana Islands, Guam, and U.S. Virgin Islands. To that end, we expend significant funds, efforts, and resources in capturing an accurate enumeration of the population, including those who are hard to count. In particular, the 2020 Census operational design considers population groups that have historically been hard to count, as well as population groups that may emerge as hard to count.

11. The planning, research, design, development, and execution of a decennial census is a massive undertaking. The 2020 decennial census consists of 35 operations utilizing 52 separate systems. Monitoring the status and progress of the 2020 Census—the operations and systems—is managed in large part using a master schedule, which has over 27,000 separate lines of census activities. Thousands of staff at Census Bureau headquarters and across the country support the development and execution of the 2020 census operational design, systems, and procedures. In addition, the 2020 Census requires the hiring and management of hundreds of thousands of field staff across the country to manage operations and collect data in support of the decennial census.

12. The 2020 Census operational design is tailored to enumerate all persons, including hard-to-count populations. Almost every major operation in the 2020 Census contains components designed to reach hard-to-count populations. This includes: census outreach, census content and forms design, finding addresses for enumeration, field infrastructure, multiple modes for self-response, Non-Response Follow-Up (NRFU) operations that enumerate households that did not self-respond to the census, and other operations designed specifically for the enumeration of population groups that have been historically hard to count. The best explanation of the many integrated operations designed to reach these populations is set forth in Appendix B to Version 4.0

of the 2020 Census Operation Plan, available at https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/planning-docs/operational-plan.html. Examples include:

- Verifying address lists using address data provided by community organizations, satellite technology, and in-person address listers checking addresses in communities nationwide;
- In-person enumeration using paper questionnaires in areas such as Remote Alaska;
- Hand-delivering 2020 Census materials to areas impacted by natural disasters, such as those impacted by Hurricane Michael in Florida;
- Conducting a special operation to count persons in "Group Quarters." Group Quarters include places such as college or university student housing, nursing homes, and corrections facilities;
- Working with local partners to identify locations, like shelters and soup kitchens, to best count people experiencing homelessness; and
- Creating culturally relevant advertisements targeting hard-to-count communities.

13. The Census Bureau obtained approval under the Paperwork Reduction Act from the Office of Management and Budget for the data collections involved in the 2020 Census. The Operational Plan is a project management document and, as in prior censuses, we did not obtain clearance for it. We presented information about our plans as we developed them in quarterly public Project Management Reviews, and we obtained input on our plans from both our Census Scientific Advisory Committee and National Advisory Committee. We consulted with other agencies throughout the decade about data security, postal delivery, acquisition of records, and the like, though we did not ask other agencies to review or approve our project management plans.

14. We allocate vast resources to ensure as complete and accurate a count as possible. Research and testing, in addition to the Census Bureau's collective knowledge and experiences, has resulted in an effective approach to reach all population groups.

15. The complexity and inter-related nature of census operations is echoed in the budget for the 2020 Census. The overall budget estimate for the 2020 Census—covering fiscal

1 years 2012 to 2023—is $15.6 billion. This represents enough funding to successfully complete
2 the 2020 Census in virtually all possible scenarios, including the current challenging
3 circumstances. In fact, the Government Accountability Office (GAO) recently reviewed this
4 budget estimate[1] and determined, as of January 2020, that the estimate substantially or fully met
5 GAO's standards and best practices for a reliable cost estimate in terms of credibility, accuracy,
6 completeness, and documentation quality. It is rare for civilian agencies to be so designated, and
7 we are proud that the Census Bureau has achieved this status.

8 16. As of this writing, the Census Bureau has been appropriated in aggregate just under
9 $14 billion to use for the 2020 Census, covering fiscal years 2012 through 2020. This is $4.4
10 billion greater in appropriated dollars than the $9.6 billion actually expended from fiscal years
11 2002 to 2010 for the 2010 Census.

12 17. Combined, prior to the COVID-19 pandemic operational adjustments, there remain
13 just over $2 billion in contingency funds that have been appropriated, but which we have not
14 needed to use. With only minimal exceptions, Congress appropriated these funds to allow us to
15 flexibly and quickly respond to any and all risks to the 2020 Census that might be realized and
16 have an impact on the operations.

17 18. That is exactly what the Census Bureau has done in these challenging times. We
18 have always planned to exhaust any resources necessary to fulfill the Census Bureau's mission in
19 counting everyone living in the United States once, only once, and in the right place. In all
20 scenarios, the focus of our resources includes the hard-to-count. We have designed and
21 implemented the 2020 Census to enumerate the most willing and able to respond in our most
22 efficient and cost effective manner, thereby freeing the majority of our resources to reach hard-to-
23 count communities using a bevy of in-person techniques specifically tailored to reach them.

24 **IV. Census Step 1: Locating Every Household in the United States**

25 19. The first operational step in conducting the 2020 Census was to create a Master
26 Address File (MAF) that represents the universe of addresses and locations to be counted in the
27
28 [1] This is known as the 2020 Census Life Cycle Cost Estimate (LCCE) Version 2.0. An executive summary of that estimate is publicly available at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/life-cycle-cost-estimate_v2.pdf.

2020 Census. This operation constitutes a significant part of the 2020 Census, and our plans to enumerate every resident once, only once, and in the right place.

20. A national repository of geographic data—including addresses, address point locations, streets, boundaries, and imagery—is stored within the Census Bureau's Master Address File/Topologically Integrated Geographic Encoding and Referencing (MAF/TIGER) System. The MAF/TIGER System provides the foundation for the Census Bureau's data collection, tabulation, and dissemination activities. It is used to generate the universe of addresses that will be included in a decennial census. Those addresses are then invited to respond, typically through an invitation in the mail. The MAF/TIGER System is used to control responses as they are returned to the Census Bureau and to generate a list of nonresponding addresses that will be visited in person. Finally, the MAF/TIGER System is used to ensure that each person is tabulated to the correct geographic location as the final 2020 Census population and housing counts are prepared.

21. For all of these reasons, the Census Bureau implemented a continuous process for address list development in preparation for the 2020 Census. There are two primary components to address list development—in-office development and in-field development. In-office development involves the regular, on-going acquisition and processing of address information from authoritative sources, such as the U.S. Postal Service (responsible for delivering mail to addresses on a daily basis), and tribal, state, and local governments (responsible for assignment of addresses to housing units), while in-field address list development involves individuals traversing a specified geographic area and validating or updating the address list based on their observations and, if possible, interaction with residents of the housing units visited.

22. Between 2013 and 2019, the Census Bureau accepted nearly 107 million address records from government partners. Over 99.5 percent of those records matched to addresses already contained in the MAF, many of which were obtained from the U.S. Postal Services' Delivery Sequence File (DSF). The remaining 0.5 percent of address records from partner governments represented new addresses and were used to update the MAF. In addition, partners submitted over 75 million address points that were either new or enhanced existing address point

locations in TIGER. Over 257,000 miles of roads were added to TIGER using data submitted by partners.

23. For the third decade, as mandated by the Census Address List Improvement Act of 1994, the Census Bureau implemented the Local Update of Census Addresses (LUCA) Program to provide tribal, state, and local governments an opportunity to review and update the Census Bureau's address list for their respective jurisdictions. In 2018, participants from over 8,300 entities provided 22 million addresses, of which 17.8 million (81 percent) matched to addresses already in the MAF. The Census Bureau added 3.4 million new addresses to the MAF, nationwide, as a result of LUCA.

24. Between September 2015 and June 2017, the Census Bureau conducted a 100 percent in-office review of every census block in the nation (11,155,486 blocks), using two different vintages of imagery (one from 2009, which was contemporary with the timing of address list development and Address Canvassing for the 2010 Census, and one concurrent with the day on which in-office review occurred) and housing unit counts from the MAF. The 2009-vintage imagery was acquired from a variety of sources, including the National Agricultural Imagery Program as well as publicly available imagery from state and local governments. Current imagery was acquired through the National Geospatial Intelligence Agency's Enhanced View Program, through which federal agencies can access imagery of sufficiently high quality and resolution to detect individual housing units and other structures, driveways, roads, and other features on the landscape.

25. During the in-office review, clerical staff had access to publicly available street-level images through Google Street View and Bing StreetSide, which provided the ability to see the fronts of structures, as if standing on the sidewalk. The technicians categorized blocks as passive, active, or on-hold. Passive blocks represented stability, meaning the technician verified the currency and accuracy of housing data in the office. Active blocks represented evidence of change and/or coverage issues in the MAF. On-hold blocks represented a lack of clear imagery. In these latter two instances, In-Field Address Canvassing was required. At the end of the initial

review in June 2017, 71 percent of blocks were classified as passive, suggesting a need for in-field review of only 29 percent of blocks.

26. However, since the 2020 Census was still several years away when In-Office Address Canvassing completed its initial review of the nation, the Census Bureau continued the in-office review to ensure the MAF was keeping up with changes on the ground. The Census Bureau used information from the U.S. Postal Services' DSF and partner governments to identify areas experiencing recent change and triggered these areas for re-review. Between July 2017 and March 2019, the additional review resulted in the categorization of nearly 87.9 percent of the 11.1 million census blocks as passive, indicating a need for in-field review of only 12.1 percent of census blocks.

27. In-Field Address Canvassing occurred between August 2019 and October 2019. Of the 50,038,437 addresses in the universe, fieldwork validated 44,129,419 addresses (88.2 percent). The remainder were removed from the universe as deletes, duplicates, or non-residential addresses. There were 2,685,190 new addresses identified during fieldwork, of which 1,553,275 matched addresses already in the MAF as a result of contemporaneous in-office update processes. In other words, even the hardest to count areas that required fieldwork to verify the addresses, resulted in only a small percentage of additions to the existing MAF.

28. The design for address list development in the decade leading up to the 2020 Census was the most comprehensive in history. Extensive partnerships with tribal, federal, state, and local governments provided multiple opportunities to validate and update the MAF using the most authoritative sources available. This process of continual assessment and update using partner-provided data created a strong foundation on which to implement the use of satellite imagery to validate existing addresses or detect change during In-Office Address Canvassing. This suite of in-office methods allowed the Census Bureau to focus In-Field Address Canvassing resources in the hardest to validate census blocks.

29. The MAF/TIGER System created the foundation for the 2020 Census. The Census Bureau believes that the Census Bureau's MAF/TIGER System is the most complete and accurate in history.

1
V. Census Step 2: Encouraging Self-response Throughout the 2020 Census

2 30. In order to encourage everyone in the United States to self-respond, the Census
3 Bureau designed, tested, and implemented and Integrated Communications Program, the IPC. The
4 two major components of this program are the ICC, the Integrated Communications Contract, and
5 the IPP, the Integrated Partnership Program.

6
A. Advertising and Media

7 31. The ICC is the major contract that supports all components of the communications
8 campaign for the 2020 Census. For the 2020 Census, the push to educate people and motivate
9 response to the 2020 Census represented the largest advertising campaign in U.S. government
10 history.

11 32. The budget for the 2020 Integrated Communications Contract is currently funded
12 at a higher level than in the 2010 Census, adjusted for both inflation and population growth. The
13 cost of the 2010 Census Integrated Communications Contract, in 2020 constant dollars, would be
14 $456 million, while the Census Bureau currently plans to spend approximately $695 million on
15 the 2020 Census Integrated Communications Contract. The $695 million spent on the
16 communications program will mean an 18% increase in per-person spending over the 2010
17 amount.

18 33. To run the ICC in connection with the Census Bureau, a contract was awarded to
19 VMLY&R, a major legacy-advertising firm with over 80 years of experience. Known as Team
20 Y&R, or TYR, by the Census Bureau, the contracting team includes 13 subcontractors. TYR
21 includes firms with expertise in reaching and working with the major audiences that will receive
22 advertising through the media outlets directed toward their population groups, including the
23 Black/African American, Hispanic/Latino, Asian, American Indian and Alaska Native, and Native
24 Hawaiian and Other Pacific Islander populations. By relying on firms with these individual skill
25 sets, the Census Bureau was able to better tailor the media and messaging toward individual groups
26 and gauge the response before going live with the advertising. It also allowed for more creative
27 risk-taking, and less of a one-size-fits-all approach.

28

1 34. Every part of the 2020 Census communications program was grounded in research.
2 Based on the commitment to being a data driven campaign, beginning in 2018, we extensively
3 researched how people perceived the census and what would motivate them to complete it. Models
4 were developed to predict areas and audiences of low response across the country. These models
5 were then translated into "low response scores" that help the Census Bureau anticipate respondent
6 behavior so that messaging, media, and other communications activities could be deployed to
7 maximize impact.

8 35. As a result of that research, we mounted a media campaign with stories in news
9 media across the country in print, social, and digital media. The campaign was tested in over 120
10 focus groups across the country, and driven by efforts to reach historically undercounted
11 audiences. More than 1,000 advertisements, in English and 43 other languages, were developed
12 to communicate the importance of responding to the 2020 Census. This compares to roughly 400
13 separate creative pieces created in 2010. A sample of these creative pieces can be seen on the
14 Census Bureau's YouTube channel website.

15 36. On March 29, 2019, the Census Bureau launched 2020census.gov—a key
16 information hub about the census, how to complete it, and how it will affect communities across
17 the country. Three days later, on April 1, 2019, we held a press conference to unveil the campaign
18 platform: "Shape Your Future. START HERE." On January 14, 2020, we unveiled highlights of
19 the public education and outreach campaign. That same day, we began airing ads to reach 99
20 percent of the nation's 140 million households, including historically undercounted audiences and
21 those that are considered hard to reach.

22 37. The massive multimedia campaign sought to engage stakeholders and partners,
23 support recruitment efforts and the Statistics in Schools program, and communicate the importance
24 of the census through paid advertising, public relations, social media content, and the new web
25 site. This was the first census where we made a significant investment in digital advertising, and
26 spending time and resources targeting online sites including Facebook, Instagram, paid search
27 engines, display ads, and programmatic advertising.
28

1 38. The push to have a greater digital presence allowed the Census Bureau to reach a
2 mobile audience, tailor messages, micro-target, and shift campaign ads and messages as needed.
3 Online media, particularly search engines and social networking sites, made up a significant
4 portion of digital connections. Nearly every person living in the United States was reached an
5 average of 40 times throughout the campaign, from television, radio, newspaper and online ads, as
6 well as outdoor locations such as billboards and bus stops.
7 39. The Census Bureau adapted its outreach strategies in response to delayed census
8 operations due to COVID-19, increasing advertising and outreach to specific areas of the country
9 with lower response rates. We quickly adjusted our messaging, pivoting from our original
10 campaign to encourage people to respond online from the safety of their own homes. The use of
11 micro-targeting allowed the Census Bureau to tailor its messaging, including directing appropriate
12 messages to hard-to-reach communities and those who distrust government, both of which have
13 been traditionally undercounted. This targeting continues through NRFU as we encourage the
14 public to cooperate with enumerators. This targeting has allowed us to make each dollar spent on
15 the advertising campaign more effective than in any previous census.

