

No. 20A62

**In The
Supreme Court of the United States**

WILBUR L. ROSS, JR., SECRETARY OF COMMERCE, ET AL.,
Applicants,

V.

NATIONAL URBAN LEAGUE, ET AL.,
Respondents

RESPONSE TO APPLICATION FOR A STAY PENDING APPEAL TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND
PENDING FURTHER PROCEEDINGS IN THIS COURT AND REQUEST FOR AN
IMMEDIATE ADMINISTRATIVE STAY

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October 10, 2020

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Plaintiffs-Respondents make the following disclosures:

The Black Alliance for Just Immigration states that it is a private, independent 501(c)(3) corporation with no parent corporations, and no publicly held company owns 10% or more of its stock.

The League of Women Voters states that it is a private, independent 501(c)(3) corporation with no parent corporations, and no publicly held company owns 10% or more of its stock.

The National Association for the Advancement of Colored People states that it is a private, independent 501(c)(3) corporation with no parent corporations, and no publicly held company owns 10% or more of its stock.

The National Urban League states that it is a private, independent 501(c)(3) corporation with no parent corporations, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Defendants’ stay request is premised on one thing: their asserted need to immediately halt the census count so they can report final population numbers to the President by a December 31 deadline. But Defendants have, for months, admitted they cannot meet that deadline. From April through the end of July, Defendants said it was already impossible to provide accurate census numbers by December 31. After the Secretary directed Census Bureau officials to meet that deadline no matter what, Defendants claimed it would be possible—but *only if* census field operations ended on September 30. When the district court enjoined the September 30 date, Defendants changed their position (again) and claimed they could still meet the deadline—but *only if* census field operations ended on October 5.

Defendants’ repeated, recent, and often sworn statements speak for themselves:

- July 23: “[I]t 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.” Defs. App. 10a (quoting Pls. App. 34a).¹

¹ “Defs. App.” refers to the Appendix to the Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in This Court and Request for an Immediate Administrative Stay, filed in this Court on October 7, 2020. “Pls. App.” refers to the appendix attached hereto. “Dkt.” refers to documents filed below in the United States District Court for the Northern District of California, No. 5:20-cv-05167-LHK.

- September 11: “[W]e wish to be crystal clear that if the Court were to extend the data collection period past September 30, 2020, the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021.” Declaration of Albert E. Fontenot, Jr. ¶ 107, *La Union del Pueblo Entero v. Trump (LUPE)*, No. 19-02710 (D. Md.), Dkt. 117-1; *see also* Defs. App. 113a ¶ 100.
- September 28: “If field work is completed anytime after October 5, [the] Census Bureau will be unable to deliver state counts for apportionment by December 31, 2020.” Pls. App. 104a.

See also Pls. App. 111a-22a (collecting additional statements). In their October 7 stay application to this Court, Defendants never once say they could meet the December 31 deadline even if a stay were granted *that same day*. And it is now October 10. The only harm Defendants assert cannot be redressed by a stay—and never could.

In marked contrast, if a stay were granted, the harm to Plaintiffs would be immediate, far-reaching, and irreversible. As Defendants’ own data shows, millions of Americans have now been counted only because of the district court’s injunction. And critical field work is ongoing, especially for those in hard-to-count populations. Any stay would allow Defendants to stop the 2020 Census count, shut down field operations, fire hundreds of thousands of employees, and start processing data the very next day. There is no going back from that. The stay Defendants seek will give

them everything they are asking for on the merits—and will effectively moot any appeal.

That would be an extraordinary result under any circumstances. But with the integrity of the United States decennial census hanging in the balance, it is untenable. The census is a massive undertaking, with weighty constitutional implications and substantial effects on the lives of hundreds of millions of Americans. That is why the Bureau spent a decade carefully analyzing and testing every step of the 2020 Census and establishing specific timeframes for each critical operation. And that is why, when the pandemic disrupted the original timeline, it spent a month devising a new plan (the COVID-19 Plan)—that maintained at least the same amount of time for each operation—and proceeded to publicize the new schedule, and implement it, for the next four months.

Then, in the course of four or five days in late July and early August, Defendants adopted a “Replan” that reduced the time for data collection from three months to two and the time for data processing from six months to three. Not because the Bureau had suddenly figured out a way to get the same work done in half the time; officials during this same time period continued to warn of significant risks to accuracy. Not because Defendants suddenly realized that Congress was not going to act on their request for an extension of the deadline; to the contrary, the Secretary had rescinded the extension request. Not because conditions on the ground had improved; the COVID-19 pandemic was still raging, and the Bureau was facing “debilitating” staffing shortages. And not because the Secretary carefully considered

the warnings from high-level Bureau officials and simply reached a different conclusion; the Secretary directed the Bureau to shorten the timelines, and then approved them, without further discussion.

The district court—with all of these facts before it, after reviewing 200 filings and the (partial) administrative record in the course of a month, and after multiple hearings—held that Defendants failed to comply with their statutory responsibilities under the Administrative Procedure Act (APA). Among other things, the court found that Defendants failed to consider the risk that the severely truncated timeline posed to the accuracy of the 2020 Census; relied on an explanation that was directly contrary to the facts in the record; and entirely ignored serious reliance interests. The district court then granted a traditional APA remedy: It stayed the Replan's timelines and reinstated the COVID-19 Plan's timelines until Defendants cured the identified legal defects. And the court of appeals, after two rounds of briefing and an oral argument, agreed that Defendants likely violated the APA and that Plaintiffs were likely to suffer irreparable harm, and stayed only the portion of the district court's order that (the court of appeals believed) enjoined Defendants from complying with the December 31 deadline.

Defendants now ask this Court to immediately bring the census to an end, without offering any meaningful response to the mountains of evidence (including consistent statements by high-level Bureau officials and their counsel) that the Bureau cannot meet the December 31 deadline regardless. The decennial census is too important for that. Every relevant factor—irreparable harm, the balance of

equities, and the likelihood of success on the merits—militates against such extraordinary relief. Defendants’ application for a stay should be denied.

STATEMENT

1. In order to apportion “[r]epresentatives and direct taxes,” an “actual Enumeration shall be made” every ten years “in such Manner” as Congress “shall by Law direct.” U.S. Const. art. I, § 2, cl. 3. The text, structure, and history of the Enumeration Clause “suggest a strong constitutional interest in accuracy.” *Utah v. Evans*, 536 U.S. 452, 478 (2002).

In the Census Act, Congress has assigned the responsibility to conduct the “actual enumeration” to the Secretary of Commerce, who in turn oversees the Census Bureau in conducting the decennial census. 13 U.S.C. §§ 2, 4, 21, 141(a). The Census Act contains instructions as to how the duty to conduct an actual enumeration will be carried out. Among other things, it provides that a “tabulation of total population by States” for apportionment will be reported from the Secretary to the President by December 31 of the year in which the census begins. *See* 13 U.S.C. § 141(b). And “by mandating” the “population count,” which “will be used to apportion representatives,” it “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.’” *Department of Commerce v. New York*, 139 S. Ct. 2551, 2568-69 (2019) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 819-20 (1992) (Stevens, J., concurring in part and concurring in the judgment)).

2. In keeping with this constitutional and statutory charge, the Bureau has stated that its goal for the 2020 Census is to “count everyone once, only once, and in the right place.” Dkt. 37-5 at 5. Accomplishing that enormous task for a population exceeding 300 million requires years of careful planning, followed by many months of sustained work.

To this end, the Bureau spent most of a decade creating its plan for the 2020 Census. The Bureau consulted with outside experts, members of its Census Scientific Advisory Committee, and a range of stakeholders. *Id.* at 204. And the Bureau conducted at least fifteen tests between 2012 and 2018, which it used to further refine its processes. *Id.* at 31-55; Defs. App. 101a-05a. The Bureau’s plan was ultimately codified in a 200-page plan (2018 Operational Plan), as well as detailed plans for each sub-operation, containing precise timelines for each and every operation in the 2020 Census. Defs. App. 3a-4a; 83 Fed. Reg. 26,643 (June 8, 2018) (announcing in the Federal Register the publication of the 2018 Operational Plan).

Census operations consist of two basic phases: data collection and data processing. During the data-collection phase, the Bureau solicits self-responses to the census questionnaire. The Bureau, State and local governments, and community partners undertake significant outreach and advertising efforts to maximize self-response. The Bureau also conducts “Non-Response Follow Up” (NRFU). During NRFU, enumerators go door-to-door to households that have not otherwise responded and also perform quality control checks (such as randomly re-

interviewing some households) to ensure that the information provided is accurate. Defs. App. 2a. NRFU is the “most important census operation to ensuring a fair and accurate count” and is essential for capturing hard-to-count populations (*id.* (quoting Thompson Decl. ¶ 15, Dkt. 36-2)), including Native Americans living in tribal areas, communities of color, low-income individuals, undocumented immigrants, non-English speakers, and persons with mental and physical disabilities.

Under the 2018 Operational Plan, if enumerators had not been able to contact a household after several attempts, they could seek to obtain information from a “proxy,” such as a neighbor or landlord, able to report on the status of the household and its members. Dkt. 37-5 at 129. Similarly, if the Bureau had high-quality administrative records for a housing unit, enumerators could—after an initial contact attempt—use those records to fill in responses for that unit. *Id.* But proxies and administrative records are less accurate than direct contact between enumerators and households. Hillygus Decl. ¶¶ 21-29, Dkt. 36-3. And both tend to increase disparities in the count—*e.g.*, undocumented immigrants and persons of color are significantly less likely to have accurate administrative records. *Id.* ¶¶ 22-23.

After data collection, the Bureau has to process the data from over 100 million households into usable information, including by performing quality-control measures and weeding out mistakes. These data-processing operations include transforming written responses into computer-readable code, removing redundant

data, detecting and fixing over- or under-counts among groups, and generally identifying errors, checking for accuracy, and ensuring that the data rises to the necessary quality level for apportionment, redistricting, and a host of federal, state, municipal, and private activities. Louis Decl. ¶¶ 15, 25-28, Dkt. 36-4.

Consistent with prior censuses, the 2018 Operational Plan determined that the Bureau needed 20.5 weeks (March 12-July 31) for self-response, 11.5 weeks (May 13-July 31) for NRFU, and 22 weeks (August 1-December 31) for data processing. Defs. App. 3a.

3. In March, just as Census season began, the COVID-19 pandemic hit and the Bureau was forced to change its plan. *Id.* at 4a. Among the many new challenges, the Bureau was unable to hire and train enumerators, and households were, unsurprisingly, unwilling to answer their doors. On March 18, the Bureau suspended all field operations. *Id.* Over the course of the next month, the Bureau consulted with experts and stakeholders and developed the COVID-19 Plan, which it announced and began implementing on April 13. *Id.* at 6a.