16 **B. Partnerships with Community Organizations**

17 40. The second major element of the Integrated Communications Program is
18 partnerships. There are two prongs to the Partnership Program, the National Partnership Program
19 that works from Census Bureau headquarters mobilizing national organizations, and the
20 Community Partnership and Engagement Program, that works through the regions at the local level
21 to reach organizations that directly touch their communities. The National Partnership Program
22 and Community Partnership and Engagement Program are more integrated than ever before, and
23 numbers involved for both programs significantly exceed the totals reached in prior censuses.
24 41. Census partners include national organizations like the National Urban League, the
25 Mexican American Legal Defense Fund, the National Association of Latino Elected Officials
26 (NALEO), the National Association for the Advancement of Colored People (NAACP), and the
27 U.S. Chambers of Commerce. Major corporations also become census partners. At the local level,
28

partners can be churches, synagogues and mosques, legal aid clinics, grocery stores, universities, colleges, and schools.

42. Partners are the trusted voices in their communities; they have a profound impact on those who listen when they say the census is important and safe. We depend on our partners to seal the deal with communities that may be fearful or distrustful of the government. Even with all the Census Bureau's innovation and improvements to the self-response system, we have learned—and confirmed through research—that when communities and leaders recognize the importance of participating in the census, this message is better conveyed to households within those communities. The best, most trusted information comes from a person of trust.

VI. Census Step 3: Self-Response

43. The design of the 2020 Census depends on self-response from the American public. In an effort to ensure the most efficient process to enumerate households, the Census Bureau assigns every block in the United States to one specific type of enumeration area (TEA). The TEA reflects the methodology used to enumerate the households within the block. There are two TEAs where self-response is the primary enumeration methodology: TEA 1 (Self-Response) and TEA 6 (Update Leave).

44. TEA 1 uses a stratified self-response contact strategy to inform and invite the public to respond to the census, and to remind nonresponding housing units to respond. Invitations, reminders, and questionnaires will be delivered on a flow basis unless a household responds. These mailings are divided into two panels, Internet First and Internet Choice. Internet First emphasizes online response as the primary self-response option. Mailings to the Internet First panel begin with an invitation letter that alerts the housing unit to the beginning of the 2020 Census and provides the Census ID,[2] the URL for the online questionnaire, and information for responding by phone.

45. Internet Choice is targeted to areas of the nation that we believe are least likely to respond online. Historical response rates from other Census Bureau surveys, internet access and

[2] A Census ID is a unique identifier assigned to each address in a decennial census; the Census ID is used to track whether an address has self-responded or to track the address through nonresponse data collection and, ultimately through response processing and data tabulation.

penetration, and demographics are used to determine those areas least likely to respond online. Mailings to the Internet Choice panel begin with an invitation letter that alerts the housing unit to the beginning of the 2020 Census and provides the Census ID and the URL for the online questionnaire, information for responding by phone, and also a paper questionnaire. Housing units in Internet Choice areas have the *choice* to respond on paper beginning with the initial contact. All nonresponding housing units, regardless of panel, receive a paper questionnaire after the initial mailing and two separate reminder mailings.

46. Update Leave (TEA 6) is conducted in areas where the majority of the housing units do not have mail delivery to the physical location of the housing unit, or the mail delivery information for the housing unit cannot be verified. The purpose of Update Leave is to update the address list and feature data, and to leave a 2020 Census Internet Choice package at every housing unit. The major difference from TEA 1 is that a Census Bureau employee, rather than a postal carrier, delivers the 2020 Census invitation to respond, along with a paper questionnaire. Housing units also have the option to respond online or by phone.

47. Self-response began in March 2020 and will continue until the end of data collection. The total self-response period for the 2020 Census will be longer than the 2010 self-response period.

VII. Census Step 4: Nonresponse Followup (NRFU)

48. NRFU is the field operation designed to complete enumeration of nonresponding housing unit addresses. The primary purpose of NRFU is to conduct in-person contact attempts at each and every housing unit that did not self-respond to the decennial census questionnaire.

49. After giving everyone an opportunity to self-respond to the census, census field staff (known as enumerators), attempt to contact nonresponding addresses to determine whether each address is vacant, occupied, or does not exist, and when occupied, to collect census response data. Multiple contact attempts to nonresponding addresses may be needed to determine the housing unit status and to collect decennial census response data.

50. The 2020 Census NRFU operation is similar to the 2010 Census NRFU operation, but improved. In both the 2010 Census and the 2020 Census, cases in the NRFU workload are

subject to six contact attempts. In both the 2010 and 2020 NRFU, the first contact attempt is primarily an in-person attempt. In the 2010 Census, these six contact attempts could be conducted as three in-person attempts and three attempts by telephone. By comparison, each contact attempt in the 2020 Census NRFU will be either a telephone or an in-person contact attempt (however the vast majority of attempts will be in-person).

51. In both the 2010 Census and 2020 Census NRFU, if upon the first contact attempt an enumerator determines an address is occupied and the enumerator is able to obtain a response for the housing unit, then the housing unit has been counted, and no follow-up is needed.

52. If upon the first contact attempt, the enumerator is not able to obtain a response, the enumerator is trained to assess whether the location is vacant or unoccupied. Enumerators will use clues such as empty buildings with no visible furnishings, or vacant lots, to identify an address as vacant or non-existent.

53. In both the 2010 and 2020 Census, a single determination of a vacant or nonexistent status was not sufficient to remove that address from the NRFU workload; a second confirmation is needed. If a knowledgeable person can confirm the enumerator's assessment, the address will be considered vacant or non-existent and no additional contact attempts are needed. A knowledgeable person is someone who knows about the address as it existed on census day or about the persons living at an address on census day. A knowledgeable person could be someone such as a neighbor, a realtor, a rental agent, or a building manager. This knowledgeable person is known as a proxy respondent.

54. If a knowledgeable person cannot be found to confirm the status of vacant or non-existent, use of administrative records may provide confirmation of the enumerator's assessment. The Census Bureau does not rely on a single administrative records source to determine an address is vacant or non-existent. Rather, multiple sources are necessary to provide the confidence and corroboration before administrative records are considered for use. When used in combination with an enumerator's assessment of vacant or non-existent, corroborated administrative records provide the second confirmation that a nonresponding address is vacant or non-existent.

1 55. If, upon the first in-person contact attempt, the enumerator believes the address is occupied, but no knowledgeable person is available to complete the enumeration, the Census Bureau will use consistent and high-quality administrative records from trusted sources as the response for the household and no further contact will be attempted. We consider administrative records to be of high quality if they are corroborated with multiple sources. Examples of high-quality administrative records include Internal Revenue Service Individual Tax Returns, Internal Revenue Service Information Returns, Center for Medicare and Medicaid Statistics Enrollment Database, Social Security Number Identification File, and 2010 Census data.

56. Regardless of whether administrative records are used as a confirmation of vacancy or non-existent status or for the purposes of enumerating an occupied housing unit, the Census Bureau will, as a final backstop, send a final mailing encouraging occupants, should there be any, to self-respond to the 2020 Census.

57. The vast majority of nonresponding addresses in the NRFU workload will require the full battery of in-person contact attempts to determine the status of the nonresponding address (vacant, occupied, does not exist) and to collect 2020 Census response data. The full battery of in-person contact attempts also includes the ability to collect information about persons living in a nonresponding housing unit from a proxy respondent. Nonresponding units become eligible for a proxy response after a pre-determined number of unsuccessful attempts to find residents of a nonresponding address.

58. The operational design for NRFU evolved over the course of the decade. Use of administrative records, field management structures, systems, procedures, data collection tools and techniques were proven in tests occurring in 2013, 2014, 2015, 2016, and 2018.

VIII. Census Step 5: Quality Control

59. The Census Bureau is committed to a quality NRFU operation and has in place several programs to monitor and promote quality, such as the NRFU Reinterview Program, the Decennial Field Quality Monitoring Operation, and the Coverage Improvement Operation.

60. The NRFU Reinterview Program involves contacting a small number of households to conduct another interview—to help us ensure that enumerators are conducting their jobs

correctly and are not falsifying responses. We have streamlined this operation, using information collected from the mobile devices used by enumerators. The data from these mobile devices tell us where the enumerators were physically located while they were conducting the interviews, how long they spent on each question in the interview, time of day of the interview, and other detail data about the interview process. Having this information—which is new for the 2020 Census—provides management with information on how the census takers are doing their jobs, and allows us to select reinterview cases in a targeted fashion.

61. A second quality check program, new for the 2020 Census, is the Decennial Field Quality Monitoring operation. This operation monitors overall adherence to field procedures in order to identify unusual patterns. We used this near real-time data analysis successfully during the Address Canvassing operation in 2019, and it is currently active in the NRFU operation. The goal of the program is to identify and investigate potential quality issues. In this program we examine data from individual field representatives and larger scale data, scanning for the possibility of both individual and systemic data quality problems. The program monitors outlier metrics, and produces reports that we analyze on a daily basis. Management staff use these reports to investigate suspicious activities and follow up as needed.

62. Another quality check operation, the Coverage Improvement Operation, seeks to resolve erroneous enumerations (people who were counted in the wrong place or counted more than once) and omissions (people who were missed) from all housing unit data. Coverage Improvement will attempt to resolve potential coverages issues identified in responses from the Internet Self-Response, Census Questionnaire Assistance, and NRFU operations, as well as from the paper questionnaires.

63. The Census Bureau believes that these quality programs (Reinterview, Decennial Field Quality Monitoring, and Coverage Improvement), taken together, provide a robust quality check for our data collection operations. We believe that our quality program remains an effective deterrent to poor performance, and an appropriate method to identify enumerators who fail to follow procedures. None of these programs, to date, reveals a pattern of substandard data collection.

64. The Census Bureau has also formed a Data Quality Executive Guidance Group that brings together the Census Bureau's experts in the fields of census operations, statistical methodology, acquisition and utilization of administrative records, and in the social, economic and housing subject areas. The group's mission is to provide direction and approvals about quality assessments of changes to the operational plans and of the 2020 Census data during and post data collection. We plan to release Demographic Analysis estimates of the population in December, prior to the release of the apportionment counts, as previously planned.

65. Finally, as noted by the Director in his August 3, 2020 statement, the Census Bureau intends to meet a similar level of household responses as in prior censuses, meaning that we will resolve 99% of the cases in each state. In short, the Census Bureau has robust programs in place to monitor data quality and has no indication that its NRFU operation is collecting "substandard" data.

IX. Census Step 6: Post-data Collection Processing

66. The next major step in the census, after the completion of data collection operations, is post processing. Post processing refers to the Census Bureau's procedures to summarize the individual and household data that we collect into usable, high quality tabulated data products. Our post processing procedures and systems are meticulously designed, tested and proven to achieve standardized, thoroughly vetted, high quality data products that we can stand behind.

67. Post data collection processing is a particularly complex operation, and the steps of the operation must generally be performed consecutively. It is not possible, e.g., to establish the final collection geography for the nation prior to processing housing units and group quarters that are added or corrected during NRFU. Similarly, it is not possible to unduplicate responses prior to processing all non-ID responses. In this sense, the post data collection activities are like building a house – one cannot apply dry wall before erecting the walls, any more than one could lay floor tile before the floor is constructed. There is an order of steps that must be maintained.

68. As part of developing the Replan Schedule, we looked at the possibility of starting the post data collection processing activities on a flow basis and reaffirmed that there is no opportunity to begin the post data collection processing until data collection operations close

everywhere. For example, we cannot begin processing in one region of the country while another region is still collecting data. This is true because the first post processing step is geographic processing, which cannot begin until the entire universe is determined. Geographic processing is key because we must tabulate census results at the block level and then build to higher levels of geography such as block groups, tracts, counties, and states.

69. The information below provides additional detail about the post data collection activities under the Replan Schedule.

A. Incorporate address updates from the field data collection operations into MAF/TIGER

Original Dates: February 10 – August 10, 2020

Replan Dates: February 6– September 24, 2020

During the data collection operations, the census field staff can update address and physical location information and add addresses. These updates are incorporated into our address and geo-spatial MAF/TIGER databases. Once updated, each address must be associated to the correct state, county, tract, block group and block. Since it is critical to associate each address to the correct geography, we verify that the address and geo-spatial updates are incorporated correctly.

B. Produce the Final Collection Geography MAF/TIGER Benchmark

Original Dates: August 14 – September 1, 2020

Replan Dates: September 5 – 25, 2020

In preparation for the producing the final collection geography data files needed for producing the apportionment counts and redistricting data products, we create a benchmark of MAF/TIGER, which is a snapshot of the databases.

C. Produce the Final Collection Address Data Products from MAF/TIGER

Original Dates: September 2 – 14, 2020

Replan Dates: September 26 – Oct 14, 2020

1 Once the benchmark has been created, the final collection geographic data files
2 are produced and verified.
3 D. Produce and review the Decennial Response File 1 (DRF1)
4
5 Original Dates: September 15 – October 14, 2020
6 Replan Dates: October 14– November 8, 2020
The verified final collection geography data are integrated with the response data.
7 Integration of these data is also verified to ensure accuracy. The next set of
8 activities involves the standardization of the collected information.
9
- First we determine the final classification of each address as either a housing
10 units or a group quarters facility. Addresses can change from a housing unit
11 to group quarters and vice versa. Initial status is set at the start of the data
12 collection operations as either a housing unit or group quarters. During the
13 enumeration operations, we collect information that informs us on the
14 classification. For a small number of addresses the classification may change,
15 for example a housing unit may have been turned into a small group home.
16 Based on the information collected we determine the status of every address
17 as either a housing unit of group quarters.
18
- Next, we identify each unique person on the housing unit returns.
19
- As part of NRFU operation, we conduct a reinterview of a sample of cases to
20 ensure quality. We incorporate the results of the reinterview.
21
- As part of the Internet self-response option and telephone operation,
22 respondents can provide their data without their Census Identification Number
23 (ID). These cases are assigned an ID which associates them to the final
24 collection geography.
25
- Some group quarters will provide the information electronically. These files
26 can contain duplicate records, so we need to remove the duplicates.
27
- We also determine the population count for all group quarters.
28

- We collect data in many ways, for example on-line, over the phone, on a paper questionnaire, electronic administrative files, and in person using an electronic questionnaire. As a result, we need to standardize the responses across the modes of collection.
- Finally, for the operations that collect data on a paper questionnaire, some housing units have more people than can fit on one paper questionnaire. The census field staff will use multiple paper questionnaires to enumerate the house. These continuation forms are electronically linked to form one electronic form.