The COVID-19 Plan retained the key design choices from the 2018 Operational Plan; it simply adjusted the timeline for operations, ensuring that each was given the same amount of time or more. *Id.* at 6a-7a. The Bureau extended the window for households to self-respond to the census until October 31, 2020. *Id.* at 6a. The Bureau publicly announced October 31 as the new deadline for self-response and posted the “new schedule” on its website. *See* Dkt. 37-4. The Bureau also instructed its partners, including several Plaintiffs here, to

disseminate the COVID-19 Plan’s extended deadline to households across the nation—which they did. *See* Defs. App. 27a-28a (citing Plaintiffs’ declarations); *id.* at 90a-91a (§§ 39-42); Pls. App. 29a.

The COVID-19 Plan similarly delayed and slightly expanded the timeline for NRFU, providing that it would last from August 11 to October 31, 2020. Defs. App. 6a. And the Bureau expanded data processing from 22 weeks to 26 weeks, so that it would end (and apportionment counts would be delivered to the President) by April 30, 2021. *Id.* at 7a. The additional time was necessary “to account for the pandemic’s disruptions to Bureau operations,” the “public’s ability to respond to the census,” and “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).” *Id.* at 6a-7a (quoting announcement of COVID-19 Plan, Dkt. 37-7 at 15).

Because the new schedule extended beyond the December 31 statutory deadline for reporting total population counts to the President, the Secretary and the Bureau jointly requested an extension from Congress. *Id.* at 7a. The President agreed that additional time was essential, but did not think a statutory extension was required. *Id.* (“I don’t know that you even have to ask [Congress]. This is called an act of God. . . . I think 120 days isn’t nearly enough.” (quoting President Trump)).

Over the next four months, Defendants carried out the COVID-19 Plan and continued to inform the public that self-response and NRFU would continue until October 31. Defs. App. 6a-9a, 38a. During this time, senior “Bureau officials

publicly stated that meeting the December 31, 2020 deadline would be impossible.” *Id.* at 7a; *see id.* at 7a-9a (collecting statements of Bureau and Commerce officials, as well as documents and recommendations, from April through early July); Pls. App. 111a-14a (same). For example, on July 8, Associate Director Albert Fontenot—Defendants’ principal declarant in this case—stated that the Bureau was “past the window of being able to get” accurate counts to the President by December 31. Defs. App. 7a-8a (quoting Bureau press briefing).

4. Then, on July 21, the President issued a memorandum declaring that it was the United States’ policy to exclude undocumented immigrants from the congressional apportionment base. *Id.* at 9a. Once the memorandum issued, there was suddenly a “push to complete NRFU asap.” *Id.* at 10a (quoting Pls. App. 35a). Shortening the census timeline would ensure that, regardless of the outcome of the November election, this President would have the opportunity to implement his memorandum. Whereas delaying reporting until April—as the COVID-19 Plan did—provided no assurance the President would be in office to do so.

In response to this push, high-level Bureau officials reaffirmed that it would be impossible to complete a constitutionally sound census count by December 31. For example, on July 23, Associate Director Timothy Olson emphasized the “need to sound the alarm to realities on the ground,” explaining that “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.” Defs. App. 10a (quoting Pls.

App. 34a). Similarly, Bureau Chief Kathleen Styles explained that “[s]hortening 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.” *Id.* at 11a (quoting Pls. App. 37a); *see also* Defs. App. 9a-11a (other similar statements between July 23 and July 27); Pls. App. 113a-16a (same).

Despite these warnings, on July 29, the Secretary “directed” the Bureau “to present a plan at our next weekly meeting on Monday, August 3, 2020, to accelerate the remaining [census] operations in order to meet the statutory apportionment deadline.” Defs. App. 107a (¶ 81); *see id.* at 31a, 40a. Senior Bureau officials gathered the next day “to begin to formalize a plan to meet the statutory deadline.” *Id.* at 107a (¶ 81). By the afternoon of July 31, the Bureau had thrown together a plan to truncate both data collection and processing, and spent the next two days reducing that plan to a slide deck. *Id.* at 11a (citing Dkt. 156-4 at DOC_10275-76). At the same time, Bureau officials continued to sound the alarm that the accelerated plan would significantly compromise data quality and pose a grave and unacceptable risk to the accuracy and completeness of the census. *See id.* at 54a-59a (statements between July 29 and August 3); Pls. App. 114a-16a (same).

On the morning of August 3, the Bureau submitted the final presentation to Secretary Ross. Defs. App. 14a. The presentation warned that “accelerating the schedule by 30 days introduces significant risk to the accuracy of census data”; that “[a]ll of these activities represent abbreviated processes or eliminated

activities that will reduce the accuracy of the 2020 Census”; that the “compressed review period creates risk for serious errors not being discovered in the data—thereby significantly decreasing data quality”; and that those “serious errors” if discovered “may not be fixed” due to lack of time. *Id.* at 55a, 58a (citations omitted). Without acknowledging or addressing any of those concerns, the Secretary approved the “Replan” the same day and the Bureau announced it in a press release. *Id.* at 11a, 117a-19a (August 3 Press Release).

The Replan drastically cut the timelines for the 2020 Census. It required that all data collection conclude on September 30. *Id.* at 11a. This change shortened the highly publicized October 31 deadline for self-response by a month, and the time for NRFU operations from 11.5 weeks to 7.5 weeks. *Id.* at 11a-12a. Data processing, meanwhile, was cut in half from 26 weeks to 13 weeks, with the deadline advancing from April 30, 2021 to December 31, 2020. *Id.* at 12a. The Bureau publicly announced September 30 as the new deadline for self-response and posted the “revised plan” on its website. *Id.* at 117a (announcing that “[w]e will end field data collection by September 30, 2020. Self-response options will also close on that date”).

5. In the weeks that followed, independent agencies and experts—including the Government Accountability Office (GAO), the Commerce Department’s Office of Inspector General (OIG), and the Bureau’s own Census Scientific Advisory Committee—repeatedly warned that the Replan’s revised timeline posed significant risks to the accuracy, completeness, and reliability of the 2020 Census.

Defs. App. 12a-15a (collecting reports). For example, in a report entitled “Recent Decision to Compress Census Timeframes Poses Additional Risks to an Accurate Count” GAO stated that implementation of untested procedures could “undermine the overall quality of the count.” Defs. App. 13a (quoting report). After an investigation, OIG concluded that the “streamlined data processing under the accelerated plan poses a myriad of risks to accuracy and completeness.” Pls. App. 84a. And the Census Scientific Advisory Committee explained that “[w]hen 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.” Defs. App. 14a (quoting report).

6. On August 18, 2020, Plaintiffs—local governments with high concentrations of hard-to-count residents, non-profit organizations representing hard-to-count populations, and individuals—filed suit, challenging the Replan as a violation of the Administrative Procedure Act and the Enumeration Clause. Because data collection was scheduled to end on September 30, the parties stipulated to an accelerated briefing schedule that would culminate in a preliminary injunction hearing on September 17. Defs. App. 15a-16a. Plaintiffs filed their motion for a preliminary injunction on August 25. *Id.* at 16a.

a. On August 26, the district court held a case management conference. At the hearing, “Defendants repeatedly denied the existence of an administrative

record” for the Replan. *Id.* (citing Tr. 9:22-24, Dkt. 65). The court instructed Defendants that “[i]f there’s an administrative record, it should be produced.” *Id.* (quoting Tr. 10:12-13, Dkt. 64). To assess how quickly a ruling was needed, the court also ordered Defendants to provide the date upon which the Bureau planned to wind down field operations. Pls. App. 4a-5a.

A week later, Defendants informed the district court they had already begun winding down field operations—nearly a month before September 30 and three weeks after starting NRFU in most of the country. *See* Pls. App. 5a (citing Dkt. 63). This early wind-down would have left the court practically incapable of granting effective relief after the September 17 hearing to which the parties had jointly agreed. With no other options, Plaintiffs immediately moved for a temporary restraining order (TRO). Pls. App. 1a.

At the September 4 TRO hearing, Defendants told the district court that it should review the declaration of Associate Director Fontenot (to be filed later that evening) before ruling. The declaration explained that field operations could start closing region-by-region on September 11 regardless of completion rates; that the Bureau had already started terminating enumerators; and that it would be extremely difficult to restart field operations once they had been shut down. Defs. App. 112a-13a (¶¶ 95-98). After finding “serious questions” on the merits, a likelihood of irreparable harm, and that the equities tipped “sharply” in favor of Plaintiffs, the court granted a 12-day TRO to preserve the status quo and prevent

Defendants from shutting down field operations before September 17. Dkt. 84 at 2-7.

At this point, Defendants still had not produced the administrative record. Defendants argued that the district court could not require production without first resolving threshold reviewability issues, such as whether there had been final agency action. Dkt. 96 at 8-17. They also argued that it would be too burdensome to produce the complete administrative record in the expedited time frame. Dkt. 126 (Sept. 14, 2020 Tr. 24:1-3). As Defendants had requested, the district court first resolved the threshold reviewability issues, and then ordered a phased production of the administrative record. Defs. App. 17a.

On the day the first phase of the administrative record was due, Defendants announced—twelve hours before the deadline—that they would no longer review additional documents that day and would be able to produce only 72 of the documents required by the district court’s order. Defs. App. 18a. The next day, Defendants informed the court that they would be unable to meet additional production deadlines. *Id.* With the agreement of both parties, the court allowed Defendants to produce a subset of the administrative record (for purposes of the preliminary injunction) comprising those documents previously provided to OIG. *Id.* at 18a-19a.² Because only two days remained before the TRO was set to expire,

² These documents had already been produced to OIG for its investigation, in response to a request for all documents “[d]iscussing or referring in any manner to the decision to accelerate the 2020 Census” and “[d]etailing the reasons for the decision to accelerate the 2020 Census schedule.” Defs. App. 18a-19a.

the court granted a seven-day extension to allow Defendants time to produce the (limited) administrative record. Pls. App. 1a-18a.

b. On September 22, the district court held the preliminary injunction hearing. Defs. App. 20a. Two days later, the court issued a 78-page decision. *Id.* at 1a-78a. The court rejected Defendants’ threshold arguments, reaffirmed its prior conclusion that the Replan was “final agency action,” and found that Plaintiffs were likely to suffer irreparable harm. The court also held that Plaintiffs were likely to succeed on their APA claim for five independent reasons: Defendants (1) failed to consider important aspects of the problem; (2) offered an explanation counter to the evidence; (3) failed to consider an alternative to the Replan; (4) failed to articulate a satisfactory explanation for the Replan; and (5) failed to consider reliance interests. *Id.* at 47a-74a. Accordingly, the court 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 Defendants from implementing those “two deadlines.” Defs. App. 78a. The court declined to grant a stay pending appeal. *Id.* at 120a.