E. Produce and review the Decennial Response File 2 (DRF2)

Original Dates: October 14 – November 4, 2020
Replan Dates: November 9 – 30, 2020
Once the previous step has been verified, we incorporate the results from the Self-Response Quality Assurance operation. As part of the group quarters operations, we enumerate domestic violence shelters. Their locations and data are high sensitive and are handled with special procedures both in the field and in processing. Their data are incorporated at this point in the process. Finally, for a small number of addresses we receive multiple returns, for example where one person in a house completes the form on-line, and other completes the paper questionnaire. For these cases, we select a form that will be used as the enumeration of record.

F. Produce and review the Census Unedited File (CUF)

Original Dates: November 4 – 30, 2020
Replan Dates: December 1 – 14, 2020
Once the previous step has been verified, we incorporate administrative records data as the response data for housing units were we do not have an enumeration and have high quality administrative records data. Next we determine the status

1 for every housing unit as occupied, vacant or non-existent. Non-existent units are
2 removed from future processing. For every occupied housing unit, the population
3 count is determined. For each person with write-in responses to the race and
4 Hispanic origin questions, we merge in the information from automated and
5 clerical coding operations. The coding operations assign a numerical value to the
6 write-in responses. At this point in the post-data collection activities, for every
7 housing unit and group quarter their location (state, county, tract, block group and
8 block) is assigned, their status (occupied, vacant or non-existent) is determined,
9 and in occupied addresses the number of persons is known. In addition, at the
10 person level the demographic information (relationship, age, date of birth, sex,
11 race and Hispanic origin along with write-in code values) and at the housing unit
12 level housing information (tenure) is determined. For the majority of these items,
13 the respondent provided the information. However, for a small number of people
14 and addresses the information may be missing or inconsistent with other provided
15 information, for example the Person 1's spouse is five years old. The result of
16 these processes is a file that contains records for every housing unit and group
17 quarters along with person records for the people associated with the addresses.
18 Note that some of the demographic information and response to the tenure
19 question may be missing.
20 G. Produce, review and release the Apportionment Counts
21 Original Dates: December 1 – 28, 2020
22 Replan Dates: Dec 15- 31, 2020
23 Once the CUF has been verified, the process goes down two paths. The first path
24 is to determine the apportionment counts. Since every housing unit and group
25 quarters has a population count and linked to a state, we can tabulation the state
26 level population counts. In addition, we merge in the count of the Federally
27 Affiliated Overseas population and the results of the Enumeration of Transitory
28 Locations for each state. To ensure accuracy in the apportionment numbers, the

state counts including the overseas population and apportionment numbers are verified by multiple independent ways. The results of the independent verifications are compared and reconciled, if necessary.

X. Census Step 0: Research and Testing of the 2020 Census Design

70. The operational design of the 2020 Census, discussed above, has been subjected to repeated and rigorous testing. Given the immense effort required to conduct the census, the importance of the results, and the decade of work by thousands of people that goes into planning and conducting the decennial census, the Census Bureau expends a significant amount of effort to evaluate its planning and design to ensure that its operations will be effective in coming as close as possible to a complete count of everyone living in the United States. Design and testing of the 2020 Census was an iterative process: after each test, we revised our plans and assumptions as necessary.

71. Below are eight significant tests conducted prior to the 2020 Census. Seven of the tests listed below directly contributed to the support of the NRFU operational design or the infrastructure needed to support it. The eighth test pertained to In-Field Address Canvassing.

A. **2013 Census Test.** The 2013 Census Test explored methods for using administrative records and third-party data to reduce the NRFU workload. Key objectives of the 2013 Census Test included:

   i. Evaluate the use of administrative records and third-party data to identify vacant housing units and remove them from the NRFU workload;

   ii. Evaluate the use of administrative records and third-party data to enumerate nonresponding occupied housing units to reduce the NRFU workload;

   iii. Test an adaptive design approach for cases not enumerated with administrative records and third-party data; and

   iv. Test methods for reducing the number of enumeration contact attempts as compared with the 2010 Census.

B. **2014 Census Test.** The 2014 Census Test built upon the results from the 2013 Census Test specific to administrative records and third-party data usage to reduce the NRFU workload. Key objectives of the 2014 Census Test included:

i. Testing various self-response modes, including the Internet, telephone, and paper, and response without a preassigned census identifier;

ii. Testing the use of mobile devices for NRFU enumeration in the field;

iii. Continuing to evaluate the use of administrative records and third-party data to remove cases (vacant and nonresponding occupied housing units) from the NRFU workload;

iv. Testing the effectiveness of applying adaptive design methodologies in managing the way field enumerators are assigned their work; and

v. Examining reactions to the alternate contacts, response options, administrative record use, and privacy or confidentiality concerns (including how the Census Bureau might address these concerns through micro- or macro-messaging) through focus groups.

C. 2014 Human-in-the-Loop Simulation Experiment (SIMEX). Key findings included:

i. Determination that the field management structure could be streamlined and the supervisor-to-enumerator ratios increased;

ii. Messaging and alerts within the operational control system provided real-time and consistent communication; and

iii. Smartphones were usable by all people—even those with little technology experience were able to adjust and adapt.

D. **2015 Optimizing Self-Response Test.** The objectives of this test included:

i. Determining use of digital and target advertising, promotion, and outreach to engage and motivate respondents;

1 ii. Offering an opportunity to respond without a Census ID (Non-ID
2 Processing) and determine operational feasibility and potential
3 workloads around real-time Non-ID Processing; and
4 iii. Determining self-response and Internet response rates.
5 E. **2015 Census Test.** The 2015 Census Test explored reengineering of the
6 roles, responsibilities, and infrastructure for conducting field data collection.
7 IT also tested the feasibility of fully utilizing the advantages of planned
8 automation and available real-time data to transform the efficiency and
9 effectiveness of data collection operations. The test continued to explore the
10 use of administrative records and third-party data to reduce the NRFU
11 workload. Key objectives included:
12 i. Continue testing of fully utilized field operations management system
13 that leverages planned automation and available real-time data, as
14 well as data households have already provided to the government, to
15 transform the efficiency and effectiveness of data collection
16 operations;
17 ii. Begin examining how regional offices can remotely manage local
18 office operations in an automated environment, the extent to which
19 enumerator and manager interactions can occur without daily face-to-
20 face meetings, and revised field staffing ratios;
21 iii. Reduce NRFU workload and increase productivity with the use of
22 administrative records and third-party data, field reengineering, and
23 adaptive design; and
24 iv. Explore reactions to the NRFU contact methods, administrative
25 records and third-party data use, and privacy or confidentiality
26 concerns.
27 F. **2016 Census Test.** The 2016 Census Test tested different supervisor-to-
28 enumerator staffing ratios and incremental improvements and updates to the

1 field data collection software that guided an enumerator through interviews.
2 The 2016 Census Test also allowed the continued evaluation of the use of
3 administrative records to reduce the NRFU workload. Key NRFU objectives
4 included:
5 i. Refining the reengineered field operations;
6 ii. Refining the field management staffing structure;
7 iii. Testing enhancements to the Operational Control System and field
8 data collection application; and
9 iv. Testing scalability of Internet and Non-ID Processing during self-
10 response using enterprise solutions.
11 Objectives related to self-response included:
12 i. Testing provision of language support to Limited English Proficient
13 populations through partnerships and bilingual questionnaires;
14 ii. Testing the ability to reach demographically diverse populations;
15 iii. Testing deployment of non-English data collection instruments and
16 contact strategies; and
17 iv. Refining Real-Time Non-ID processing methods, including respondent
18 validation.
19 G. **2018 End-to-End Census Test.** The 2018 End-to-End Census Test focused
20 on the system and operational integration needed to support the NRFU
21 operation. Nearly all 2020 system solutions supporting the NRFU operation
22 were deployed. The test also allowed continued evaluation of the NRFU
23 contact strategy. The objectives of this test included:
24 i. Testing and validating 2020 Census operations, procedures, systems,
25 and field infrastructure together to ensure proper integration and
26 conformance with functional and nonfunctional requirements.
27 H. **Address Canvassing Test (conducted in the fall of 2016).** The Address
28 Canvassing Test examined the effectiveness of the In-Office Address

Canvassing through the results of the In-Field Address Canvassing. The objectives of the test included:

- **i.** Implementing all In-Office Address Canvassing processes;
- **ii.** Evaluating the effectiveness of online training for field staff;
- **iii.** Measuring the effectiveness of In-Office Address Canvassing through In-Field Address Canvassing; and
- **iv.** Integrating multiple information technology applications to create one seamless operational data collection, control, and management system.

XI. Current Status of 2020 Census Operations

72. As of September 2, 2020, over 96 million households, 65 percent of all households in the Nation, have self-responded to the 2020 Census. Combining the households that self-responded with those that field staff have enumerated under NRFU reveals that as of September 1, 2020 the Census Bureau has enumerated 84 percent of the nation's housing units.

73. The Census Bureau is now roughly 3 ½ weeks into the 7 ½ week schedule for conducting the NRFU operation. Under the Replan Schedule, NRFU is scheduled to last 7 ½ weeks, not 6 weeks as some of Plaintiffs' declarations state. As of September 1, 2020, we have completed roughly 60% of the NRFU workload. We were helped in achieving this result by the fact that we got a "head start" on data collection by beginning NRFU at select offices in July at a "soft launch." When we began NRFU in all areas on August 9 we had already enumerated over 3 million households. Additionally, over 80% of the households in 40 states have been enumerated

74. While the number of enumerators hired and deployed has not been at the level anticipated, current progress indicates that we will nonetheless be able to complete NRFU before September 30. We currently have over 235,000 enumerators actively deployed, and we are conducting continuous replacement training sessions to increase that number.

75. The productivity rate for our enumerators thus far is substantially above the planned rate. Our plans assumed a productivity rate of 1.55 cases/hour, and 19 hours/week average hours

worked, whereas as of September 1, 2020 we have experienced a productivity rate of approximately 2.32 cases/hour, and 20.1 hours/week averaged work hours.

76. In sum, at our current rate we anticipate being able to conclude NRFU data collection no later than September 30, 2020.

XII. Replanning the Census – Multiple Times

77. The Census Bureau's planning for the 2020 Census was, in my professional opinion, excellent. Our plan was comprehensive and thoroughly tested. In March 2020, however, it became clear that COVID-19 was a serious health issue, and we were forced to change our plans around the time we began our self-response operation.

78. On March 18, 2020 the Census Bureau initially announced a two-week suspension of field operations to protect the health and safety of our employees and the American public because of the COVID-19 Pandemic. Self-response continued during this period through Internet, telephone and paper questionnaires. On March 28, 2020 the Census Bureau announced an additional two week suspension, until April 15, 2020.

79. At that time the career professional staff at the Census Bureau undertook the project of replanning each of the field operations based on our best predictions of when we could safely begin sending staff into the field to interact with the public. On April 13, 2020 staff finalized the plan to adjust field operations, and I presented the plan to the Secretary of Commerce and Department of Commerce management. The plan involved delaying our key high personal contact operations by 90 days. Update Leave, which had started on March 15 and been stopped because of COVID-19 on March 17, would resume pursuant to a new schedule beginning on June 13 and concluding on July 9. In-person Group Quarters operations which had been scheduled from April 2 – June 5 would be rescheduled from July 1 – September 3, and our largest field operation, NRFU, which was scheduled from May 13- July 31, would be moved to August 11- October 31. We rescheduled self-response to conclude with the end of Field Operations so instead of ending on July 31 as indicated in the original plan, it was extended to October 31. This schedule required Congress to provide legislative relief from the statutory deadlines of December 31, 2020, for the submission of the Apportionment counts to the President, and March 31, 2021, for the delivery of

redistricting data to the states. A request statutory relief from Congress was made for 120 days to enable us to complete the field operations and post enumeration processing.

80. On April 13, 2020, the Secretary of Commerce and the Director jointly announced the new Census Schedule and stated that they would seek statutory relief from Congress of 120 additional calendar days. This new schedule set a completion date for field data collection and self-response of October 31, 2020. For clarity, I will refer to this as "the COVID Schedule." The COVID Schedule assumed Congressional action and called for the delivery of apportionment counts to the President by April 30, 2021 (120 days after the statutory deadline) and redistricting data files to the states no later than July 31, 2021.

81. Once it became apparent that Congress was not likely to grant the requested statutory relief, in late July the career professional staff of the Census Bureau began to replan the Census operations to enable Census to deliver the apportionment counts by the Statutory deadline of December 31, 2020. On July 29, the Deputy Director informed us that the Secretary had directed us, in light of the absence of an extension to the statutory deadline, to present a plan at our next weekly meeting on Monday, August 3, 2020 to accelerate the remaining operations in order to meet the statutory apportionment deadline. I gathered all the senior career Census Bureau managers responsible for the 2020 Census at 8:00 a.m. on Thursday, July 30 and instructed them to begin to formalize a plan to meet the statutory deadline. At that time I consulted with the Associate Director of Communications and we directed that the COVID Schedule be removed from our website while we replanned. We divided into various teams to brainstorm how we might assemble the elements of this plan, and held a series of meetings from Thursday to Sunday. We developed a proposed replan that I presented to the Secretary on Monday August 3.

82. In developing the proposed replan we considered a variety of options and evaluated risk for each suggested time-saving measure. We evaluated the risks and quality implications of each suggested time-saving measure and selected those that we believed presented the best combination of changes to allow us to meet the statutory deadline without compromising quality to an undue degree. The challenge was to shorten the field data collection operation by 30 days, and to conclude the post processing operation in only 3 months, as opposed to 5 months in prior

schedules. We began with a review of the status of all field outreach operations, and assessed the impacts of possible revisions on the Census Bureau's ability to complete those operations within the compressed timeline. The six million housing units in the Update Leave Operation (which provides Census invitations to housing units that do not receive regular US mail) had been completed in early July, and we had received over two million self-responses and the remaining housing units would be moved into the NRFU operation to be visited by enumerators for personal interviewing. The Group Quarters enumeration operation which had begun on July 1st was on track to be completed on schedule by September 3, 2020 and would not be negatively affected by compressing the balance of the Field Schedule. The enumeration of persons staying in transitory locations (Campgrounds, RV parks, marinas and hotels without a home elsewhere) was scheduled to be conducted from September 3 – September 28. That operation could be conducted as planned within the replan schedule timeline.

83. The COVID-19 pandemic had precluded the Census Bureau from sending staff to conduct our Service Based Enumeration (SBE) operation. SBE is conducted at emergency and transitional shelters, soup kitchens and regularly scheduled food vans and targeted non-sheltered outdoor locations (TNSOL), and is designed to insure that people experiencing homelessness are counted); it was originally scheduled to be conducted March 30-April 2. We had conducted an extensive consultation in May and early June with a panel of 67 national service providers, federal and state agencies to determine the best time frame to conduct this operation to best replicate the weather, migratory behaviors and other factors affecting this population. The overwhelming consensus of the stakeholders, and the input from Census experts, was that the best time to conduct this operation would be mid-late September. Based on that stakeholder consultation we selected September 22-24 to conduct the SBE and TNSOL operations with appointments made with service providers in early September. A review of this operation indicated that we could conducted it in the replan as currently scheduled without disruption.

84. We also reviewed NRFU, our largest and most critical operation. The Census Bureau had conducted soft launches of all our major operations (during a soft launch a small portion of the operation starts early to insure that all the planned and tested systems work as

designed under real field conditions with real respondents and actual newly hired temporary employees). The NRFU Soft Launch was planned with six offices that could be safely started based on COVID risk profiles (developed using CDC, HHS, State and Local health guidance), availability of staff, and provisioning of Personal Protective Equipment. The original plan was to begin the operation in one office from each of our six regions starting on July 16th (Cycle 1a) and to follow on July 23rd (Cycle 1b - one week later) with six additional offices picked from coastal areas that would be prone to Hurricane risk. As the plan developed we were unable to take offices from all of the areas in the original plan because of high COVID risk and state and local stay at home orders, however we were able to select 6 offices for each cycle and these offices commenced NRFU field operations without incident on the planned dates. In early to mid July, as the pandemic controls began to be lifted, and our concerns grew over lack of action on a waiver of the December 31, 2020 apportionment statutory deadline, we decided to expand NRFU operations to all offices that could meet the safety, health, and staffing requirements – to start those offices in advance of the initial planned start date of August 11, 2020. We deployed NRFU operations in 35 additional offices on July 30, 2020 and 39 additional offices on August 6, 2020. We then made the decision to pull forward all remaining offices from August 11 to August 9. All ACOs had begun NRFU operations by August 9 and we had enumerated over 7.4 million housing units before the Replan Schedule's official start date of August 11.

85. Concurrent with the early start of NRFU operations, we observed higher levels of overall staff productivity resulting from the efficiency of the Optimizer (a software program that both schedules work for our enumerators and then routes them in the most effective routing). The increased productivity that we observed during the soft launch period was a factor in our ability to design the replanned field operations to end by September 30, 2020. The bonus plan to increase hours also contributed to our ability to create a replan to meet this deadline. We presented the Replan Schedule to the Secretary on August 3, he accepted it, and the Director announced it that same afternoon. For clarity, I will refer to this schedule as "the Replan Schedule."

86. The Replan Schedule intends to improve the speed of the NRFU operations without sacrificing completeness. Under the Replan Schedule, the Census Bureau has responded to the

shortened calendar period for NRFU operations by taking steps to increase the ability of its employees in the field to work as efficiently as possible. This involves increased hours of work per enumerator, spread across the total workforce, to get the same work hours as would have been done under the original time frame. We incentivize this behavior by providing monetary bonuses to enumerators in who maximize hours worked, and retention bonuses to those who continue on staff for multiple successive weeks. Successful completion of NRFU is dependent on hours worked, not days worked.

87. We have aimed to improve the effectiveness of our count by continuing to maintain an optimal number of active field enumerators by conducting additional training sessions, and keeping phone and tablet computer devices for enumeration in use for the maximum time possible, thereby decreasing the inefficiency created by training new enumerators.

88. The Census Bureau was able to adopt the Replan Schedule because the design of the 2020 Census allows a more efficient and accurate data collection operation in a shorter timeframe than was possible in the 2010 Census. Improvements that make this possible include use of our route and case optimization software, use of handheld devices, and streamlined processing. Additionally, it is worth noting that largely because of the schedule delays, the self-response period for the 2020 Census will be longer than the self-response period for the 2010 Census.

89. The Replan Schedule also necessitated some changes to the content and timing of our post processing operation. These changes include:

- We shortened address processing from 33 to 20 days. This required eliminating 13 days of processing activities that will be deferred until the creation of the redistricting data products.
- We cancelled the internal independent review of the final list of addresses that will be used to tabulate 2020 Census data (what we call “the MAF Extract”).
- We eliminated redundant quality control steps, and the multiple file deliveries that supported those steps, in order to enable a state-by-state flow of deliveries for processing.

1 (Previous procedures delivered data to the next step only when the entire country had
2 been reviewed by multiple teams).
3 • We optimized employee assignments to ensure maximum staff resource usage during this
4 shortened production period – i.e., implemented a seven-day/week production schedule.
5 • We compressed the time allotted for subject matter expert review and software error
6 remediation, cutting 21 days from the schedule.
7 90. These changes increase the risk the Census Bureau will not identify errors during
8 post processing in time to fix them.
9 91. Nevertheless, the Census Bureau is confident that it can achieve a complete and
10 accurate census and report apportionment counts by the statutory deadline following the Replan
11 Schedule. The 2020 Census operational design is tailored to enumerate all persons, including hard-
12 to-count populations.
13 92. The Census Bureau has kept the Office of Management and Budget informed about
14 schedule developments for both the COVID Schedule and the Replan Schedule, and has filed
15 nonsubstantive changes that have been published in the Federal Register. OMB was not required
16 to approve the changes to the operational plan, nor did it. As with the 2018 Operational Plan, we
17 did we not ask other agencies to review or approve either the COVID Schedule or Replan
18 Schedule.
19 **XIII. Impacts of Granting a Preliminary Injunction**
20 93. If the Court grants an injunction, the Census Bureau will need to replan the
21 remaining census operations again. We cannot speculate at this point exactly how we will replan
22 the remainder of the census, as the specific actions we take will depend on when the Court rules
23 and the specifics of the ordered actions.
24 94. The timing of any Court order changing the schedule is particularly important, as
25 stated in our filing on Wednesday, September 2, 2020, where we explained that the Census Bureau
26 has already taken steps to conclude field operations. As I will explain further, the fact that we are
27 concluding field operations in ACOs that have completed their workload is a normal part of the
28 NRFU operation, and is not specific to the Replan Schedule.

95. The Census Bureau manages its nonresponse follow up operation (NRFU) out of "Census Field Supervisor areas" or "CFS areas" within each of the nation's 248 ACOs. As of September 3, 2020, roughly 11% of CFS areas nationwide are eligible for what we call "the closeout phase," over 1,220 are actually in the closeout phase, and roughly 50 have actually reached conclusion. The closeout phase refers to the process of focusing our best enumerators to resolve the remaining cases in that area. CFS areas are eligible for closeout procedures when they cross the 85% completion mark. All CFS areas become eligible for closeout procedures on September 11. This does not mean that all CFS areas will be moved to closeout procedures on that date, only that regional directors can make this decision. Prior to that date no CFS area can be moved into closeout procedures until it reaches 85% completion. **The Census Bureau is continuing to work across the nation to obtain responses from all housing units, and has not begun closeout procedures for any CFS area with under 85% completion.**

96. It is a normal and planned part of the NRFU operation for an ACO to move into the closeout phase and complete operations. We used closeout procedures in NRFU in the 2010 Census and always planned to do the same for the 2020 Census. If we have not wound down in some areas, it is because we are still counting. Some ACOs have greater initial workload, and some started earlier than others –therefore, moving to completion varies by ACO and is a reflection of workload and local conditions and results in the allocation of enumerator resources from areas that are complete to areas that require more work.

97. We are currently finished with over 64% of the NRFU field work and over 85% of the total enumeration of all housing units in the nation and those numbers increase daily. More than 13 states have over 90% of their housing unit enumeration completed, and in 18 additional states we have completed over 85% of the housing units in those states. As we complete areas, staff are offered an opportunity to assist by enumerating in other areas that are not yet complete. Some staff elect that option, others choose not to go outside of their home area, and as their area is completed, they are released. As we complete more field work, the number of staff that are still active declines, and our ability to ramp up is severely hampered.

1 98. Lack of field staff would be a barrier to reverting to the COVID Schedule were the
2 Court to rule later in September. The Census Bureau begins terminating staff as operations wind
3 down, even prior to closeout. Based on progress to date, as is standard in prior censuses, we have
4 already begun terminating some of our temporary field staff in areas that have completed their
5 work. It is difficult to bring back field staff once we have terminated their employment. Were the
6 Court to enjoin us tomorrow we would be able to keep more staff on board than were the Court to
7 enjoin us on September 29, at which point we will have terminated many more employees.
8 99. Were the Court to enjoin us, we would evaluate all of the changes we made for the
9 Replan Schedule and determine which to reverse or modify. For example, we notified participants
10 of the cancellation of the Count Review 2 operation, originally scheduled for September 15. If our
11 schedule were extended, we would evaluate whether to re-schedule this operation. We would go
12 through each and every aspect of remaining operations and determine how best to use the
13 remaining time to maximize the accuracy and completeness of the census results.
14 100. Finally, we wish to be crystal clear that if the Court were to extend the data
15 collection period past September 30, 2020, the Census Bureau would be unable to meet its statutory
16 deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior
17 to April 1, 2021. The post processing deadlines for the Replan Schedule are tight, and extending
18 the data collection deadline would, of necessity, cause the Census Bureau to fail to be able to
19 process the response data in time to meet its statutory obligations. We have already compressed
20 the post processing schedule from 5 months to only 3 months. We previously planned and tested
21 our post processing systems assuming that we would follow a traditional, sequential processing
22 sequence, and the 3-month schedule necessary for the Replan Schedule has already increased risk.
23 We simply cannot shorten post processing beyond the already shortened 3-month period.
24 101. As I have tried to make clear in this Declaration, the decennial census is a massive,
25 complex, and interrelated endeavor. Particularly troubling is the prospect of continual, conflicting,
26 and evolving court orders from this this and other courts, including appellate courts. While Census
27 Bureau staff have demonstrated considerable resilience and flexibility during this difficult year,
28

1 some certainty as to the amount of time available to conclude data collection and post processing
2 will increase the likelihood of a successful outcome.

3 **XIV. Commitment to Transparency and High Quality Enumeration**

4 102. In my role as Associate Director, I remain committed to transparency about 2020
5 Census operations. The Census Bureau has been posting detailed information on its website about
6 both self-response and NRFU completion progress:

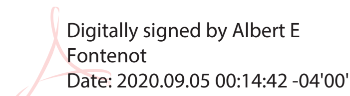
7 https://2020census.gov/en/response-rates/self-response.html
8 https://2020census.gov/en/response-rates/nrfu-completion.html
9 https://2020census.gov/en/response-rates/nrfu.html

10 103. The 2020 Census is the first to post NRFU workload information, which is now
11 available at the state and ACO level and may be seen at https://2020census.gov/en/response-
12 rates/nrfu-completion.html. I have briefed staff for House and Senate leadership every Friday
13 since April (except for August 7), and I have provided a transcribed briefing to Congress. We
14 produce a massive amount of documents and other information to the Office of the Inspector
15 General and the General Accounting Office every week, and these organizations interview Census
16 Bureau staff on almost a daily basis.

17 104. In my role as the Associate Director, I remain committed to conducting a high-
18 quality field data collection operation as explained above, and the ultimate goal of a complete and
19 accurate census.

20
21
22
23 I have read the foregoing and it is all true and correct.
24 DATED this ___ day of September, 2020

25 Albert E
26 Fontenot



27 Albert E. Fontenot, Jr.
28 Associate Director for Decennial Census Programs

United States Bureau of the Census

EXHIBIT 1

Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count

AUGUST 03, 2020
RELEASE NUMBER CB20-RTQ.23

August 3, 2020 — The U.S. Census Bureau continues to evaluate its operational plans to collect and process 2020 Census data. Today, we are announcing updates to our plan that will include enumerator awards and the hiring of more employees to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce. The Census Bureau's new plan reflects our continued commitment to conduct a complete count, provide accurate apportionment data, and protect the health and safety of the public and our workforce.

- **Complete Count:** A robust field data collection operation will ensure we receive responses from households that have not yet self-responded to the 2020 Census.
  - We will improve the speed of our count without sacrificing completeness. As part of our revised plan, we will conduct additional training sessions and provide awards to enumerators in recognition of those who maximize hours worked. We will also keep phone and tablet computer devices for enumeration in use for the maximum time possible.
  - We will end field data collection by September 30, 2020. Self-response options will also close on that date to permit the commencement of data processing. Under this plan, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities.

- **Accurate Data and Efficient Processing:** Once we have the data from self-response and field data collection in our secure systems, we plan to review it for completeness and accuracy, streamline its processing, and prioritize apportionment counts to meet the statutory deadline. In addition, we plan to increase our staff to ensure operations are running at full capacity.

- **Flexible Design:** Our operation remains adaptable and additional resources will help speed our work. The Census Bureau will continue to analyze data and key metrics from its field work to ensure that our operations are agile and on target for meeting our statutory delivery dates. Of course, we recognize that events can still occur that no one can control, such as additional complications from severe weather or other natural disasters.

- **Health and Safety:** We will continue to prioritize the health and safety of our workforce and the public. Our staff will continue to follow Federal, state, and local guidance, including providing appropriate safety trainings and personal protective equipment to field staff.

The Census Bureau continues its work on meeting the requirements of Executive Order 13880 - issued July 11, 2019 and the Presidential Memorandum - issued July 21, 2020. A team of experts are examining methodologies and options to be employed for this purpose. The collection and use of pertinent administrative data continues.

We are committed to a complete and accurate 2020 Census. To date, 93 million households, nearly 63 percent of all households in the Nation, have responded to the 2020 Census. Building on our successful and innovative internet response option, the dedicated women and men of the Census Bureau, including our temporary workforce deploying in communities across the country in upcoming weeks, will work diligently to achieve an accurate count.

We appreciate the support of our hundreds of thousands of community-based, business, state, local and tribal partners contributing to these efforts across our Nation. The 2020 Census belongs to us all. If you know someone who has not yet responded, please encourage them to do so today online at 2020census.gov, over the phone, or by mail.

###

Contact

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, et al.,

Defendants.

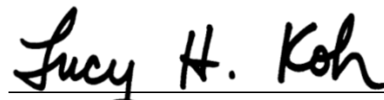
Case No. 20-CV-05799-LHK

ORDER DENYING MOTION TO STAY PENDING APPEAL

For the reasons stated in the Court's Order Granting Plaintiffs' Motion for Stay and Preliminary Injunction, ECF No. 208, Defendants' motion to stay pending appeal, ECF No. 211, is DENIED.

IT IS SO ORDERED.