7. On September 25, Defendants filed a notice of appeal and moved for an administrative stay and a stay pending appeal in the Ninth Circuit.

a. On September 28—while the motion for an administrative stay was pending and two minutes before a case management conference in the district court—Defendants announced via tweet and a message on the Bureau’s website that data collection would now end on October 5, 2020. *See* Pls. App. 24a. The

announcement did not address Defendants’ prior statements, and Associate Director Fontenot’s sworn declaration, making it “crystal clear” that the Bureau would be “unable” to meet the December 31 deadline if data collection continued past September 30. *See* Pls. App. 116a-21a.³ Nor did it purport to have cured any of the legal defects identified in the district court’s order.

b. On September 30, the court of appeals denied the motion for an administrative stay. It explained that the “status quo would be seriously disrupted by an immediate stay,” which would allow the “process of disbanding thousands of census workers” to resume and leave “the Bureau’s ability to resume field operations . . . in serious doubt.” Defs. App. 124a-25a. The court further reasoned that the Bureau would not be harmed in the absence of a stay because “the record does not demonstrate that the Bureau’s ability to meet [the statutory] deadline is affected by the district court’s injunction.” *Id.* at 126a. Rather, the court explained, “the evidence in the administrative record uniformly show[s] that no matter when field operations end,” the Bureau cannot deliver an accurate count by December 31. *Id.* Judge Bumatay dissented. *Id.* at 131a-53a.

³ A few days later, a three-judge panel in a parallel case ordered Defendants to file a letter addressing “if the Bureau still intends to meet the December 31 statutory deadline” and, if so, “how it plans to accomplish an accurate enumeration given that the post-data processing phase has been shortened further,” contrary to Defendants’ “vigorous[]” arguments in prior declarations and filings that post processing “simply cannot [be] shorten[ed].” Letter Order, *La Unión del Pueblo Entero v. Trump (LUPE)*, No. 19-cv-02710 (D. Md.), Dkt. No. 125 (emphasis omitted). Defendants responded that they intended to “postpone[] the five days of processing needed to implement the Presidential Memorandum” to after December 31, 2020. Declaration of Albert E. Fontenot, Jr. ¶ 4, *LUPE*, Dkt. No. 126-1.

c. On October 1, the district court issued an order clarifying the stay and preliminary injunction. The court explained that the “effect of staying the two Replan deadlines was to reinstate the rule previously in force,” and that rule “was the COVID-19 Plan,” including “the COVID-19 Plan’s deadline of October 31, 2020 for data collection” and the “deadline of April 30, 2021 for reporting total population to the President.” Pls. App. 21a-22a. The court explained further that the injunction’s effect “was to require Defendants to cure the legal defects identified in the Injunction Order if Defendants were to insist on implementing the two Replan deadlines,” and that “[u]ntil those legal defects are cured, the two COVID-19 Plan deadlines remain in force.” *Id.* at 22a. And the court found that Defendants had repeatedly violated the “Injunction Order” by implementing the Replan’s deadlines—with the September 28 tweet being the “most egregious” violation. *Id.* at 23a-24a.

d. On October 7, after briefing and oral argument, the court of appeals denied in part and granted in part Defendants’ motion for a stay pending appeal. The court held that Defendants had not made a “strong showing” that they were “likely to prevail” in establishing that the Replan was not final agency action. Defs. App. 161a-64a. The court also held that Defendants “ha[d] not made a strong showing of likely success” on the merits of the APA claim. *Id.* at 164a-68a. The court explained that the record “d[id] 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.” *Id.* at 165a-68a. The court further explained that, despite “depend[ing] heavily” on “partnerships with private organizations to drive participation in the census,” “[n]owhere d[id] the brief Replan materials consider” the reliance interests of those partners or the public in the COVID-19 Plan’s deadline for self-response. *Id.* at 167a. And the court rejected Defendants’ argument that the Replan was necessarily compelled by the statutory deadline, because the “deadline does not excuse the failure to address at all other relevant considerations, such as accuracy and reliance.” *Id.* at 164a-68a (emphasis omitted).

The court of appeals denied the stay as to the October 31 deadline for data collection. “[T]he balance of hardships,” the court reasoned, “decidedly favors the Plaintiffs, who make a strong showing that they w[ould] suffer irreparable harm if a stay of the injunction [were] granted.” Defs. App. 170a. Plaintiffs’ anticipated injuries, the court continued, outweighed Defendants’ allegations of irreparable harm—particularly given the “great likelihood” that Defendants “would be unable to meet th[e] deadline under any conditions” based on “the wealth of evidence in the record.” *Id.* at 169a-70a.

As to the December 31 deadline, the court of appeals recognized that “both parties aver” that “data processing cannot be completed by December 31 as a practical matter,” but believed that did “not mean that missing the putative statutory deadline should be required by a court.” Defs. App. 173a. Because the deadline was “nearly three months away,” and because of “[s]erious separation of

powers concerns,” the court exercised “judicial restraint” and stayed the injunction in so far as it “enjoined the Defendants from attempting to meet the December 31 date.” *Id.* at 172a-74a.

ARGUMENT

Defendants bear a “heavy burden” to justify the “extraordinary” relief they seek. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). Where, as here, “a district court judgment is reviewable by a court of appeals that has denied a motion for a stay,” that burden is “especially heavy.” *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (citation omitted); see *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1312 (1985) (Rehnquist, J., in chambers) (“[A] stay application to a Circuit Justice on a matter before a court of appeals is rarely granted.” (citation omitted)). It is only the “rare and exceptional case[] in which a stay pending appeal is warranted.” *Fargo Women’s Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O’Connor, J., concurring in denial of stay application).

Defendants must show “(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Even if all of those conditions are met, Defendants must further show that the “balance [of] the equities” and “relative harms to the applicant and to the respondent” favor granting a stay. *Id.*; see *Barnes v. E-Sys., Inc. Grp.*

Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers). Defendants cannot satisfy their heavy burden.

A. Defendants fail to demonstrate any harm from the now partially stayed injunction

Defendants cannot demonstrate harm—irreparable or otherwise—from having to conduct field operations for the 2020 Census on the same timeline (until October 31) that the Bureau itself adopted in the COVID-19 Plan. That is reason enough to deny. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) (“An applicant’s likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay.”); *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers) (stay should “clearly” be denied “[u]nless the applicants will suffer irreparable injury”).

1. Defendants’ sole claim of harm is that the Bureau will be unable to complete its data-processing work before December 31. Stay App. 35-37. But any stay granted by this Court will do nothing to remedy that “harm.” Defendants could not then, and certainly cannot now, produce an accurate and complete census by the statutory deadline.

As an initial matter, the district court’s order did not cause the asserted harm. “[T]he evidence in the administrative record uniformly showed that no matter when field operations end . . . the Bureau w[ould] be unable to deliver an accurate census by December 31, 2020.” Defs. App. 126a; *see id.* at 169a-70a. The “President, Department of Commerce officials, Bureau officials, and outside analysis from [OIG],

the Census Scientific Advisory Committee, and [GAO] 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.” *Id.* at 169a (emphasis added); see Pls. App. 111a-22a (collecting statements).

But even if the Court believed that, in the four or five days the Bureau took to throw together the Replan, it somehow made the impossible possible, Defendants have made clear—repeatedly, recently, unequivocally, and under oath—that they cannot meet the statutory deadline even if they end field operations *today*. Associate Director Fontenot “swore under penalty of perjury that the Census Bureau could not meet the December 31, 2020 statutory deadline if data collection were to extend past September 30, 2020.” Pls. App. 30a; see Defs. App. 113a (¶ 100); Declaration of Albert E. Fontenot, Jr. ¶ 107, *La Union del Pueblo Entero v. Trump (LUPE)*, No. 19-02710 (D. Md.), Dkt. 117-1. And Defendants’ counsel “emphasize[d]” to the district court that “extending the timeline of the count past September 30th would make it impossible for the Bureau to comply with Section 141’s statutory deadline.” Dkt. 98 (Sept. 8, 2020 Tr. 9:6-9). The reason: “the post processing deadlines for the Replan Schedule are tight, and extending the data collection deadline would, of necessity, cause the Census Bureau to fail to be able to process the response data in time to meet its statutory obligations.” Defs. App. 113a (¶ 100). As Associate Director Fontenot declared under oath, “[w]e simply cannot shorten post processing beyond the already shortened 3-month period.” *Id.*

After the district court's order, Defendants suddenly changed their position and came up with a *new* drop-dead date to end field operations: October 5. But Defendants were just as unequivocal that they could not stay in the field a single day past October 5 and still meet the statutory deadline. On September 28, the Secretary asked top Bureau officials the following: "I would like to make sure that I understood correctly that your team's opinion is that if we stay in the field beyond October 5, we would not be able to meet the statutory deadline of December 31." Pls. App. 109a-10a. As Defendants told this Court on October 2, Deputy Director Jarmin's answer was "that the Bureau must 'finish field work on 10/5 if we are to have enough time (assuming all goes well) to finish the processing of the resident population, federally affiliated overseas and, if requested, unlawful aliens in ICE Detention Centers by 12/31 [pursuant to the Presidential Memorandum].'" Appellants' Supp. Br. 4-5, *Trump v. New York*, No. 20-366 (citation omitted). Defendants similarly told the district court that the Bureau "need[s] to conclude field operations by October 5 in order to keep open the possibility of meeting the deadline Congress set for reporting census figures to the President." Dkt. 284 at 4. And Associate Director Fontenot again swore under oath that the Bureau could meet the statutory deadline only if "the California injunction is stayed by the Ninth Circuit or the Supreme Court *and* the Census Bureau is able to complete field operations by October 5." Declaration of Albert E. Fontenot, Jr. ¶ 8, *LUPE*, No. 8:19-cv-2710 (D. Md.), Dkt. 126-1 (emphasis added).

Defendants’ October 7 stay application does not disavow those prior statements. To the contrary, it reaffirms that “the Bureau’s most recent calculations were that field operations would need to end on October 5 to preserve the Secretary’s ability to meet the statutory deadline.” Stay App. 21. October 5, of course, has come and gone. So Defendants change position again, and claim that it is “impossible to predict with certainty precisely when the drop-dead date has passed.” *Id.* at 36. But they never once suggest—let alone produce evidence in support of—any new “drop-dead” date that would allow them to meet the statutory deadline. Nor do they explain why this Court should credit Defendants’ constantly shifting positions. Because Defendants never could meet the statutory deadline—and they certainly cannot do so now—a stay will do nothing to alleviate the only harm they assert.

2. Defendants’ inability to meet the statutory deadline is also not the sort of harm that could justify a stay. Defendants rely on the principle that “[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” Stay App. 36 (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). But the district court did not enjoin Defendants from “effectuating” the Census Act. The court held that Defendants must consider their countervailing constitutional and statutory duty to conduct a true and accurate enumeration in deciding how to respond to the Act’s deadline and in light of the massive disruptions caused by the pandemic. Agencies should of course strive to meet statutory deadlines, but where other statutory and constitutional commands preclude them from doing so, that is not irreparable harm.

That is particularly true now: The court of appeals’ decision stayed the only portion of the district court’s order that even arguably precluded them from meeting that deadline. Defs. App. 172a-74a.

3. Defendants also briefly suggest (at 23) that the “longer the court’s order remains in effect, the more it could interfere with” “significant actions” “dealing” with “redistricting.” But Defendants have made clear that their push to meet the December 31 deadline comes at the expense of meeting their *next* statutory deadline: the requirement to produce redistricting numbers by April 1, 2021. *See* 13 U.S.C. § 141(c). As the district court explained, “[a]mong the[] impacts [of the Replan] is possible harm to a different statutory deadline—the deadline for the Secretary’s report of redistricting data to the states.” Defs. App. 56a. That is because the Bureau is separating, for the first time, the apportionment process from the redistricting process. Before the Replan, Bureau officials warned that “the downstream effect of separating apportionment and redistricting processing activities could not be assessed” and would “result[] in additional risk to the delivery of the redistricting products.” Defs. App. 55a (quoting Dkt. 199-4 at DOC_9496); *see also* Dkt. 199-2 at DOC_8743 (“[T]he [Replan] does not address redistricting”); *id.* at DOC_8742 (“[T]he [Replan] itself specifically omits any consideration of redistricting data processing”). That Defendants have no plan as to how to meet the redistricting

deadline raises questions about their stated commitment to meet statutory deadlines at all costs. *See, e.g.*, Defs. App. 55a-56a; Dkt. 199-2 at DOC_8742-43.⁴

4. Finally, Defendants’ attempt to shift blame onto the district court and the court of appeals for delays in this litigation is shockingly misguided. Stay App. 39. The district court initially issued its 12-day TRO because Defendants revealed (on September 2) that they had already started the irreparable steps of winding down field operations and terminating employees—in the midst of litigation and notwithstanding the stipulated schedule the parties had agreed to. Dkt. 84 at 2, 6-7. The court was then forced to extend the TRO by seven days because Defendants delayed the proceedings by refusing to produce any administrative record in an APA case and then defying a court order to produce even a partial record by the court’s deadline. *Id.*

Far from engaging in “quasi-adversarial discovery” (Stay App. 14), the court ultimately permitted Defendants to produce only a subset of the administrative record—documents they had already produced to OIG—to mitigate their burden and allow a timely decision. Defs. App. 14a-15a. And throughout the proceedings, the district court issued every order within 24-48 hours. As for the court of appeals, the

⁴ Any redistricting concerns are also misplaced. More than half of the States with relevant 2021 deadlines filed an amicus brief in support of Plaintiffs in the district court, urging that the count be extended so that they can redistrict using accurate data. Dkt. 58. Of the remaining states, only one (Maine) has a deadline that falls between the statutory deadline for the delivery of redistricting data (April 1) and the COVID-19 Plan’s deadline for the same (July 31). *See* Brennan Center for Justice, 50 State Guide to Citations (2019), <https://www.brennancenter.org/sites/default/files/legal-work/2019%2050%20State%20Guide%20Citations.pdf>.

administrative stay was decided within 48 hours of Plaintiffs’ opposition, and the stay pending appeal was decided within 48 hours of oral argument—which was held the next business day after Defendants’ Saturday reply. Any delay here has been entirely of Defendants’ own making.⁵

B. The public interest and balance of equities tip sharply in favor of Plaintiffs

In marked contrast to the lack of harm to Defendants, Plaintiffs and the public will suffer irreparable harm if a stay is granted. Defs. App. 170a. As the court of appeals explained, hundreds of “[t]housands of census workers currently performing field work will be terminated, and restarting these field operations and data-collection efforts . . . would be difficult if not impossible.” *Id.* at 125a. And as the district court explained, “[o]nce field operations are terminated, they are difficult to resume; and once data processing begins, no more data can be added for processing.” Pls. App. 30a-31a. Associate Director Fontenot said the same. Defs. App. 96a-97a, 113a (¶¶ 67-68, 98). Granting a stay will end the count for the 2020 Census, will give Defendants everything they are asking for on the merits, and will effectively moot the pending appeal.

1. Until their reply brief in the court of appeals, Defendants never disputed any of this. But Defendants now claim, in conclusory fashion and without any

⁵ Defendants’ suggestion that the preliminary injunction bars them “from engaging in any contingency planning to satisfy the statutory deadline in the event that the injunction is stayed or vacated on appeal” is just wrong. Stay App. 37 (emphasis omitted). Defendants have always been free to engage in contingency planning. Immediately shutting down the 2020 Census on October 5 when the “contingency” (a stay pending appeal) has not come to pass is not that.

support, that the Bureau could simply “reopen field operations” and “redo post processing” if Plaintiffs prevail. Stay App. 40. Defendants do not reconcile that possibility with their prior statements, the declarations of Associate Director Fontenot, or their suggestion that any delay past December 31 would be inherently harmful. Nor do they explain how the Bureau could somehow rehire the more than 200,000 enumerators it plans to fire, restart the count, and redo all of the data processing after the appeal is resolved months from now. Defendants’ position, apparently, is that Plaintiffs suffer no irreparable harm because the Bureau could essentially redo the 2020 Census in 2021. That is not credible.

2. Defendants’ primary argument—best summarized as “no harm, no foul”—fares no better. Relying on new evidence that was not before the district court, Defendants argue that there will be no harm from stopping the count now because 46 States are “already” over the “99% [response] rate.” Stay App. 6. Defendants will surely seek to update those numbers further, should they file a reply. But the argument is fundamentally flawed for several reasons.

First, the response rate only goes to show why the district court’s injunction was needed in the first place. Defendants do not dispute that the Bureau’s own standard of accuracy for the 2020 Census was “at least 99%” completion “in every state.” Defs. App. 11a; *see id.* at 170a n.3. But as the district court noted in its September 24 order, the figures at that time showed that the Bureau “had resolved 99% of housing units in *only four states*.” *Id.* at 15a (emphasis added). That means that 46 out of 50 states in the nation (plus the District of Columbia) were nowhere

close to being adequately counted, one week before the September 30 field operation end date. On September 30—the date field operations would have ended but for the district court’s injunction, and the date by which Associate Director Fontenot promised the Bureau would reach 99% completion in every State (*id.* at 96a (¶ 65))—16 States and the District of Columbia were still under 99% and seven States were under 98%. See U.S. Census Bureau, *2020 Census Housing Unit Enumeration Progress by State* (Oct. 1, 2020 report date).⁶ And in the October 5 report—the latest “drop-dead” date proposed by the Bureau—seven States were still below 99%, with three below 98%. See U.S. Census Bureau, *2020 Census Housing Unit Enumeration Progress by State* (Oct. 5, 2020 report date).⁷ This march, whereby millions of Americans continue to be counted only because of the injunction issued and sustained by the courts to date, remains ongoing. Every day has mattered. Every day still matters.

Second, the Bureau does not deem the count in any given State fully complete at 99%, such that it simply stops counting. Not a single declarant has ever said that field operations are no longer needed after a 99% target is reached (either for the U.S. as a whole, or per State). Nor could they. In 2010, the Bureau continued NRFU operations for another *month* after reaching the 99% threshold. See U.S. Census Bureau, *2010 Census Nonresponse Followup Operations Assessment Report* (Apr. 23,

⁶ <https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-10-01.pdf>.

⁷ <https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-10-05.pdf>.

2012), at 47.⁸ And the final count exceeded 99% in every state by a significant margin. Dkt. 198-9 at DOC_6529-30. Similarly, under the COVID-19 Plan, “close out” was not to begin until “*100% completion* or on October 24,” and if completion at that point was not “acceptable,” the “operation” could “be extended.” Dkt. 295-8 at DOC_15853 (emphasis added).

There are good reasons for that. In a nation of more than 300 million individuals, and more than 100 million separate households, a 1% differential is *millions* of people. And statewide metrics do not speak to the enumeration rate within States, especially in traditionally hard-to-count areas. Defendants do not publish this information, but the limited data available shows that some hard-to-count areas (such as the tribal area of Window Rock, Arizona) are 20 or 25% below targets. *See* Dkt. 233-2 at 2; *see also* Dkt. 330-1 at 2-3 (¶¶ 4-8) (tribal area, with a 14% self-response rate, was told by Bureau officials that it had a “completion percentage” of 101.31%, when it was “actually only 88.01%”). As the Bureau’s September 28 presentation to the Secretary explained, continuing field work past October 5 would help “improve enumeration of lagging sub-state areas, such as tribal areas, rural areas, and hard-to-count communities.” Pls. App. 105a. Failing to do so is what will create the differential undercounts that harm Plaintiffs, whatever the overall completion rates.

⁸ https://www.census.gov/content/dam/Census/library/publications/2012/dec/2010_cpex_190.pdf.

Third, Defendants’ attempt to present new, unverified statistics to this Court for the first time is procedurally improper. The speed at which Defendants claim to have reached the 99% threshold nearly everywhere—in the space of two weeks, in the midst of a pandemic and natural disasters—is breathtaking and raises significant questions. *See* Stay App. 6. Defendants admit (in a footnote) that the “enumerate[ed] rate” is *not* based on the same procedures set forth in the COVID-19 Plan or used in prior censuses. *Id.* at 7-8 n.3. Under the Replan, the Bureau is making broader use of counting methods that adversely impact accuracy—including “fewer follow-up visits for some addresses,” a different approach to the use of “administrative records,” and “more-limited use of random reinterviews as a quality check.” *Id.* But exactly how these changes (and others) may have contributed to the latest “enumerated” rate is left unexplained and unexplored. If Defendants believe they have now made up remarkable ground, such that the injunction which allowed the counting to continue is no longer warranted, they should present the supporting facts to the district court in the first instance. *See Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005) (“[W]e are a court of review, not of first view.”).

Fourth, Defendants’ 99% argument entirely ignores the impact of shortening the self-response deadline. Private households were told, for four months, that they had until October 31 to respond to the census. On October 2, they were told, again, that they have until October 31. Pls. App. 33a. As Defendants recently told this Court, failure to respond to the census is a violation of the law. *See New York*, 139 S. Ct. at 2565-66; 13 U.S.C. § 221(a). That the most recent messaging from the Bureau

came as a result of the district court’s order to ensure compliance does not change the fact that serious reliance interests exist in the October 31 deadline. Nor does it explain or excuse Defendants’ continued failure to acknowledge or consider those interests.

3. Senior Bureau officials, OIG, the Census Scientific Advisory Committee, GAO, and Plaintiffs’ experts (including a former Bureau Director and former Bureau Chief Scientist) all agree: enforcing the Replan will “severely compromise the quality, accuracy, reliability, and indeed the legitimacy of the 2020 Census numbers.” Louis Decl. ¶ 1, Dkt. 36-4; *see* Thompson Decl. ¶¶ 5, 21-27, Dkt. 36-2; Hillygus Decl. ¶¶ 5, 39-42, Dkt. 36-3; *see also* Pls. App. 111a-22a. Jurisdictions with hard-to-count populations, and their residents, will suffer disproportionately from this rushed process—as even a small undercount can result in significant losses in federal funding and political representation. Defs. App. 23a-28a, 170a-71a.