Dated: September 25, 2020



LUCY H. KOH
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 30 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NATIONAL URBAN LEAGUE; LEAGUE OF WOMEN VOTERS; BLACK ALLIANCE FOR JUST IMMIGRATION; HARRIS COUNTY, Texas; KING COUNTY, Washington; CITY OF LOS ANGELES, California; CITY OF SALINAS, California; CITY OF SAN JOSE, California; RODNEY ELLIS; ADRIAN GARCIA; NAVAJO NATION; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; CITY OF CHICAGO, Illinois; COUNTY OF LOS ANGELES, California; GILA RIVER INDIAN COMMUNITY,

Plaintiffs-Appellees,

v.

WILBUR L. ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF COMMERCE; STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau; UNITED STATES CENSUS BUREAU,

Defendants-Appellants,

and

STATE OF LOUISIANA; STATE OF MISSISSIPPI,

No. 20-16868

D.C. No. 5:20-cv-05799-LHK
Northern District of California, San Jose

ORDER

Intervenor-Defendants.

Before: RAWLINSON, CHRISTEN, and BUMATAY, Circuit Judges.

Order by Judges RAWLINSON and CHRISTEN, Dissent by Judge BUMATAY

On August 3, 2020, the United States Census Bureau (Bureau) adopted a census plan (Replan) that dramatically advanced critical deadlines for conducting the 2020 census. Appellees challenged this action pursuant to the Enumeration Clause of the United States Constitution and the Administrative Procedure Act (APA). On September 24, 2020, the district court entered a preliminary injunction staying the Replan's schedule for completion of census field operations and for reporting the census results to the President and enjoining the government from implementing these deadlines. The government has filed an emergency motion to stay the preliminary injunction pending appeal, and a request for an immediate administrative stay pending resolution of the stay motion. In this order, we consider only the request for an administrative stay.

The decennial census is an enormous and complex nationwide operation. It requires nearly a decade of planning and hundreds of thousands of dedicated workers to accomplish. In 2018, after years of planning and testing, the Bureau adopted a plan to complete the 2020 census. The plan called for an extraordinary

effort on the part of the government including hiring 340,000–500,000 field staff. For reasons stated in the record, the district court found that due to significant challenges encountered in the wake of COVID-19, the Bureau suspended field operations in March 2020. When operations resumed, the Bureau was unable to recruit sufficient numbers of field staff. In July 2020, the Bureau estimated that it only retained 38% of the field staff required to complete an accurate and timely census.

As a result of these serious challenges, the district court found that as early as April 2020, the Bureau, the Department of Commerce, and even the President had all publicly acknowledged that the December 31 deadline was no longer attainable. The Bureau adopted a new census plan in April to accommodate the delays caused by COVID-19 ("COVID-19 Plan"). The COVID-19 plan extended the deadline for each step in the process and contemplated that the Bureau would ask Congress for a 120-day extension of the December 31, 2020 delivery deadline for the completed census report. The Bureau's work proceeded according to the COVID-19 Plan until August 2020.

In early August, a "senior Department [of Commerce] official" directed the Bureau to change course and prepare a new plan for completing the census by the December 31, 2020 statutory deadline. Senior Bureau staff were given just four to five days to develop this "Replan." On August 3, 2020, the Bureau announced its

adoption of the Replan, and its central feature: accelerating the COVID-19 Plan's deadline for the completion of field work and data collection from October 31 to September 30. On September 24, the district court entered a preliminary injunction preventing the Bureau from implementing the September 30 deadline to stop field work and data collection. The government requests an immediate administrative stay of the district court's injunction.

I

The government has filed a single emergency motion seeking a stay pending appeal, and also seeking an administrative stay pending resolution of the motion for stay pending appeal. We recently established that an administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion for stay pending appeal." *Doe v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). Based on our preliminary review of the record, we conclude that the status quo would be seriously disrupted by an immediate stay of the district court's order.

As explained above, until August of this year, the Bureau had been operating for several months under the COVID-19 plan. That plan represented a revised schedule to account for the challenges caused by the COVID-19 pandemic. It included extended deadlines based on the understanding that the Bureau would

need additional time to complete the necessary field work and data processing to produce an accurate census report. The district court's September 5 temporary restraining order and September 24 preliminary injunction preserve the status quo because they maintain the Bureau's data-collection apparatus pending resolution of the appeal. By the time the district court entered its order, the Bureau had already begun winding down its field operations and terminating census field workers in anticipation of the Replan's accelerated September 30 deadline. The process of disbanding thousands of census workers will resume if an administrative stay is put in place, eliminating the Bureau's ability to conduct field work. Accordingly, on the facts of this case, staying the preliminary injunction would upend the status quo, not preserve it.

We are mindful of the potential harms faced by both parties. Here, not only would the status quo be upended by an administrative stay, the Bureau's ability to resume field operations would be left in serious doubt. Thousands of census workers currently performing field work will be terminated, and restarting these field operations and data collection efforts, which took years of planning and hiring efforts to put in place, would be difficult if not impossible to accomplish in a timely and effective manner. Granting the administrative stay thus risks rendering the plaintiff's challenge to the Replan effectively moot.

We also recognize that missing the December 31 statutory deadline risks

serious harm to the government. However, the record does not demonstrate that the Bureau's ability to meet that deadline is affected by the district court's injunction. Rather, the evidence in the administrative record uniformly showed that no matter when field operations end—whether September 30 under the Replan or October 31 under the COVID-19 Plan—the Bureau will be unable to deliver an accurate census by December 31, 2020. The President, senior Bureau officials, senior Department of Commerce officials, the Office of Inspector General, the Census Scientific Advisory Committee, and the Government Accountability Office have all stated that delivering a census by December 31 without compromising accuracy is practically impossible, and has been for some time. As the district court recognized, after the Bureau realized the pandemic would prevent it from adhering to its original schedule, the Bureau made two requests to Congress: first, it requested the December 31 deadline be extended to April 2021. When no final congressional action had been taken on that request in July, the Bureau requested $443 million to cover the additional cost to complete the census by year's end. Contrary to the dissent's repeated assertion, the only undisputed fact in this sequence was that Congress has not given the Bureau the extension or the additional funding it needs to meet the statutory deadline.

The government did not counter the Appellees' showing on this point. Citing the chorus of statements made by the Bureau and other officials, the district

court found that the Bureau could not meet the December 31 deadline. Indeed, despite the government's persistent argument in the district court and before our court that the September 30 deadline for terminating field operations is essential to meeting its December 31 statutory deadline, the administrative record compellingly supports the district court's conclusion that moving the October 31 deadline to September 30 will not allow the Bureau to complete the census on time.

Finally, we note that notwithstanding the pendency of the government's emergency request for an immediate administrative stay to allow the Replan's September 30 deadline to take effect, on September 28 the government again changed the deadline for completing field work. The government informed us in a September 28, 2020 letter, without explanation, that it now intends to end field operations on October 5, 2020. This abrupt change contradicts the government's argument that the September 30 date is vitally important to the Bureau's ability to meet its statutory reporting deadline. Our dissenting colleague cites a September 28 estimate suggesting that the census is 98% complete. This is still below the enumeration rate required by the Bureau's internal standards for generating an accurate census report. Further, the district court ruled on September 24 and found, as of that date, the Bureau had met its standard in only four states.

Given the extraordinary importance of the census, it is imperative that the

Bureau conduct the census in a manner that is most likely to produce a workable report in which the public can have confidence. The Bureau must account for its competing constitutional and statutory obligation to produce a fair and accurate census report. The hasty and unexplained changes to the Bureau's operations contained in the Replan, created in just 4 to 5 days, risks undermining the Bureau's mission.

Our dissenting colleague makes four errors. First, the dissent applies the wrong standard for a preliminary administrative stay. In *Doe #1 v. Trump*, our circuit definitively resolved which standard applies to administrative stay motions. We are not free to depart from that standard. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (holding that a three-judge panel may not overrule a prior decision of the court). Citing the dissent from *Doe #1 v. Trump*, our colleague applies the factors used when we consider a motion for stay pending appeal. This analysis erroneously collapses the distinct legal analyses for an administrative stay and a motion for stay pending appeal. When considering the request for an administrative stay, our touchstone is the need to preserve the status quo. We defer weighing the *Nken*[1] factors until the motion for stay pending appeal is considered. *See Doe #1*, 944 F.3d at 1223.

Second, as a consequence of its threshold error, the dissent does not grapple

[1] *Nken v. Holder*, 556 U.S. 418, 426 (2009).

with the factor that drives the outcome of the government's motion: the Bureau's apparatus for conducting field work will be dismantled before the motion for stay pending appeal can be decided. The dissent does not dispute that issuing an administrative stay in this case would return the Bureau to the process of dismantling its data-collection infrastructure and terminating its field staff.

Third, although we need not wade into the underlying merits of the issues on appeal, we would be remiss if we did not note that the dissent hinges on the unsupported premise that the Bureau can meet the December 31 deadline if an administrative stay is issued. The dissent's assumption that the agency can still meet its deadline relies entirely upon one conclusory statement that was not in the administrative record but was instead prepared for litigation. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1908 (2020) (explaining that an agency's *post hoc* rationalizations "must be viewed critically"); *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008) (rejecting a justification for agency action that "is entirely absent from the administrative record"). Given the consistent picture painted by the administrative record, it is not surprising the district court was unpersuaded by this sole conclusory statement.

Fourth, the dissent addresses several issues that are not properly before us at the administrative stay stage. The government's emergency motion does not contest the district court's conclusion that Appellees have standing to bring their

claims. Nor does the emergency motion challenge the district court's conclusion that the Bureau's decision to adopt the Replan is an unreviewable political question. Thus, those issues are not properly before us and we do not reach them.

Because the status quo would be upended, rather than preserved, if an administrative stay is issued, the government's request for an immediate administrative stay set forth in Docket Entry No. 4 is denied.

Appellees' response to the emergency motion is due October 2, 2020. Appellants' optional reply is due by October 3, 2020.

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

National Urban League v. Ross, No. 20-16868
Bumatay, J., dissenting

COVID-19 has wreaked an undeniable toll on the Nation. The virus has already stolen too many American lives. Even more have been hospitalized or fallen ill. And nearly every American's plans this year have been roiled by the virus. But it cannot roil the law. Contorting the Administrative Procedure Act, and liberating itself from any semblance of judicial restraint, the district court injected itself into a sensitive and politically fraught arena: the 2020 census. After the Department of Commerce adopted a plan to address census delays from the COVID-19 pandemic, plaintiffs brought suit under the APA. Upon reviewing the internal deliberative emails of the agencies, the district court decided that it knows better than the Secretary of Commerce. Based on internal discussions about the agency's ability to complete the census in a timely and accurate fashion, the district court essentially overruled the Secretary's decision to adopt the revised plan. But it is undisputed that this new plan was the only way to meet the statutory obligation to report the census results to the President by December 31, 2020. No matter for an adventurous district court: it simply cast aside the statutory deadline as part of its injunction.

Because the district court was without authority to issue its injunction, the defendants are likely to succeed on the merits, and they will be irreparably harmed

without relief, I would have granted the request for an administrative stay. Accordingly, I respectfully dissent.

I.

A census is required by our Constitution, which provides that the "actual Enumeration" of the population shall be conducted "in such Manner as [Congress] shall by Law direct." U.S. Const. Art. I, § 2, cl. 3. As should be evident from this text, besides requiring that such an enumeration shall occur, the Constitution otherwise vests "virtually unlimited discretion" with Congress. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996); *see also Baldrige v. Shapiro*, 455 U.S. 345, 361 (1982) (recognizing Congress's broad discretion over the census). Congress, in turn, has vested substantial discretion with the Secretary of Commerce to determine how to conduct the decennial census. *See* 13 U.S.C. § 141(a); *Wisconsin*, 517 U.S. at 19 ("Through the Census Act, Congress has delegated its broad authority over the census to the Secretary."). But there's one aspect that Congress did not delegate: the date for completion of apportionment counts. 13 U.S.C. § 141(b). That deadline is etched in stone: December 31, 2020.[1] And

[1] Congress has provided for other deadlines as well. For example, the Census Bureau must "take a decennial census of the population" starting on April 1, 2020, and report the results to the President by December 31, 2020 (the deadline primarily at issue in this case). *See* 13 U.S.C. § 141(a)-(b). After receiving this report, the President must calculate "the number of Representatives to which each State would be entitled" and transmit that information to Congress by January 10,

there's one branch Congress has not delegated any census decisions to: the judiciary.

Cognizant of its statutory deadlines—but unaware of the looming health crisis—the Census Bureau adopted a final operational plan for the 2020 Census in December 2018. This plan has two major phases: a data-collection phase and a data-processing phase. During the data-collection phase, field employees follow up at non-responding addresses and collect other crucial information. Only after this phase is complete can the Bureau begin processing the collected data to report to the President by the December 31 deadline.

But even the best laid plans can go awry. Just as the data collection phase was set to begin, the COVID-19 pandemic struck, forcing the Bureau to suspend its field operations for four weeks. To resume those operations, the Bureau adopted the COVID-19 Plan on April 13, 2020, which set new deadlines for the data collection and dating processing phases, on the assumption that Congress would extend the statutory deadlines by 120 days. Congress did not act, however, so the Bureau adopted the "Replan" schedule, which outlined expedited deadlines designed "to accelerate the completion of data collection [] by our statutory deadline of December 31, 2020, as required by law[.]" According to the Bureau, it was able to meet this

2021. *See* 2 U.S.C. § 2a(a). Finally, the Bureau must report a tabulation of population for redistricting to the states by March 31, 2021. *See* 13 U.S.C. § 141(c).

compressed timeframe by (1) offering financial incentives to increase the number of hours each enumerator worked and achieve the "same work hours as would have been done under the original time frame"; and (2) taking advantage of updated software and processing capabilities not available during the 2010 Census in order to maximize enumerator effectiveness. An Associate Director at the Bureau attests that the agency "is confident that it can achieve a *complete and accurate* census and report apportionment counts by the statutory deadline following the Replan Schedule." (emphasis added).[2] Under this plan, field operations would conclude by September 30, and data processing would begin on October 1. The Bureau asserts that it must complete the data collection phase by September 30 and turn to the data processing phase by October 1 to meet its December 31, 2020 deadline. *See* Motion at 1. On September 28, 2020, the Bureau extended its internal deadline slightly: setting October 5, 2020 as the target date for concluding field operations.[3] As of September 28, 2020, the Bureau reports over 98% enumeration nationwide.[4]

II.