Defendants do not dispute that decade-long losses of federal funding and political representation would constitute irreparable harm. Nor do they dispute that such losses are the natural consequence of an inaccurate census. Defendants just state, without further explanation, that Plaintiffs have not adequately demonstrated that these harms would fall “disproportionate[ly]” on the communities they represent, or would be significant enough to “have an actual impact on apportionment and federal funding.” Stay App. 38. The district court issued detailed factual findings to the contrary. *See* Defs. App. 23a-27a, 74a-75a. And those findings can be rejected only if clearly erroneous. *See New York*, 139 S. Ct. at 2565 (declining to set aside

district court's "findings of fact" as "clearly erroneous"). Defendants do not try to make that showing.

They could not. As this Court recently explained, an undercount of "as little as 2%" can result in States "los[ing] out on federal funds." *Id.* Plaintiffs' expert predicts a more significant undercount than that: the Replan will "likely result in undercounts . . . materially larger than were observed in the 1990 Census," which saw a 4.6% undercount of the Black population and a 5% undercount of the Hispanic population. Thompson Decl. ¶ 21, Dkt. 36-2. Plaintiffs submitted detailed declarations explaining how undercounts among hard-to-count communities will translate into lost funding and loss of representation in their communities. *See* Defs. App. 24a-25a (discussing declarations); Dkt. 130 at 4-6 (detailing injuries and declarations). The district court correctly found this record more than sufficient.

4. *Klutznick v. Carey*, 449 U.S. 1068 (1980), does not help Defendants either. Stay App. 38. The Second Circuit in that case had found "nothing sacred in the due date of the [census] filing, especially when the work of the Census Bureau, at least as preliminarily demonstrated below, is incomplete." *Carey v. Klutznick*, 637 F.2d 834, 837-38 (2d Cir. 1980) (per curiam). Relying on that principle, the court upheld an injunction that could have caused the Bureau to miss its deadline. Although this Court stayed the injunction pending appeal, the order does not explain why. According to the dissent, the bulk of the government's briefing was "devoted to arguing that the respondents [we]re unlikely to succeed on the merits" of their challenge. *Klutznick*, 449 U.S. at 1070 (Marshall, J., dissenting). And when the

Second Circuit later vacated the injunction after remand, it did so on unrelated merits grounds. *Carey v. Klutznick*, 653 F.2d 732, 737-40 (2d Cir. 1981), *cert. denied*, 455 U.S. 999 (1982). Neither this Court nor the Second Circuit ever suggested that the relief granted was *per se* inappropriate or that the statutory deadline in the Census Act was in fact “sacred.”

C. Defendants fail to show that this Court would likely grant certiorari and vacate the now partially stayed injunction

Defendants also cannot meet their burden to show that the Court would likely grant certiorari and vacate the now partially stayed injunction. As an initial matter, Defendants do not assert most of the threshold arguments they rested on below. *See* Defs. App. 21a-29a (rejecting those arguments). Nor do Defendants meaningfully defend the quality of their decisionmaking under the APA.

Defendants instead argue that the district court was wrong for three reasons: (1) the Replan is not subject to APA review; (2) Defendants could not have acted in an arbitrary and capricious manner because of the statutory deadline; and (3) the district court had no authority to order Defendants to violate the statutory deadline. Whatever the merit of that third argument, the partial stay granted by the court of appeals resolves it. Defs. App. 172a-74a. The other arguments fail too.

1. The district court held that the Replan is final agency action reviewable by a court, and the court of appeals held that Defendants failed to make a strong showing to the contrary. Defs. App. 32a-42a, 162a-63a. Those courts were correct.

a. Defendants first argue (at 31-32) that the Replan is committed to agency discretion by law under 5 U.S.C. § 701(a)(2), because there is “no enforceable or

judicially manageable standard of [census] accuracy.” But as the district court recognized, “[t]he APA creates a ‘strong presumption favoring judicial review of administrative action,’” and the exception to that presumption has been read “quite narrowly” as limited to “certain categories of administrative decisions.” Defs. App. 41a-42a (citations omitted). “The taking of the census is not one of those areas traditionally committed to agency discretion.” *New York*, 139 S. Ct. at 2568. Rather, the Census Act, as this Court recently explained, provides meaningful standards—including, specifically, the requirement that Defendants “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 the judgment)). Defendants do not address that contrary holding.

b. Defendants next argue (at 32-35) that the Replan is not sufficiently “discrete” or “final” “[f]or the same reasons.” Both arguments fail.

This is not a “broad programmatic attack” on the internal operations of the Bureau, as Defendants claim. Defs. App. 30a (citation omitted); *cf. NAACP v. Bureau of the Census*, 945 F.3d 183 (4th Cir. 2019). As the court of appeals explained, “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.” Defs. App. 162a (citation omitted). “[T]he Bureau treated the Replan as a single proposal, presented ‘to the Secretary in a single slide deck’ and announced in a single press release.” *Id.* at 163a; *see id.* at 11a-12a, 30a-

32a. And Plaintiffs’ challenge does not require “‘hands-on’ management” by the district court. *Cf. NAACP*, 945 F.3d at 191. After finding that the Replan failed APA review, the district court granted the traditional remedy for an APA violation: staying the unlawful action (the Replan), which had “[t]he effect” of “reinstat[ing] the rule previously in force” (the COVID-19 Plan). Defs. App. 171a-72a (citation omitted); *see Dep’t of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 & n.7 (2020) (affirming judgment vacating rescission and restoring Deferred Action for Childhood Arrivals (DACA) program).

And contrary to Defendants’ new characterization, the Replan’s September 30 deadline was never a mere “target date.” Stay App. 33. On and after August 3, the Bureau informed the public and its partners that the end date for self-response and NRFU *would* be September 30. *See, e.g.*, Defs. App. 117a (“We *will* end field data collection by September 30, 2020. Self-response options *will* also close on that date” (emphasis added)); Pls. App. 22a (quoting Bureau’s website as stating that the “2020 Census *will* conclude data collection on September 30, 2020” (emphasis added)). The Bureau never wavered from that position until days ago, after the district court’s stay and injunction had already issued. And Defendants’ attempt to modify this deadline (to circumvent the district court’s injunction) does not somehow retroactively make it less final. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (“The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.”).

2. The district court also correctly held that the Replan cannot stand under the APA—five times over. Defs. App. 44a-74a. The court of appeals agreed. *Id.* at 164a-68a. Defendants did not then, and do not now, meaningfully quarrel with any of that. As the court of appeals explained, Defendants’ “only argument that it has met the APA’s requirements is its mantra that the Replan was necessary to meet the statutory deadline.” *Id.* at 167a. But for that “barebones, one-note argument” (*id.* at 164a) to work, one of two things must be true. Either (a) Defendants had no legal duty to consider accuracy when adopting the Replan, or (b) they did have such a duty, and they satisfied it. Neither withstands scrutiny.

a. Defendants never come right out and say that they had no constitutional or statutory duty to consider accuracy. Nor could they. The Enumeration Clause evinces a “strong constitutional interest in accuracy.” *Utah v. Evans*, 536 U.S. 452, 478 (2002). And 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.” *New York*, 139 S. Ct. at 2568-69 (citation omitted); *cf.* 1998 Appropriations Act, Pub. L. No. 105-119, § 209(a)(6), 111 Stat. 2440, 2480-81 (1997) (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.”); Defs. App. 164a-66a. The APA requires the agency to consider “important aspect[s]” of the problem before it. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And constitutional and statutory requirements are plainly important aspects

of a decision. Defs. App. 47a; *see Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020) (“If the Departments 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.”).

Defendants instead appear to suggest that because Congress has not specified a “particular level of accuracy,” but has “expressly prescribed when the census must be completed,” the deadline must always trump accuracy. Stay App. 24. But they do not explain how conducting an accurate count—the entire constitutional purpose of the census—is less important than a reporting deadline that is not constitutionally required. If the Constitution requires an agency to build a house, and Congress provides that the house shall be complete by December 31, no one would say the agency need not even consider the option of performing the constitutionally required task and delivering a structurally sound house a little late, rather than delivering a pile of bricks by the statutory deadline.

And that is key: The district court never adopted or applied its own standard of accuracy. Defs. App. 47a-59a. It simply held that the agency charged with conducting the census must at a minimum meaningfully *consider* accuracy when making the decision to cut the timeline in half during a global pandemic. *See id.* at 48a. As the court of appeals explained, the “worthy aspiration to meet th[e]

[December 31] deadline does not excuse the failure to address *at all* other relevant considerations, such as accuracy and reliance.” *Id.* at 167a-68a.

As Defendants know, agencies miss statutory deadlines for far less weighty reasons than the need to complete the critically important and constitutionally mandated work of a decennial census during a global pandemic. The United States has argued, and this Court has agreed, that an agency still has authority to act after a statutory deadline has passed and that later action will not necessarily be invalidated. *See Nielsen v. Preap*, 139 S. Ct. 954, 967 (2019) (plurality opinion); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 171-72 (2003); Brief for Petitioner at 27-28, *Nielsen v. Preap*, 139 S. Ct. 954 (2019) (No. 16-1363), 2018 WL 2554770; Defs. App. 64a-67a (citing cases). That the agencies in each of these cases necessarily considered the possibility of missing the deadline, and ultimately decided to do so, shows why Defendants could not simply blind themselves to that alternative.

This Court’s decision in *Regents* further confirms that an agency’s firmly held belief that an action is unlawful (even if correct) does not give it license to violate the APA. 140 S. Ct. at 1910-15. Although the Attorney General had concluded that DACA was illegal and ordered the Secretary to rescind the program, this Court declined to rule on whether that determination of illegality was correct because, even if it was, the Secretary had still violated the APA by failing to consider important aspects of the decision and possible alternatives to complete rescission. *Id.* And although the agency was entitled to ultimately “conclude that reliance interests in benefits that it view[ed] as unlawful [were] entitled to no or diminished weight,”

“[m]aking that difficult decision was the agency’s job” in the first instance. *Id.* at 1914. That reasoning applies with even greater force here, where there are competing constitutional and statutory requirements and no contemporaneous statement declaring the prior program (the COVID-19 Plan schedule) unlawful.

If that were not enough to make clear that Defendants had (at least) a duty to *consider* significant accuracy concerns, history provides additional comfort. This would not be the first time the U.S. government missed statutorily imposed reporting deadlines for the census. It did so in 1810, 1820, 1830, and 1840. Defs. App. 67a (citations omitted). Defendants note that, in each instance, “Congress itself retroactively modified the deadlines.” Stay App. 27. But that is precisely the point: Congress changed the deadlines *after* they had been missed. More recent history provides similar examples. In the 1940 and 1950 Censuses, Congress provided only two weeks for the enumeration of large cities and thirty days for the remainder. *See* Pub. L. No. 71-13, § 6, 46 Stat. 21, 23 (1929). When those deadlines proved impossible to meet, enumeration continued. *See* Bureau of the Census, *The 1950 Censuses—How They Were Taken*, at 19 (1955)⁹; *17,000,000 Still Unlisted as Census Taking Lags*, N.Y. Times (Apr. 24, 1940).¹⁰ Congress never extended the deadlines; the Bureau apparently decided that completing an adequate count was more important.