[2] Inexplicably, the majority's decision simply ignores this attestation when claiming that even under the Replan, "the Bureau will be unable to deliver an accurate census by December 31, 2020." Majority Op. at 5.
[3] United States Census Bureau, *2020 Census Update*, https://www.census.gov/newsroom/press-releases/2020/2020-census-update.html
[4] United States Census 2020, *Total Response Rates by State*, https://2020census.gov/en/response-rates/nrfu.html

Whether to grant a request for a stay is governed by the familiar four-factor test: "(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." *Doe #1 v. Trump*, 944 F.3d 1222, 1225 (9th Cir. 2019) (Bress, J., dissenting) (simplified).[5]

We should have granted an administrative stay here because defendants are likely to succeed on the merits. The Secretary's decision to adopt the Replan—rather than simply ignore a statutory deadline—was not arbitrary and capricious. At bottom, the district court's APA analysis seems to turn on the court's apparent disagreement with whether the census will be sufficiently accurate under the Replan. But the accuracy of the census is likely a nonjusticiable political question; a properly deferential review would find the Replan satisfies statutory and constitutional requirements; and the plaintiffs here do not appear to have standing

[5] The majority suggests that I apply the "wrong standard for a preliminary administrative stay." Majority at 7. But as Judge Bress has already persuasively explained: "the instant request for a temporary stay is part of the request for a stay pending appeal, and the Court cites no authority for why the usual stay factors—including likelihood of success on the merits—would not apply." *Doe #1*, 944 F.3d at 1226 (Bress, J., dissenting). We can't simply ignore the fact that the government is likely to prevail on the merits here. That's particularly true where, like here, the parties have addressed the merits in the request for a stay and the opposition thereto. *See id.*

because their alleged injuries are not redressable. I discuss each flaw with the district court's injunction in turn.

A.

Putting aside momentarily the fact that the crux of this case is not justiciable, *see, infra,* § II-B and II-C, and assuming that the APA applies here and that the Replan can be considered a "final agency action," *cf. NAACP v. Bureau of the Census*, 945 F.3d 183, 189 (4th Cir. 2019) (challenges to 2020 census "design choices" were not final agency actions under the APA), the Replan does not violate the APA.

Under the APA, agencies must engage in "reasoned decisionmaking." *Michigan v. EPA*, 576 U.S. 743, 750 (2015). Where census decisions are concerned, this only requires the Secretary to "examine the relevant data and articulate a satisfactory explanation for his decision." *Department of Commerce v. New York*, 139 S.Ct. 2551, 2569 (2019). "We may not substitute our judgment for that of the Secretary." *Id.* Nor may we "subordinat[e] the Secretary's policymaking discretion to the Bureau's technocratic expertise." *Id.* at 2571 (Bureau staff's conclusions are not "touchstones of substantive reasonableness."); *accord Wisconsin*, 517 U.S. at 23 (Because it is the Secretary "to whom Congress has delegated its constitutional authority over the census," "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.").

To make reasoned decisions, agencies must consider "significant alternatives." *Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1232 (9th Cir. 1993). The defendants did so. As a Bureau Associate Director explained, the Bureau "considered a variety of options and evaluated risks" in crafting the Replan, ultimately "select[ing] those that we believed presented the best combination of changes to allow us to meet the statutory deadline without compromising quality to an undue degree." Although the Replan compressed several steps, which might "increase the risk" of errors, the Associate Director explained that efficiencies new to the 2020 Census nevertheless allowed the Replan to "achieve a complete and accurate census."

The core of the district court's reasoning is that the Secretary erred in considering the deadline fixed and then trying to maximize accuracy within that constraint. The court thought the Secretary should have been more flexible and considered other alternatives. But all of the alternatives would require the Bureau to consciously blow a statutory deadline. For example, the district court suggests the defendants could have considered "not adopting the Replan while striving in good faith to meet statutory deadlines." Or, as the plaintiffs put it, "Defendants could have continued to operate under the COVID-19 Plan while striving to meet

statutory deadlines." But the COVID-19 Plan was premised on Congress extending the statutory deadlines. By adhering to that plan despite Congress's inaction, the defendants would necessarily not be striving in good faith to meet the deadline; they would be consciously abandoning it.[6] "An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives." *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996). Thus, *a fortriori*, an agency need not consider alternatives that violate the law. The Bureau cannot be liable for failing to consider an alternative that would undisputedly violate the clear deadline set by Congress to obtain marginal improvements (of some unknown degree) to the census.

The district court also erred in determining that the Secretary's reason for adopting the Replan ran contrary to the facts. The district court noted that some Bureau employees thought it would be impossible to accurately complete the census by December 31, given the COVID-19 delays.[7] But each statement relied

[6] This same core defect infects the other proposed alternatives, such as making "good faith efforts to meet the deadline" short of adopting the Replan and "balanc[ing]" accuracy and timeliness concerns.
[7] The court also suggests that the Commerce Department pressured the Bureau to cease seeking an extension of the deadline, though nothing in the record before this panel suggests this is so, and the district court's citations show only that the Bureau did not affirmatively request an extension in certain instances. Even if that were true though, it cannot undermine the Bureau's stated reason that it adopted the

on was made *before* the Replan, which the Bureau's Associate Director has attested will reach sufficient levels of accuracy. In any event, "there is nothing even unusual" about a Cabinet secretary "disagreeing with staff, or cutting through red tape." *New York*, 139 S. Ct. at 2580 (Thomas J., concurring in part and dissenting in part). The Secretary is owed "wide discretion" in this arena because "it is he to whom Congress has delegated its constitutional authority over the census." *Wisconsin*, 517 U.S. at 22; *see* 13 U.S.C. § 141(a). Dissent from inferior employees at the Bureau cannot constitute "facts" that the Secretary's decision runs "contrary" to. *See Wisconsin*, 517 U.S. at 23 ("[T]he 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."). To hold otherwise would impermissibly "subordinat[e] the Secretary's policymaking discretion to the Bureau's technocratic expertise." *New York*, 139 S. Ct. at 2571.

Finally, the district court concluded that the defendants "failed to sufficiently consider" their obligations to produce an accurate census because "the Replan will decrease the census's accuracy and undercount historically undercounted

Replan because it realized Congress would not extend the deadline. *See New York*, 139 S. Ct. at 2576 (2019) (Thomas J., concurring in part and dissenting in part) (courts defer to executive agency and it is entitled to a presumption of regularity in part because crediting accusations of pretext, which can be easily lodged by "political opponents of executive actions to generate controversy," could "lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes").

individuals." But the need to consider accuracy does not give courts license to act as a super Census Bureau. The Secretary is "required to consider the evidence and give reasons for his chosen course of action," but "[i]t is not for us to ask whether [the] decision was 'the best one possible' or even whether it was 'better than the alternatives.'" *New York*, 139 S. Ct. at 2571 (citation omitted). The Bureau fulfilled the deliberative requirement by considering the Replan's impact on accuracy. *See Providence v. Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010) (Agency action is arbitrary and capricious where the agency "*entirely failed*" to consider an important aspect of the problem.) (emphasis added).

B.

Although the district court ostensibly conducted APA review of the procedures the Secretary used to adopt the Replan, the crux of the court's decision is its view that the Replan would not produce an accurate census. But the "accuracy" requirement is a general duty arising from the Census Act, not a specific statutory or constitutional mandate. *See New York*, 139 S. Ct. at 2568–69 ("[B]y mandating a population count that will be used to apportion representatives, *see* [13 U.S.C.] § 141(b), 2 U. S. C. § 2a, the Act imposes 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.") (simplified). And it is

for the Secretary, under the authority Congress delegated to him, to balance the need for accuracy against the statute's hard deadline.

Although justiciability arguments are only raised briefly on the pending motion for a stay, "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Deciding whether the census meets a free-floating concept of "accuracy" is exactly the type of political question that courts are powerless to adjudicate. Virtually all of the factors announced in *Baker v. Carr*, 369 U.S. 186 (1962), support a finding of this being a nonjusticiable political question.[8] Principally, the district court's "accuracy" requirement is not amenable to "judicially discoverable and manageable standards." *See id.* at 217. How accurate is accurate enough? *See, e.g.*, *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 322 (1999) ("[T]he Bureau has always failed to reach—and has thus failed to

[8] These factors include: a textual commitment of the issue to a coordinate political branch, a lack of judicially discoverable and manageable standards for resolving it, the impossibility of deciding without an initial policy determination of the kind clearly for nonjudicial discretion, or the impossibility of a court's undertaking independent resolution of the question without expressing a lack of respect due coordinate branches of government. *Baker*, 369 U.S. at 217.

count—a portion of the population.”).[9] And what standard are courts to use when evaluating accuracy anyway? Neither the district court nor this panel offer any answers.

But the answer is actually quite simple: it would be impossible for us to decide this case “without an initial policy determination of the kind clearly for nonjudicial discretion.” *See Carr*, 369 U.S. at 217. Even under ordinary circumstances, the Secretary and Bureau must juggle many important considerations when designing the census plan. For example, in choosing the date for when to end its data-collection phase and begin its data-processing phase, the defendants must consider the trade-offs between terminating field operations (even though not everyone has been counted) against the time needed to process the data into the Secretary’s report to the President and the States. *See* 2 U.S.C. § 2a(a); 13 U.S.C. § 141(c); *see also NAACP*, 945 F.3d at 191 (“‘Setting aside’ one or more of these ‘choices’ necessarily would impact the efficacy of the others, and inevitably would lead to court involvement in ‘hands-on’ management of the Census

[9] *See also Wisconsin*, 517 U.S. at 6 (“[Various] errors have resulted in a net ‘undercount’ of the actual American population in every decennial census.”); *Karcher v. Daggett*, 462 U.S. 725, 732 (1983) (recognizing that “census data are not perfect,” and that “population counts for particular localities are outdated long before they are completed”); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (remarking that census data “are inherently less than absolutely accurate”); *accord* C. Wright, History and Growth of the United States Census 16-17 (1900) (noting that the accuracy of our first census in 1790 was seriously questioned by the man who oversaw its implementation as Secretary of State, Thomas Jefferson).

Bureau's operations."). With each decision, the Bureau must consider (and choose among) the various tradeoffs each option presents. By requiring the Bureau to prioritize an elusive standard of accuracy over and above the interest in completing the census in a timely manner, *as prescribed by Congress*, the court substitutes its own policy determination for those set by Congress and delegated to the Secretary.

Analogous cases have held similar claims to be nonjusticiable political questions. Just last year the Court held that trying to decide among "different visions of fairness" for districting maps is an "unmoored determination of the sort characteristic of a political question beyond the competence of the federal courts." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499–2500 (2019) (internal quotations omitted); *accord Nixon v. United States*, 506 U.S. 224 (1993) (constitutional provision granting the "the sole Power to try all Impeachments" does not "provide an identifiable textual limit on the authority which is committed to the Senate"). So too here: determining the "accuracy" of the census is no more of a judicial question than determining the "fairness" of districting maps.[10]

[10] Nor does the fact that plaintiffs brought their claims under the APA change the political question analysis. *See* 5 U.S.C. § 702 ("Nothing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground[.]"); *Int'l Refugee Assistance Project v. Trump,* 883 F.3d 233, 366 (4th Cir. 2018) (Niemeyer, J., dissenting) ("§ 702(1)'s recognition of 'other limitations' on the scope of APA review reflects Congress's intent to maintain longstanding prudential limits confining the judiciary to its proper role in our constitutional

To be sure, courts may entertain some challenges to census-related decisions. But cases treating such challenges as justiciable involved narrow and deferential review—not a freewheeling inquisition into the "accuracy" of the census. In *Department of Commerce v. New York*, for example, the Court considered whether the Secretary could add a citizenship question to the census consistent with the Enumeration Clause and Census Act. 139 S. Ct. at 2566, 2569. On the constitutional challenge, the Court reviewed only for whether the addition of the challenged question bore a "reasonable relationship to the accomplishment of an actual enumeration." *Id.* at 2566. On the statutory question, the Court deferentially considered "whether the Secretary examined the relevant data and articulated a satisfactory explanation for his decision." *Id.* at 2569. The Court's other census cases likewise involved this type of narrow and deferential review. *See Wisconsin*, 517 U.S. at 19–20 ("[S]o long as the Secretary's conduct of the census is consistent with the constitutional language and the constitutional goal of equal representation, it is within the limits of the Constitution.") (simplified); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (similar); *see also U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458–59 (1992) ("The polestar of equal

system, such as the political question doctrine."); *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 92 (D.D.C. 2016) (holding that political question doctrine precluded review of APA claims).

representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course" among multiple options.).

When our review morphs beyond these precedents into an interrogation of "accuracy," of the type underlying the district court's APA analysis here, we are beyond our proper role as judges. Some legal questions—even ones arising under the same constitutional provision as previously justiciable questions—might prove to be nonjusticiable. *See New York v. United States*, 505 U.S. 144, 185 (1992) ("[T]he Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions" even if most do). Thus, while the court might be competent to decide whether a particular decision bears a "reasonable relationship" to the goal of an "actual enumeration," the same cannot be said of evaluating the "accuracy" of a census. Indeed, the Court has rejected the claim that its prior cases require "a census that was as accurate as possible" and has recognized that "[t]he Constitution itself provides no real instruction" on how to measure the "accuracy" of a census. *Wisconsin*, 517 U.S. at 18; *see also Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417 (7th Cir. 1992) (Posner, J.) ("It might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a judicially administrable standard.").

We cannot mechanically apply the political question doctrine, which must be considered in light of the important separation of powers function it performs. A court's authority to act depends on a threshold question of the "appropriate role for the Federal Judiciary": whether the claims brought "are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere." *Rucho*, 139 S. Ct. at 2494 (emphasis in original). Here, these background principles weigh in favor of not adjudicating this dispute. No census has been, or can be, fully accurate, according to the Court. *See Wisconsin*, 517 U.S. at 6 ("Although each [census] was designed with the goal of accomplishing an 'actual Enumeration' of the population, no census is recognized as having been wholly successful in achieving that goal."). Determining what level of accuracy is sufficient is simply not something that the judicial branch is equipped to do.[11] Indeed, "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the

[11] The district court and plaintiffs seem to think that the district court's injunction does not require judicial supervision over the accuracy of the census. Instead, they frame the injunction as merely preventing the Secretary from adopting the Replan because it failed to follow the requisite procedures for doing so. But the crux of the district court's injunction is its disagreement with the Secretary's resolution of how to balance accuracy of the census against the statutory deadline. *See, infra,* § II-A. And in ordering relief, the district court has inserted itself at the top of the Executive branch's census operation. *See* Motion at 17 (describing ongoing supervision of the district court under the preliminary injunction).

electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). By allowing census-accuracy supervision under the guise of APA review, we have "given the green light for future political battles to be fought in this Court rather than where they rightfully belong—the political branches." *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1919 (2020) (Thomas, J., concurring in part and dissenting in part).

C.

Plaintiffs also likely fail to establish Article III standing, given that they have not shown that their alleged injury is redressable by the courts, even assuming the other standing requirements are met. An injury is necessarily not redressable if the court has no authority to authorize the relief requested. *See Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.) ("Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury."); *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1199 (9th Cir. 2017) (holding that a lawsuit seeking to enforce a treaty right was not redressable because "the federal courts have no power to right or to prevent . . . violat[ions of] a non-self-executing treaty provision").

Clearly, a district court has no authority to order an Executive agency to disobey a Congressional statute. Neither the district court nor plaintiffs have cited

any authority for this unprecedented expansion of the judicial power to decide cases and controversies. *See* U.S. Const. Art. III, § 2. Congress makes laws, the Executive enforces them, and we interpret them in the course of adjudicating disputes. Absent the metaphorical "striking down" of an unconstitutional statute, we are impotent to set aside congressionally enacted laws. *See United States v. Booker*, 543 U.S. 220, 283 (2005) (Stevens, J., dissenting in part) ("[T]he Court simply has no authority to invalidate legislation absent a showing that it is unconstitutional. To paraphrase Chief Justice Marshall, an 'act of the legislature' must be 'repugnant to the constitution' in order to be void.'" (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803))). Here, no one challenges the constitutionality of the statute establishing the Secretary's deadline. Accordingly, the district court had no authority to ignore it—let alone order an Executive agency to do so.

All of the cases relied on by the district court to enjoin operation of the statute, despite not finding any constitutional infirmity, are wholly inapposite. None suggest that a court can require an agency to *disobey* a statute; they merely confirm that an agency is not necessarily precluded from acting, even if it is doing so after a statutory deadline. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (holding that despite statute's mandatory deadline, post-deadline action taken by the agency was not void because there was no Congressional intent

that agency would be deprived of statutory authority to act if it did so beyond the deadline); *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1304 (D.C. Cir. 1991) (similar). The fact that an agency can—depending on the text, structure, and history of the statue at issue—continue to act beyond its statutory deadline, says nothing about a court's authority to *require* an agency to do so.

D.

An agency's decision on how to respond to a once-in-a-century pandemic, in order to meet its statutory deadline, is quintessentially the type of decision we should give substantial deference to. Throughout this pandemic, we've deferred to the elected branches to determine how to best respond, even when shuttering our churches and businesses. *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020) (denying Free Exercise Clause challenge to application of California's stay-at-home order to in-person religious services based on deference to elected branches during pandemic). We've done so despite our role in protecting individuals' constitutional rights. *See On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249, at *6 (W.D. Ky. 2020) (although "a state may implement emergency measures that curtail constitutional rights" during a pandemic, it cannot enact measures that are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law"). If deference is appropriate there, surely it is doubly appropriate here, where courts are already required to

show deference to the agencies. *See New York*, 139 S. Ct. at 2578 & n.3 (Thomas, J., concurring in part and dissenting in part) (explaining highly deferential review of an "agency's discretionary choices and reasoning under the arbitrary-and-capricious standard"); *Wisconsin*, 517 U.S. at 19–20 (explaining narrow and deferential review of Secretary's census decision). Simply put, there's no basis to anoint ourselves supervisors of this sensitive process at the eleventh hour.

III.

At a minimum, we should have granted an administrative stay while we further considered the underlying motion to stay the injunction pending appeal. The government faces irreparable harm from our refusal to do so. It's undisputed that if the government cannot finalize the data collection phase of the census and move into the data processing phase in a timely fashion, it will likely miss its statutory deadline.

Thus, even if the court ultimately rules for the defendants on the merits, it might not matter much: the plaintiffs will have effectively secured the relief they seek on the merits (e.g., a delay of moving into the data processing phase). In contrast, the defendants have said only that it would be "difficult" to rehire and redeploy workers once terminated, if they are allowed to do so, but not that it would be impossible to revamp these workers if needed. Accordingly, although an administrative stay would be inefficient if ultimately reversed later, the damage

would not be irreparable. At most it would present a bureaucratic hassle for the agencies. The same cannot be said for the majority's decision to deny the administrative stay. Similarly, the district court, and now the majority, fail to consider the harms that irreparably flow to other States. *See* Amicus Brief at 8 ("The effect of the TRO was to run up the census tally in Plaintiffs' jurisdictions at the expense of lagging jurisdictions like Louisiana and Mississippi."); *id.* at 8–9 (noting "disruption of redistricting and reapportionment in 24 states that have constitutional or statutory deadlines" tied to census).

Finally, the status quo here, to the extent that's relevant, is the legal landscape that would have existed prior to the district court's judicial misadventure. *See Doe #1*, 944 F.3d at 1229 (Bress, J., dissenting) (explaining that preserving the status quo is not an enumerated factor, but in any event, an administrative "stay simply suspends judicial alteration of the status quo, while the injunctive relief granted below constitutes judicial intervention upending it") (simplified). Accordingly, we should have granted the request for an administrative stay to restore the parties to the positions they were in prior to the district court's decision.

IV.

Despite its errors, the district court deserves some credit. It seems to have been motivated by a valiant attempt to balance two competing priorities: accuracy

of the census versus timeliness under the statutory deadline. But the elected branches have already done this balancing. The Secretary of Commerce was briefed on all of the Bureau employee concerns the district judge found persuasive. The Secretary considered those concerns, and then, in exercising the role that the President appointed him to perform, made the decision to proceed with the Replan. "By second-guessing the Secretary's weighing of risks and benefits and penalizing him for departing from the Bureau's" views about the Replan, the district court, and now the majority, "substitute[] [their] judgment for that of the agency." *New York*, 139 S.Ct. at 2571. Likewise, Congress was aware of the potential problem and did not extend the deadline. The House of Representatives held committee hearings and ultimately voted on a bill to extend the deadline. The Senate received the bill, held committee hearings on it, but then took no further action—and hasn't since July 2020.[12] Plaintiffs suggest that the Senate might act on the bill soon.[13]

There is no basis for the judiciary to inject itself into this sensitive political controversy and seize for itself the decision to reevaluate the competing concerns between accuracy and speed, after the elected branches have apparently done so

[12] https://www.congress.gov/bill/116th-congress/house-bill/6800/all-actions?overview=closed
[13] Plaintiffs' Opposition at 14 n.1 (citing Hansi Lo Wang, Bipartisan Senate Push to Extend Census Begins Weeks Before Count Is Set to End, NPR (Sept. 15, 2020), https://www.npr.org/2020/ 09/15/913163016/bipartisan-senate-push-to-extend-census-begins-weeks-before- count-is-set-to-end)

already—or are actively doing so now. *See Clinton v. City of New York,* 524 U.S. 417, 449 (1998) (Kennedy, J., concurring) ("Failure of political will does not justify unconstitutional remedies."). Plus, had we ruled for the defendants, nothing would have prevented the elected branches from revisiting this dispute at a later date. A belated fix might entail additional cost and delay that the district court's injunction avoids. But in our constitutional design, courts are not empowered to swoop in and rescue the elected branches from themselves. If additional cost and delay is the consequence of Congress's inaction, or the Secretary's decision to adopt the Replan, then so be it. The recourse for such problems lies with the People themselves at the ballot box—not with unelected and unaccountable judges in chambers.

I respectfully dissent.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL URBAN LEAGUE; LEAGUE OF WOMEN VOTERS; BLACK ALLIANCE FOR JUST IMMIGRATION; HARRIS COUNTY, Texas; KING COUNTY, Washington; CITY OF LOS ANGELES, California; CITY OF SALINAS, California; CITY OF SAN JOSE, California; RODNEY ELLIS; ADRIAN GARCIA; NAVAJO NATION; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; CITY OF CHICAGO, Illinois; COUNTY OF LOS ANGELES, California; GILA RIVER INDIAN COMMUNITY,

Plaintiffs-Appellees,

v.

WILBUR L. ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF COMMERCE; STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau; UNITED STATES CENSUS BUREAU,

Defendants-Appellants,

and

STATE OF LOUISIANA; STATE OF MISSISSIPPI,

No. 20-16868

D.C. No. 5:20-cv-05799-LHK
Northern District of California, San Jose

ORDER

Intervenor-Defendants.

Before: GRABER, W. FLETCHER, and BERZON, Circuit Judges.

Just as the 2020 decennial census was getting underway, the COVID-19 pandemic hit, freezing operations and disrupting a process that had taken nearly a decade to plan. The Census Bureau ("Bureau") instituted a revised schedule on April 13 ("COVID-19 Plan"), extending its operations to account for this delay. But on August 3, 2020, the Secretary of Commerce ("the Secretary") announced a new schedule ("the Replan"), under which the Bureau greatly compressed, as compared both to the original schedule and to the COVID-19 Plan, the time allocated to various stages for completing the census. The district court issued a preliminary injunction preventing the Bureau from implementing its proposed Replan schedule for conducting the census. Addressing the government's emergency motion for a stay of the preliminary injunction pending appeal, we conclude that the government is unlikely to succeed on the merits of the appeal as to the Plaintiffs' Administrative Procedure Act ("APA") claims. To the extent that the district court enjoined the Replan and the September 30, 2020, deadline for data collection, the government has not met its burden in showing irreparable harm, and the irreparable harm to the Plaintiffs and the resulting balance of equities justify the denial of a stay. To the extent that the district court enjoined the

government from attempting to meet the December 31, 2020, statutory deadline for completing tabulations by state, the government has, at this juncture, met its burden in seeking a stay pending appeal. We therefore deny the government's motion for a stay in part and grant it in part.

I.

The "Bureau's mandate in conducting the decennial census is to count everyone living in the United States" and its territories, as Bureau Associate Director Fontenot described in his September 5 declaration. The Bureau spent most of the last decade planning the 15.6 billion dollar 2020 decennial census, an undertaking of extreme complexity.

The four critical interlocking steps of the 2020 census are: (1) soliciting self-response by households, electronically or by mail; (2) non-response follow-up ("NRFU"); (3) data processing; and (4) submission by the Secretary of the two statutorily required reports based on the census data. 13 U.S.C. § 141(b)–(c). The Secretary is required to tabulate the total population by state for congressional apportionment, a task that "shall be completed within 9 months after the census date," of April 1. *Id.* § 141(b). The Secretary also must tabulate population data used by states for districting, which "shall be completed by him as expeditiously as possible after the decennial census date" and "shall, in any event, be completed,

reported, and transmitted to each respective State within one year after the decennial census date." *Id.* § 141(c).

Just six days after the self-response period began, in March 2020, COVID-19 stopped the entire census process in its tracks. Following Office of Management and Budget ("OMB") guidance, the Bureau completely suspended decennial field operations for 47 days between March 18 and May 4, and restarted operations in phases over the next two weeks. During that freeze, the Bureau created a new schedule to accommodate the COVID-19 delays.

On April 13, 2020, the Bureau adopted the COVID-19 Plan, extending the total time for the census from 54 weeks to 71.5 weeks. This extension restored to the schedule the 47 days lost to the complete pandemic shutdown. The Plan also provided additional time for field operations to restart and conclude by October 31, 2020. The Bureau reasoned that the pandemic would make hiring and training the huge temporary staff needed more difficult. Additional time would also be required for the NRFU process, both because of relocations caused by the pandemic and because of the difficulty of in-person canvassing when respondents would be reluctant to interact with enumerators for fear of contracting the illness. The extension also built in more time for data processing, needed to address the complexities of population shifts caused by COVID-19.

The Bureau requested that Congress accordingly extend the statutory deadlines by 120 days. Government officials, from the President to Bureau officers, strenuously maintained that the current statutory deadlines were impossible to meet after the delays and changes caused by the COVID-19 suspension and its aftermath. The House of Representatives passed a bill extending the statutory deadlines for reporting; the Senate Small Business and Entrepreneurship Committee held a hearing on the bill on July 23, 2020. Soon thereafter, the Administration switched gears, requesting, instead of an extension, additional funding to complete a "timely" census. Census Bureau Director Dillingham, when asked about the change at a House hearing, no longer supported an extension.

On July 31, 2020, the Bureau removed the October 31, 2020, deadline for data collection field operations from its website. Over the next four days, Bureau staff and officials prepared a presentation for Secretary Wilbur Ross on the feasibility of moving the end of data collection to September 30, 2020 and completing the data processing necessary for reapportionment by December 31. Despite the Bureau's months-long position that meeting the statutory deadlines was impossible, Secretary Ross on August 3, 2020, approved the new Replan schedule, which ended field operations by September 30 and the initial data processing stage by December 31, 2020. This plan condensed the total time to

conduct the census to 49.5 weeks, 4.5 weeks less than the pre-COVID schedule of 54 weeks and 22 weeks less than the extended COVID-19 schedule adopted to account for past and future pandemic-related delays. The Secretary announced the Replan in a two-page press release, which contained no explanation concerning why the previous projected need to extend the deadlines no longer obtained.

A coalition of plaintiffs, including advocacy organizations, cities, counties, and tribal groups (collectively, "Plaintiffs"), filed suit to enjoin the Replan, alleging violations of both the APA and the Enumeration Clause of the Constitution. The district court granted, and then extended, a temporary restraining order. The government argued that "there is no administrative record in this case because there is no APA action." But both sides agreed that discovery, in the short term, could be limited to non-privileged documents provided to the Department of Commerce Inspector General for a report on the Replan.

Based on that record, the district court issued a preliminary injunction. The court held that Plaintiffs had a high likelihood of success on the merits of their APA claim and so did not reach the question whether the Replan directly violated the Enumeration Clause. The court's order stayed the "Replan's September 30, 2020 deadline for the completion of data collection and December 31, 2020 deadline for reporting the tabulation of the total population to the President" and "enjoined [the defendants] from implementing these two deadlines."

After the district court entered its injunction, the government continued to publicize the September 30, 2020, data collection deadline on its website. Enumerators across the country—the individuals hired to conduct the census by contacting inhabitants—reported being told that operations would end on September 30. On September 28, 2020, the Bureau announced, on Twitter and in a press release, that it would now end data collection on October 5, 2020, which it justified in an internal document as the date adopted "in order to meet apportionment delivery date of December 31, 2020." The district court subsequently issued an order clarifying the scope of the injunction, explaining that the injunction "'postpone[s] the effective date of' th[e] two Replan deadlines and so reinstates the administrative rule previously in force: the COVID-19 Plan deadlines of October 31, 2020 for the completion of data collection and April 30, 2021 for reporting the tabulation of total population to the President." The district court determined that the October 5 deadline violated the injunction, also noting that it suffered "the same legal defects as the Replan." The court required the Census Bureau to notify employees that "data collection operations will continue through October 31, 2020." The Bureau recently complied with that directive.

The government appealed and requested both an administrative stay and a stay of the preliminary injunction. On September 30, this court denied the administrative stay. *National Urban League v. Ross*, - F.3d -, 2020 WL 5815054

(9th Cir. Sept. 30, 2020). The question now before us is whether to grant a stay pending appeal to a merits panel.