⁹ <http://www2.census.gov/prod2/decennial/documents/1950/proceduralHistory/1950proceduralhistory.zip>

¹⁰ <https://timesmachine.nytimes.com/timesmachine/1940/04/24/92949988.html?pageNumber=1> (behind paywall).

b. The administrative record makes it abundantly clear that Defendants did not sufficiently consider accuracy, serious reliance interests, or anything else—and that the explanation given was counter to the facts.

“The record of the agency’s decisionmaking during the few days that the Replan was being developed does not show *any* response, let alone a ‘satisfactory explanation,’ to the numerous statements by Bureau officials” that the Replan “would jeopardize the accuracy of the census.” Defs. App. 165a-66a. And “Defendants’ explanation—that the Replan was adopted in order to meet the December 31, 2020 deadline because Congress failed to act—*r[an] counter to the facts.*” *Id.* at 63a (emphasis added). As the district court explained, by late July, “not only” could the Bureau “not meet the statutory deadline,” it was also actively being “pressure[d] [by] the Commerce Department to cease seeking an extension of th[at] deadline.” *Id.* And in fact, that is exactly what happened. *See id.* at 158a (“[T]he Administration switched gears, requesting, instead of an extension, additional funding to complete a ‘timely’ census.”); *id.* at 63a (citing recording of the House Oversight and Reform Hearing on July 29, at which Director Dillingham no longer “support[ed] extending the statutory deadline”).

There is also “a striking lack of evidence in the record showing that the Bureau had considered the extensive reliance interest[s] on the COVID-19 Plan.” Defs. App. 166a. Defendants did not consider the effects on its partners (including several Plaintiffs here) “who relied on the October 31 deadline” and expended significant resources “publiciz[ing] it to their communities.” *Id.* at 71a. Nor did they consider

“the reliance interest of the public in following the October 31 deadline for self-reporting.” *Id.* at 167a.

Defendants spend a single paragraph arguing otherwise. Stay App. 28. The only contemporaneous evidence they cite is a sentence from the August 3 press release, stating that the Bureau was working to “improve the speed of our count without sacrificing completeness.” *Id.* (quoting Defs. App. 117a-18a). But as the court of appeals explained, that “unsupported attestation that the count would be accurate,” in the “barebones press release announcing the Replan,” is not an answer to the “chorus” of statements in the record—including in the August 3 slide deck that presented the Replan to the Secretary—expressly warning of the grave danger of a shortened timeline. Defs. App. 126a-27a, 166a; *supra* 10-12; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency must “provide a more detailed justification . . . when . . . its new policy rests upon factual findings that contradict those which underlay its prior policy”). Nor can a post-hoc and vague assertion that the Bureau selected “time-saving measure[s]” that would allow it to “meet the statutory deadline without compromising quality to an *undue degree*” fill that gap. Stay App. 28 (emphasis added) (quoting Defs. App. 107a); *see also id.* at 162a; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).¹¹

¹¹ Defendants also rely on Associate Director Fontenot’s litigation declaration to suggest that the “new schedule took advantage” of “software” that purportedly “maximized enumerator effectiveness.” Stay App. 13. That was not an innovation of the Replan; it was part of the 2018 Operational Plan. *See* Defs. App. 110 (¶ 88); Pls. App. 99a (¶ 17). And nothing in the administrative record explained how incentivizing enumerators to work faster (Stay App. 13) was somehow going to make

Defendants next suggest (at 28-31) that all of the concerns about accuracy simply “failed to anticipate changes made under the Replan Schedule.” They concede (as they must) that “senior Bureau employees expressed significant concerns about the year-end deadline in June and July,” but claim these concerns evaporated after spending four or five days coming up with a Replan that slashed the schedule in half. Stay App. 30. That is directly contrary to the record. As the compilation of key record cites in Plaintiffs’ Appendix clearly shows, high-level Bureau officials sounded the alarm throughout the relevant time period—including while presenting the Replan to the Secretary on August 3. See Pls. App. 111a-16a; Defs. App. 57a-61a.

Nor is this an example of the Secretary simply “overrul[ing] the views of some of his subordinates” after weighing relevant considerations. Stay App. 30 (citation omitted). The administrative record here “stands in stark contrast to Secretary Ross’s memorandum on adding a citizenship question to the 2020 Census.” Defs. App. 70a. There, the Secretary “outlined the four options available to him and the benefits and drawbacks of each option,” “considered all relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision.” *Id.* (quoting *New York*, 139 S. Ct. at 2570). Here, there is no indication the Secretary considered,

up for the 38% shortfall in staffing caused by a “debilitating” quit rate and “awful deploy rate”—not to mention one-third less time to complete the count. Defs. App. 5a-6a, 10a (quoting Pls. App. 34a). The proposed incentive awards had also never been tested and, as OIG recently reported, posed a serious “risk[] [of] incentivizing production at the expense of accuracy.” Office of the Inspector General, *2020 Census Alert: The Census Bureau’s Program to Provide Awards to Nonresponse Followup Enumerators and Field Supervisors May Require Additional Quality Assurance of Cases to Ensure Data Accuracy* at 5 (Sept. 28, 2020), <https://www.oig.doc.gov/OIGPublications/OIG-20-052-M.pdf>.

weighed, or overruled anything. On July 29, he “directed” the Bureau to come up with a plan to report apportionment figures to the President by December 31 and, on August 3, he approved the Replan. Defs. App. 107a (¶ 81). Nothing more.

Which leaves Defendants asking this Court to rely on “enumeration rates” and statements that *postdate* the agency’s decision to conclude that they engaged in reasoned decisionmaking when adopting the Replan. This attempt to “cut[] corners” should be rejected too. *Regents*, 140 S. Ct. at 1909-10. Judicial review of agency action “is limited to ‘the grounds that the agency invoked when it took the action.’” *Id.* at 1907 (citation omitted). Defendants cannot rescue the Replan by arguing that it all worked out in the end, any more than they can rely on the post-hoc rationales of counsel and Bureau officials to create a record that does not exist. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”); *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943). At any rate, and as already explained, the enumeration rates only prove out the many decisionmaking failures. *Supra* 28-32.

3. In the end, Defendants direct most of their energy to attacking the district court’s remedy. In their view, the court had no authority to order them to “violate the governing statute.” Stay App. 5 (emphasis omitted); *id.* at 20, 21. That is not what the district court did. *See* Pls. App. 22a (enjoining Defendants from enforcing the “two Replan deadlines” until the legal defects identified were cured). But more importantly for current purposes, the court of appeals has now stayed that portion of

the district court's injunction. As it stands now, Defendants are free to try to comply with the statutory deadline.¹²

Defendants argue that, “as a factual matter,” they will be unable to do so. Stay App. 2. But Defendants will miss the deadline regardless of the only injunction that remains in place. Defendants stated, repeatedly and unequivocally, that they could not meet the December 31 deadline unless they were out of the field by September 30 or, more recently, October 5. Their stay application does not address those prior statements, except to essentially reaffirm the October 5 “drop-dead” date. They make no attempt to show why it is not already too late. And any belated attorney argument on this point could not overcome the wealth of evidence and sworn statements from Bureau officials stating that continuing field operations will not impact their ability (or inability) to process the data by December 31. *See* Pls. App. 111a-22a.

The critical point, though, is that “missing the putative statutory deadline” is not “required by [any] court” order. Defs. App. 173a. And even if the court of appeals’ decision (counterfactually) made it harder for Defendants to comply, that would not provide a reason to stay a perfectly lawful injunction. If Congress instructs an agency to accomplish a particular task by a deadline, but a court finds that the steps the agency took to accomplish that task violated governing law (the APA), surely the

¹² There is nothing “internally inconsistent” about the partial stay. Stay App. 22. The court of appeals held that Defendants had likely violated the APA in promulgating the Replan, but found “any harm from governmental attempts to meet the December 31 date” to be “likely less irreparable” than shutting down field operations. Defs. App. 172a. Because of “separation of powers” concerns, the court simply exercised “judicial restraint” with respect to the remedy. *Id.* at 173a-74a.

court retains authority to set aside that unlawful agency action—notwithstanding that the agency might, as a practical matter, ultimately miss its deadline due to the vacatur. That is (at most) all that happened here.

CONCLUSION

The Court should deny Defendants' application for an immediate administrative stay and a stay pending appeal to the United States Court of Appeals for the Ninth Circuit and pending further proceedings in this Court.

Dated: October 10, 2020

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PLAINTIFFS' APPENDIX

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United States District Court
Northern District of California

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 EXTENDING TEMPORARY
RESTRAINING ORDER FOR
DEFENDANTS' PARTIAL
PRODUCTION OF THE
ADMINISTRATIVE RECORD**

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 Administrative Procedure Act ("APA").

1 Plaintiffs seek to preliminarily enjoin Defendants from implementing Defendants' August
 2 3, 2020 Replan. The Replan shortens census data collection and processing timelines from the
 3 eight months set forth in the Defendants' April 13, 2020 COVID-19 Plan to four months. The first
 4 approaching Replan deadline is the September 30, 2020 deadline for the end of data collection,
 5 which consists of both self-responses to Census questionnaires and Non-Response Follow Up
 6 ("NRFU") field operations. Under the COVID-19 Plan, data collection would end on October 31,
 7 2020. Plaintiffs claim that the Replan's shortened timelines will unlawfully harm the accuracy of
 8 crucial census data.

9 On September 5, 2020, the Court granted Plaintiffs' motion for a Temporary Restraining
 10 Order ("TRO") in order to preserve the status quo until the September 17, 2020 hearing on
 11 Plaintiffs' motion for stay and preliminary injunction ("preliminary injunction motion"). ECF
 12 No. 84 at 2.

13 On September 10, 2020, the Court ordered Defendants to produce the administrative
 14 record on September 13 and 16, 2020. ECF No. 96. Defendants have failed to comply with that
 15 order. As of today, September 17, 2020, Defendants have failed to produce the administrative
 16 record. Because of Defendants' failure to comply with the Court's Order to Produce the
 17 Administrative Record and the need for the Court to rule on Plaintiffs' preliminary injunction
 18 motion quickly, the parties and the Court agreed that on September 18, 2020 Defendants shall
 19 produce the documents that Defendants produced to the United States Department of Commerce
 20 Office of the Inspector General ("OIG production") regarding the Defendants' decision to adopt
 21 the Replan. ECF No. 132. Defendants have represented that the OIG production includes about
 22 1,800 documents totaling about 15,000 pages. ECF No. 141 at 26:15–16. Defendants have
 23 represented that they may assert the deliberative process, attorney-client, attorney work product,
 24 and White House privileges as to the OIG production. *Id.* at 35:25–36:18.

25 Accordingly, Defendants' September 18, 2020 OIG production has necessitated a
 26 continuance of the preliminary injunction hearing from September 17, 2020 to September 22,

2020 to allow for the following:

- September 18, 2020: Defendants to produce the OIG production and a privilege log
- September 19, 2020: Plaintiffs to file any objections to Defendants' assertions of privilege
- September 20, 2020: Defendants to file responses to Plaintiffs' privilege objections and the parties to file supplemental briefs on the motion for preliminary injunction addressing the OIG production
- September 21, 2020: United States Magistrate Judges to rule on the parties' privilege disputes
- September 22, 2020: Hearing on motion for preliminary injunction

ECF No. 140. The Court understands the urgency of issuing a ruling on the motion for preliminary injunction. To that end, the Court has issued rulings within 24 hours and 48 hours throughout this case thus far. The Court will issue its reasoned decision on the motion for preliminary injunction as soon as possible after the September 22, 2020 hearing. However, because of the complexity of the issues and the fact that 1,800 documents may be produced three days before the hearing, the Court finds good cause to extend the TRO until the Court issues its decision on the preliminary injunction motion or through September 24, 2020, whichever is sooner.

I. PROCEDURAL HISTORY

The procedural history of this case is necessary to understand why there is good cause to extend the TRO. The Court thus recounts the events leading up to the TRO, the issuance of the TRO, and Defendants' subsequent failure to produce the administrative record. In brief, the timeline below is as follows: (1) at first, Defendants denied the existence of an administrative record; (2) Defendants then disclosed that there are documents that were considered by agency decisionmakers at the time of the decision to adopt the Replan and that field operations are already winding down; (3) the Court issued a TRO that expires on September 17, 2020; (4) the Court ordered production of the administrative record; and (5) despite that order, Defendants failed to

1 produce the administrative record. The Court details each event in turn.

2 **A. At First, Defendants Repeatedly Denied the Existence of an Administrative Record.**

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

7 To allow Plaintiffs to effectively challenge the Replan, including the September 30, 2020
8 end of data collection, the parties stipulated to a briefing schedule and hearing date of September
9 17, 2020 on Plaintiffs' motion for stay and preliminary injunction (hereafter, "motion for
10 preliminary injunction"). ECF No. 35. Pursuant to that schedule, Plaintiffs filed a motion for a
11 preliminary injunction on August 25, 2020 based on their claims under the Enumeration Clause
12 and the APA. ECF No. 36.

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

23 **B. Defendants Disclosed That There Are Documents Considered by Agency**
24 **Decisionmakers at the Time the Replan Was Adopted and that Field Operations are**
Already Concluding.

25 To assist the Court in determining by what date a ruling on Plaintiffs' motion for
26 preliminary injunction must be issued, Defendants agreed to file a statement by September 2, 2020

1 as to when the winding down of field operations would begin relative to the September 30, 2020
2 deadline for ending data collection. Defendants filed the following statement:

3 [T]he Census Bureau has already begun taking steps to conclude field operations. Those
4 operations are scheduled to be wound-down throughout September by geographic regions
5 based on response rates within those regions. As will be described in Defendants'
6 forthcoming filing on Friday, September 4, 2020, any order by the Court to extend field
7 operations, regardless of whether those operations in a particular geographic location are
8 scheduled to be wound-down by September 30 or by a date before then, could not be
9 implemented at this point without significant costs and burdens to the Census Bureau.

10 ECF No. 63. Based on Defendants' statement, Plaintiffs moved on September 3, 2020 for a TRO
11 to preserve the status quo for 12 days until the September 17, 2020 preliminary injunction hearing.
12 ECF No. 66. On September 4, 2020, Defendants opposed the motion, ECF No. 74, and the Court
13 held a hearing on the motion. During the hearing, Defendants relied upon a declaration that would
14 be filed later that evening in opposition to Plaintiffs' motion for preliminary injunction. ECF No.
15 81-1. On September 5, 2020, Plaintiffs filed a reply. ECF No. 83.

16 At the September 4, 2020 hearing on the motion for a TRO, Defendants reiterated their
17 position that no administrative record existed, ECF No. 82 at 33:13–15, but disclosed that there
18 were documents considered by agency decisionmakers at the time the Replan was adopted.

19 Defendants stated:

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

24 *Id.* at 33:2–7. That said, Defendants said no administrative record technically existed because “the
25 documents that fed into the operational plans and the operational decisions are internal documents
26 that are subject to the deliberative process privilege.” *Id.* at 32:14–16.

27 Only a few minutes later, however, Defendants retracted their assertion of deliberative
28 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 the 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 the declaration of Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the U.S. Census Bureau. ECF No. 81.

C. The Court Issued a TRO That Expires on the September 17 Hearing Date.

On September 5, 2020, the Court issued a TRO after full briefing and a hearing on the motion. ECF No. 84. The Court made the requisite TRO findings. Specifically, the Court found that the balance of the hardships tipped sharply in Plaintiffs’ favor; that Plaintiffs presented serious questions going to the merits at least as to Plaintiffs’ claims under the APA; that Plaintiffs would likely suffer irreparable harm without a TRO; and that a TRO would further the public interest. ECF No. 84.

The Court also expressly recognized that TROs “serv[e] the[] underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.” *Id.* at 2 (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 439 (1974)). Thus, the Court ordered that the TRO expire after the “September 17, 2020 hearing on Plaintiffs’ PI motion.” *Id.* at 7. The Court incorporates its TRO, ECF No. 84, herein by reference.

D. The Court Ordered Production of the Administrative Record.

On September 8, 2020, three days after issuing the TRO, the Court held a case management conference and inquired into Defendants’ earlier statements about documents considered by the agency decisionmakers when the Replan was adopted. 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

1 “indeed codified.” *Id.* at 21:7. The Replan simply was “not necessarily codified in one particular
2 document.” *Id.* at 21:9–10. Accordingly, Plaintiffs asked the Court to order Defendants to produce
3 the administrative record. *E.g., id.* at 43:16–17. The parties briefed the issue on September 8 and
4 9, 2020. *See* ECF Nos. 88–89, 92.

5 On September 10, 2020 at 2:46 a.m., the Court issued its Order to Produce the
6 Administrative Record. ECF No. 96. In response to Defendants’ claim that the Court needed to
7 address threshold arguments before ordering production, the Court addressed those arguments to
8 avoid any doubt about its authority to compel production. Specifically, the Court addressed
9 whether the Replan presented a political question, whether Plaintiffs have standing to challenge
10 the Replan, whether the Replan constitutes final agency action, and whether the Replan is not
11 committed to agency discretion by law. *Id.* at 9. The Court ruled in Plaintiffs’ favor on each
12 threshold issue. Thus, the Court concluded that the instant case was reviewable. The Court noted,
13 though, that its conclusions in this APA case were necessarily “provisional” and “subject to
14 change after production of Defendants’ administrative record.” *Id.* at 8; *see id.* at 9–17.

15 The Court then explained why the Court could not rely solely on Associate Director
16 Fontenot’s declaration, as Defendants so insisted. *Id.* at 19–21. In short, for APA claims, “the
17 focal point for judicial review should be the administrative record.” *Id.* at 20 (quoting *Camp v.*
18 *Pitts*, 411 U.S. 138, 142 (1973)). Litigation affidavits such as Associate Director Fontenot’s are
19 thus impermissible “post hoc rationalizations” that are “manifestly inappropriate” bases for the
20 Court’s review. *Id.* (first quoting *Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1972); then
21 quoting *Cnty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990) (R.
22 Ginsburg, Thomas, Sentelle, JJ.)).

23 For all those reasons, the Court concluded that Defendants must produce the administrative
24 record. However, because of the competing need to resolve the motion for preliminary injunction
25 as quickly as possible, the Court split the production into three stages. The first two stages (the
26 “September 13 Production” and the “September 16 Production”) would be completed before the
27

1 September 17, 2020 preliminary injunction hearing and would be limited to documents with
2 certain subject matters, date range, and custodians. Specifically, the Court's order for the first two
3 stages of production was:

4 By September 13, 2020, Defendants Bureau Director Steven Dillingham and Secretary of
5 Commerce Wilbur Ross and all of their direct reports/subordinates shall file the following,
6 and a privilege log for any privileged documents: All documents comprising the Replan
7 and its various components for conducting the 2020 Census in a shortened time period,
8 including guidance, directives, and communications regarding same. The date range of the
documents is April 13, 2020 to August 3, 2020. These custodians can limit their review to
documents and materials directly or indirectly considered during these four months.

9 By September 16, 2020, Associate Director Fontenot, his subordinates, and the individuals
10 engaged with Fontenot to consider and prepare the Replan shall file the following, and a
11 privilege log for any privileged documents: All documents and materials directly or
12 indirectly considered when making the decision to replace the COVID-19 Plan with the
13 Replan. The date range of the documents is April 13, 2020 to August 3, 2020. These
custodians can limit their review to documents and materials directly or indirectly
considered during these four months.

14 *Id.* at 21. As for the final stage of production, the Court specified it would consult with the parties
15 on a schedule after the preliminary injunction ruling. *Id.* at 22. Moreover, given these production
16 deadlines, the Court continued the deadline for Plaintiffs' reply in support of their preliminary
17 injunction motion from September 10 to September 15, 2020. The Court incorporates the Order to
18 Produce the Administrative Record, ECF No. 96, herein by reference.

19 **E. Despite the Court's Order, Defendants Failed to Produce the Administrative Record.**

20 On September 13, 2020 at 11:45 a.m. Pacific Time, twelve hours before the production
21 deadline, Defendants filed a notice stating that they had identified more than 8,800 documents as
22 responsive for the September 13 Production, but that Defendants had reviewed only 2,484 of those
23 documents. ECF No. 104 at 2. Defendants stated that "[r]eview of the remaining documents
24 remains ongoing" and that "[b]ecause review of the remaining documents remains ongoing, and
25 due to the volume of documents involved, Defendants will be unable to produce or log any
26 additional documents today." *Id.* Moreover, Defendants did not identify when they would

1 complete the September 13 Production.

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

9 In response to Defendants’ failure to comply with the Court’s order on September 13,
10 2020, Plaintiffs filed the Department of Commerce Inspector General’s August 13, 2020
11 Information Memorandum for Secretary of Commerce Wilbur Ross, which included the following
12 Request for Information:

13 To assist the OIG [“Office of Inspector General”] in its oversight responsibilities, please
14 provide all documents or communications, including but not limited to email, instant
15 messages, and text messages:

- 16 1. Discussing or referring in any manner to the decision to accelerate the 2020
17 Census schedule as described in the August 3, 2020 press release.
- 18 2. Detailing the persons involved, and their respective involvement, in the
19 decision to accelerate the 2020 Census schedule.
- 20 3. Detailing the reasons for the decision to accelerate the 2020 Census
21 schedule.