II.

"A party requesting a stay pending appeal 'bears the burden of showing that the circumstances justify an exercise of [judicial] discretion.'" *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 433–34 (2009)). In determining whether to grant the government's motion for a stay, "we apply the familiar standard set forth by the Supreme Court in *Nken*, namely: (1) whether the Government has made a strong showing of the likelihood of success on the merits; (2) whether the appellants will be irreparably injured absent a stay; (3) whether a stay will substantially injure other parties; and (4) where the public interest lies." *Id.* (quoting *Nken*, 556 U.S. at 426). "The first two factors . . . are the most critical." *Id.* (quoting *Nken*, 556 U.S. at 434). "We review the scope of the district court's preliminary injunction for abuse of discretion." *Id.* (citing *California v. Azar*, 911 F.3d 558, 568 (9th Cir. 2018), *cert. denied sub nom. Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716 (2019)).

A.

The government's primary argument as to why it is likely to succeed on the merits of its appeal is that the district court erred in determining that the Replan was a "final agency action" subject to APA review. The government has not made

the requisite strong showing that it is likely to prevail on this point.

To maintain a cause of action under the APA, a plaintiff must challenge "agency action" that is "final." *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2013) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004)). To be reviewable as an "agency action," the challenged act of the agency must be "circumscribed" and "discrete." *Norton*, 542 U.S. at 62–63. The government maintains that the Replan fails this test, as it "is a collection of individual judgments by the Census Bureau, all subject to constant revision." The government does not have a strong likelihood on this record of supporting that characterization.

The Replan was characterized in the short August 3 Press Release as a change in census operations and in the deadlines for completing those operations "to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020." Unlike in *NAACP v. Bureau of the Census*, 945 F.3d 183 (4th Cir. 2019), Plaintiffs challenge the decisionmaking process that went into the decision in the Replan to greatly accelerate the census process over the COVID-19 Plan, not specific "design choices" within that plan. *Id.* at 188. And unlike in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), which held that there was no discrete agency action in an "APA challenge to 'each of the 1250 or so individual classification terminations and withdrawal

revocations' effected under the land withdrawal review program," *id.* at 881, a term that was "not derived from any authoritative text," *id.* at 890, the district court here found that the Bureau treated the Replan as a single proposal, presented "to the Secretary in a single slide deck" and announced in a single press release.

As to the other requisite for APA review, finality, for an agency action to be "final," "the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature . . . . [and] the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). Here, the new deadlines were announced publicly, the Replan was implemented by the Bureau, and when the district court first ruled, data collection was set to cease on September 30. The district court concluded that significant legal consequences will flow from the timing and deadlines of the census, including consequences to political representation, federal and state funding, and degradation of census data, due to likely inaccuracies in the reported totals of hard-to-count populations. These effects echo the consequences faced by the Plaintiffs in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), which also analyzed a final agency action concerning census decisionmaking under the APA. *Id.* at 2565.

In sum, the government has not made a strong showing that it is likely to

prevail on appeal on its primary challenge to the district court's merits ruling.

B.

The government also argues that, if the Replan is reviewable, the district court erred in concluding that its adoption likely violated the APA, so the government is likely to succeed on the merits of this appeal. The government's barebones, one-note argument on this point does not meet the stringent *Nken* "strong showing" standard. The district court laid out in great detail five grounds on which to find Plaintiffs were likely to succeed on their contention that the government did not meet the APA's standards for reasoned decisionmaking.

APA review "is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Ca.*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). Agency action is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), an analysis which "turns on what [the] relevant substantive statute makes 'important,'" *Or. Nat'l Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996). Here, the Enumeration Clause demonstrates a "strong constitutional interest in accuracy" in the census, *Utah v. Evans*, 536 U.S. 452, 478 (2002), and "[t]he [Census] Act imposes '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,'" *Dep't of Commerce*, 139 S. Ct. at 2568–69 (quoting *Franklin v. Massachusetts*, 505 U.S. 778, 819–20 (1992) (Stevens, J., concurring in part and concurring in the judgment)). Both the Constitution and the relevant statutes governing the Bureau thus require that "the agency must examine the relevant data and articulate a satisfactory explanation for its action" taking into account the strong interest in accuracy. *State Farm*, 463 U.S. at 43. The government's arguments for a stay largely decline to discuss this requirement, instead focusing on the purported need to meet the December deadline at all costs.[1]

The record of the agency's decisionmaking during the few days that the

[1] Title 13 U.S.C. § 141(b) requires that "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be completed *within 9 months after the census date* and reported by the Secretary to the President of the United States." *Id.* (emphasis added). The census date is specified as "the first day of April" every tenth year. *Id.* § 141(a). The parties have both understood § 141(b) to require tabulation and reporting by December 31, 2020, so we therefore assume that interpretation here. We note, however, that the statute contemplates a time frame in which to complete the census, rather than a specified date, as it does in § 141(a). The subsequent requirement in 2 U.S.C. §2a(a) for the President to transmit apportionment data to Congress also gives a contingent deadline of "the first day, or within one week thereafter, of the first regular session" of Congress. We leave open the question whether, given the wording of the statutes and general considerations regarding the interpretation of statutory timelines, the agency should view this deadline as inflexible or, instead, as subject to adjustment, akin to equitable tolling or force majeure concepts, if they cannot be met because of extraordinary circumstances. Perhaps, as President Trump publicly stated in April, "I don't know that you even have to ask [Congress for an extension]. This is called an act of God. This is called a situation that has to be."

Replan was being developed does not show *any* response, let alone a "satisfactory explanation," to the numerous statements by Bureau officials that accelerating the schedule adopted in the COVID-19 Plan would jeopardize the accuracy of the census. Most importantly, the August 3 slide deck presented to the Secretary giving "Operational and Processing Options to meet September 30, 2020" warns that "[a]ccelerating the [field operations] schedule by 30 days introduces significant risk to the accuracy of the census data." This accuracy concern went unaddressed—beyond an unsupported attestation that the count would be accurate—in the barebones press release announcing the Replan or elsewhere in the administrative record.

The district court also concluded that there was a striking lack of evidence in the record showing that the Bureau had considered the extensive reliance interest on the COVID-19 Plan. That conclusion is amply supported. "When an agency changes course, as [the Bureau] did here, it must 'be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account."'" *Dep't of Homeland Sec.*, 140 S. Ct. 1891 at 1913 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016)). "It would be arbitrary and capricious to ignore such matters." *Id*. (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The August 3 Press Release and the Replan slide deck do not consider reliance interests at all. The Bureau depends heavily on its own advertising and partnerships with private organizations to drive participation in the census, particularly in hard-to-reach communities. Toward this end, targeted public advertising was increased under the COVID-19 Plan. Nowhere do the brief Replan materials consider that the Bureau and its partners had been relying on and disseminating information based on the October 31 deadline for data collection. Nor did the government address the reliance interest of the public in following the October 31 deadline for self-reporting and for responding to enumerators' contact efforts, and therefore not filling out a census or responding to a census worker before September 30.[2] These basic gaps in the government's attention to the pertinent factors, along with the other considerations surveyed by the district court, are sufficient to demonstrate that the government has not made a strong showing of likelihood of success on appeal as to the APA claim.

The government does not really argue to the contrary regarding the various ways in which it failed its APA obligation to engage in reasoned decisionmaking. Its only argument that it has met the APA's requirements is its mantra that the Replan was necessary to meet the statutory deadline. But the worthy aspiration to

[2] Title 13 U.S.C. § 221 imposes a fine of "not more than $100" to anyone who "refuses or willfully neglects" to answer any census questions when requested by an authorized census officer.

meet that deadline does not excuse the failure to address *at all* other relevant considerations, such as accuracy and reliance. It also does not excuse the failure to consider whether, given the timeline of congressional action laid out by the district court, the statutory deadline could have been moved; whether the deadline might be retroactively adjusted, as was done in several earlier censuses; or whether the deadline might be equitably tolled due to the force majeure of the pandemic, particularly given the evidence before the Bureau at the time of both the COVID-19 Plan and the Replan decisions suggesting that the deadline was already unlikely to be met without sacrificing the accuracy of the count.

As the APA requires that agencies engage in "reasoned decisionmaking," *State Farm*, 463 U.S. at 52, the agency had an obligation to *consider* its other obligations and any alternatives, even if it could properly end up rejecting them. The record before us shows little evidence of that reasoning, nor does it show that "the Secretary examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Commerce*, 139 S. Ct. at 2569 (quoting *State Farm*, 463 U.S. at 43). The government therefore has not made a strong showing of likely success on appeal as to the merits of the APA claim.

C.

With respect to the September 30, 2020, data collection deadline in the

Replan, the government has also not met its burden in making a strong showing either that the Plaintiffs will not succeed in establishing irreparable injury under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), or that the government will suffer irreparable harm if a stay is issued under *Nken*.

The government argues that it will suffer irreparable harm if a stay is not issued, as it represents that it will be unable to meet the statutory deadline of December 31 if it cannot end counting by October 5. A longer data collection period does leave less time for processing. But the President, Department of Commerce officials, Bureau officials, and outside analysis from the Office of the Inspector General, the Census Scientific Advisory Committee, and the Government Accountability Office all stated unequivocally, some before and some after the adoption of the Replan, that the Bureau would be unable to meet that deadline under any conditions.

The government's current representation that it will be able to meet the statutory deadline if it ends collection by October 5 is a very recent development, at odds with Associate Director Fontenot's prior September 22 declaration, in which he stated: "we wish to be crystal clear that if the Court were to extend the data collection period past September 30, 2020, the Census Bureau's ability to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021 would be seriously

jeopardized." The government's current justification—"that the enumeration is approaching a 99% target in nearly every state"[3]—speaks to accuracy of the count, but does not explain why the shortening of processing time below three months is consistent with Director Fontenot's prior declaration. So while there is a risk of irreparable harm to the government in denying a stay, there is also a great likelihood, given the wealth of evidence in the record, that the harm is already likely to occur.

In any event, as the district court determined in applying the *Winter* factors, the balance of hardships decidedly favors the Plaintiffs, who make a strong showing that they will suffer irreparable harm if a stay of the injunction is granted. *Nken*, 556 U.S. at 426. This court, in denying an administrative stay, explained that staying the injunction would "risk[] rendering the plaintiff's challenge to the Replan effectively moot." *National Urban League*, 2020 WL 5815054, at *2. "Thousands of census workers currently performing field work will be terminated, and restarting these field operations and data-collection efforts, which took years of planning and hiring efforts to put in place, would be difficult if not impossible . . . ." *Id.* The harms to apportionment and distribution of federal and

[3] To the extent that the current enumeration targets are relevant, the government noted at Oral Argument that it has not hit 99% enumeration in 7 states and is only at 97% in three states, below its own target throughout the planning and implementation of the 2020 census, including in the Replan slide deck.

state funding that the Plaintiffs allege from the Replan would be impossible to remedy until the next census in 2030. *See, e.g.*, *Dep't of Commerce*, 139 S. Ct. at 2565 (discussing similar harms).

Finally, the September 30, 2020 data collection deadline has no direct statutory hook. Its connection to the government's only strongly articulated irreparable injury—meeting at all costs the December 31 date the government understands to be statutorily required and inflexible, *but see supra* note 1—is based on ever-changing projections about the connection between the data collection and data processing stages. According to the government, its own predictions about the art of the possible at the data collection stage proved wrong. We are not told why the predictions as to what could be accomplished at the data processing stage—or whether the deadline could be moved if necessary—are more accurate.

The government has therefore failed to meet its burden to justify a stay pending appeal as to the district court's injunction of the September 30, 2020 data collection deadline.

D.

To the extent that the district court did not merely stay the Replan but *required* the government to continue to ignore the December 31 timeline for completing the tabulation, the *Nken* factors do justify a stay pending appeal.

"The effect of invalidating an agency rule is to reinstate the rule previously

in force." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc) (quoting *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005)). The district court was therefore correct that the effect of enjoining the Replan deadlines was to reinstate the COVID-19 plan. Under the COVID-19 plan, data collection continues until October 31, 2020, and processing *could* continue until April 30, 2021, under the assumption that the deadline for reporting to the President could be tolled or extended if necessary.

But the district court's order went further: it "enjoined [the defendants] from implementing" *both* the September 30, 2020 internal agency deadline *and* the statutory December 31, 2020 deadline. In other words, once data collection ends on October 31, 2020, the order precludes the government from meeting the December 31 date even if it can do so, or if it develops another way to meet its statutory obligation. The plaintiffs have not at this juncture made the same showing of irreparable harm as to precluding any consideration of the statutory deadline that they have made as to the nonstatutory data collection deadline. So their likelihood of success on appeal on this point is—on the current record—weaker.

Moreover, the December 31, 2020, deadline is nearly three months away. As we have already stated, predictions as to whether it can still be attained are speculative and unstable. And any harm from governmental attempts to meet the December 31 date are likely less irreparable than the injury from displacing the

October 31 data collection endpoint. If the Bureau meets the December 31 date by using procedures that violate any accuracy requirement embedded in the Enumeration Clause, or proceeds in an arbitrary and capricious manner, existing data can be reprocessed more easily than data collection can be restarted. Moreover, given the remaining time, leaving the December 31, 2020 date in place as an aspiration will have no immediate impact. Perhaps the Bureau will find that with an extraordinary effort or changes in processing capacity, it is able to meet its deadline. Or the Department of Commerce may seek and receive a deadline extension from Congress. Or perhaps the Bureau will miss the deadline, as statement after statement by everyone from agency officials to the President has stated it would, due to the extraordinary circumstances of the pandemic. Missing the deadline would likely not invalidate the tabulation of the total population reported to the President, *see, e.g.*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157, 171–72 (2003), and may well be approved by Congress after-the-fact, as has happened in the past, *see, e.g.*, Act of Sept. 1, 1841, ch. 15, § 1, 5 Stat. 452, 452 (1841).

Finally, and of great import to our balancing of the equities, and consideration of the public interest, even if—as both parties aver—data processing cannot be completed by December 31 as a practical matter, that does not mean that missing the putative statutory deadline should be required by a court. Serious

separation of powers concerns arise when a court seeks to override a congressional directive to an Executive Branch agency. *See, e.g.*, *Wisconsin v. City of New York*, 517 U.S. 1, 17 (1996) (recognizing Congress's broad constitutional authority over the census). There is therefore a strong argument for judicial restraint while the ability to meet or extend the deadline, and any resulting injury, is still speculative.

To the extent that the district court enjoined the Defendants from attempting to meet the December 31 date, that injunction is stayed pending appeal.

Emergency Motion for a Stay DENIED IN PART and GRANTED IN PART.