22 Please provide all requested documents and communications by close of business
23 Monday, August 17, 2020. You may also produce any additional documentation or
24 information you deem relevant to this request for information.

25 ECF No. 111-2 at 5. Plaintiffs also noted that Associate Director Fontenot had averred that the
26 Census Bureau had produced many documents to the OIG. ECF No. 111 at 5 (citing Fontenot
27 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 the 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 that Defendants had already produced documents to the OIG—and that Defendants would fail to produce even a partial administrative record before the September 17, 2020 preliminary injunction hearing—the Court asked Defendants two questions: (1) if Defendants had “complied in whole or in part” with the OIG’s Request for Information; and (2) if Defendants would agree to producing *in camera* “the documents Defendants [had] produced to the Inspector General that would constitute the administrative record or would be included in the administrative record.” ECF No. 119 at 3. The Court further proposed that it “would treat all such documents as privileged and conduct an *in camera* review. If the Court determines that a document is not privileged, Defendants shall have an opportunity to object to the Court’s determination. The Court would not consider in its determination of Plaintiffs’ motion for stay and preliminary injunction any privileged documents.” *Id.*

Defendants’ September 14, 2020 response represented that Defendants had “complied with the OIG request at issue.” ECF No. 122 at 2. As to producing the OIG production in the instant case, Defendants’ September 14, 2020 response, ECF No. 122 at 2, agreed that Defendants “would be willing to provide to the Court all of the documents that the Census Bureau and the Department of Commerce provided to the Department of Commerce Office of Inspector General . . . on the understanding that:”

1. The Court would treat all such documents as privileged and conduct an *in camera* review. If the Court determines that a document is not privileged, Defendants shall have a reasonable opportunity to object to the Court’s determination;
2. The Court would not base its resolution of the preliminary injunction on privileged documents; and
3. The documents that the Court finds to be non-privileged, along with the nonprivileged documents that Defendants have already produced, shall be deemed by the Court to

1 constitute the entire record in this matter. Defendants will not be required to conduct
 2 further document searches, reviews, or productions, or respond to any discovery, to
 develop a record in this case.

3 *Id.*

4 On September 15, 2020, Plaintiffs replied with three major points. First, Plaintiffs stated
 5 that “Defendants must ultimately produce the complete AR [administrative record].” ECF No. 129
 6 at 2. Second, to assess to what extent the OIG production comprises a complete record, Plaintiffs
 7 asked the Court to order Defendants “to file a declaration from a knowledgeable source attesting
 8 to the following:”

9 (1) whether the production included materials from the Secretary and his subordinates, in
 10 addition to the Census Bureau; (2) what time frame was searched for these documents; (3)
 11 what custodians were searched; (4) whether the Department complied fully with the scope
 12 of the production request; (5) the exact date on which the documents were produced to
 OIG; (6) whether any portion of the production to OIG is still outstanding; and (7) how
 many documents were produced.

13 *Id.* Third, Plaintiffs asked that within two days after the production and review of the OIG
 14 production, the parties would have the opportunity to file simultaneous briefs addressing the OIG
 15 production.

16 The Court inquired further into producing the OIG documents at the September 15, 2020
 17 hearing on allegations of Defendants’ potential non-compliance with the TRO. At that hearing,
 18 Defendants at first reiterated that they were “very confident” that they had complied with the OIG
 19 request and that they had completed their production to the OIG. ECF No. 141 at 32:9. However,
 20 Defendants later clarified that Defendants had not completed their production to the OIG and that
 21 Defendants’ production was “substantially complete.” *Id.* at 35:10. “One document” remained
 22 “outstanding that is still undergoing review.” *Id.* at 34:11–14. Moreover, Defendants did not know
 23 the OIG production’s custodians (such as whether the Secretary Ross’s office was included),
 24 timeframe searched, or dates of production. *See, e.g., id.* at 29:14–15 (Defendants: “I, off the top
 25 of my head, do not know all the custodians whose files were pulled for the OIG production.”); *id.*
 26 at 30:6–7 (The Court: “What timeframe was searched for these documents?” Defendants: “So I
 27

1 also don't have the precise timeframe, Your Honor."); *id.* at 31:4–9 (The Court: "So when were
2 they produced?" Defendants: "Over the course of weeks, Your Honor." The Court: "I know. From
3 what date to what date? From when to when?" Defendants: "I don't have the specifics, Your
4 Honor.").

5 Defendants did, however, represent that the OIG production comprised of about 1,800
6 documents totaling about 15,000 pages. *Id.* at 26:15–16. Defendants further stated that they
7 "would anticipate" asserting four different privileges over the OIG production, including
8 deliberative process, attorney-client, attorney work product, and White House privileges. *Id.* at
9 35:25–36:18. In addition, even though Defendants did not have a confirmed method of producing
10 the documents to the Court, Defendants continued to oppose the Court's proposed extension of the
11 TRO. *See id.* at 51:13–25. Without an extension, the TRO would expire on September 17, 2020.

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

22 II. DISCUSSION

23 Plaintiffs argue that "the record demonstrates good cause to extend the TRO for two
24 independent reasons." ECF No. 111 at 4. "*First*, good cause exists because Defendants have not
25 complied with the Court's order requiring production of the [administrative record] in this case."
26 *Id.* "*Second*, good cause exists if the Court needs 'more time' to 'fully . . . consider the parties'

arguments and motions.”” *Id.* (quoting *Costa v. Bazron*, 2020 WL 2410502, at *2 (D.D.C. May 11, 2020)). The Court agrees.

A. Defendants’ Violation of the Court’s Order to Produce the Administrative Record Has Necessitated Delay of the Preliminary Injunction Hearing and Extension of the TRO.

As detailed above, Defendants failed to complete even the first stage of ordered production of the administrative record. Nor did Defendants expect to complete the first production by the September 17, 2020 preliminary injunction hearing date and TRO expiration date. Specifically, on September 13, 2020, Defendants produced only a quarter of the September 13, 2020 Production with more than 12 hours to spare and refused to produce more that day. *See* ECF No. 104 at 2 (stating that Defendants had reviewed only 2,484 of more than 8,800 documents, but that “Defendants will be unable to produce or log any additional documents today.”) Then, at the September 14, 2020 case management conference, Defendants stated that they “d[id] not anticipate” completing the September 13, 2020 Production on September 16, 2020. ECF No. 126 at 22:6.

As for the September 16 Production, Defendants stated that they were still collecting documents for it 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. Much of this asserted “physical impossibility” the Court suspects is of Defendants’ own making. The instant case has been, from its very start on August 18, 2020, a case arising under the APA. In an APA case, it is settled that “review is to be based on the full administrative record that was before the Secretary at the time he made his decision.” *Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1972); *accord, e.g., Camp*, 411 U.S. at 142 (explaining that “[t]he focal point for judicial review [of APA claims] should be the administrative record”); *Creative Non-Violence v. Lujan*, 908 F.2d at 998 (holding that relying on litigation affidavits rather than the administrative record is “manifestly inappropriate”). Defendants’ repeated denial of the existence of an

1 administrative record and failure to make any attempt to collect the administrative record over the
 2 past month have necessitated delay of the preliminary injunction hearing and extension of the
 3 TRO.

4 **B. The Need for Partial Production of the Administrative Record and to Preserve the**
 5 **Status Quo Constitutes “Good Cause” for an Extension of the TRO.**

6 In any event, to expeditiously resolve Plaintiffs’ motion for preliminary injunction, the
 7 Court has ordered Defendants to produce a stipulated partial administrative record that Defendants
 8 already produced (or is about to produce) to the United States Department of Commerce Office of
 9 Inspector General. *See* 5 U.S.C. § 706 (providing that “the court shall review the whole record or
 10 those parts of it cited by a party”); ECF No. 141 at 33:14–22 (Defendants’ agreement), 72:19–21
 11 (Plaintiffs’ agreement); *cf. Walter O. Boswell Mem’l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir.
 12 1984) (holding that “in the circumstances of this case”—an appeal resolved more than a year after
 13 a district court decision that was neither expedited nor interlocutory—the district court should
 14 have considered the “whole record”).¹ Defendants must either produce or add to their privilege log
 15 about 1,800 documents. Defendants have represented that they may assert deliberative due
 16 process, attorney-client, attorney work product, and White House privileges as to these documents.
 17 Plaintiffs must review the production and file any privilege objections. Defendants must respond
 18 to the objections. United States Magistrate Judges must resolve the parties’ privilege disputes. The

19
 20 ¹ As the Court has repeatedly stated and the parties understand, the Court may need to review the
 21 “whole record” after deciding the motion for preliminary injunction. 5 U.S.C. § 705. “The ‘whole’
 22 administrative record [] consists of all documents and materials directly or *indirectly* considered
 23 by agency decision-makers and includes evidence contrary to the agency’s position.” *Thompson v.*
 24 *U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis in original) (quoting *Exxon*
 25 *Corp. v. Department of Energy*, 91 F.R.D. 26, 32 (N.D. Tex. 1981)); *see also IMS, P.C. v. Alvarez*,
 26 129 F.3d 618, 623–624 (D.C. Cir. 1997) (“It is a widely accepted principle of administrative law
 27 that the courts base their review of an agency’s actions on the materials that were before the
 agency at the time its decision was made.”); 33 Wright & Miller’s Federal Practice & Procedure:
 Judicial Review § 8391 & n.8 (2d ed. Apr. 2020 update) (“[T]he ‘record’ for informal proceedings
 [i]s, in essence, including all the relevant material that the decision-maker considered before
 taking action.”).

1 parties must file supplemental briefs on the motion for preliminary injunction addressing the OIG
2 production. The Court must hold a hearing and issue a reasoned decision. Clearly, all this will not
3 happen when the TRO expires on September 17, 2020, the day before Defendants produce the
4 OIG production on September 18, 2020.

5 If the TRO expires, Plaintiffs would face hardships that tip sharply in their favor and would
6 likely suffer irreparable harm. Moreover, Plaintiffs have shown serious questions going to the
7 merits and that a TRO is in the public interest. *See* ECF No. 84. All told, the same conditions that
8 warranted a TRO on September 5, 2020 still hold true today. *See* 11A Wright & Miller's Federal
9 Practice & Procedure: Civil § 2953 (3d ed. Apr. 2020 update) ("Although there does not seem to
10 be any case law on what constitutes 'good cause' for purposes of extending a Rule 65(b) order, a
11 showing that the grounds for originally granting the temporary restraining order continue to exist
12 should be sufficient.").

13 Even Associate Director Fontenot stated in his declaration that field staff are terminated
14 when field operations stop, and it is difficult to bring back field staff once they are terminated.
15 Associate Director Fontenot in effect requested that if the Court were to enjoin the Defendants, the
16 Court should do so sooner rather than later, so that Defendants would not terminate field staff.
17 Specifically, Associate Director Fontenot stated:

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

26 ECF No. 81-1 at 35 ¶ 98.

27 Accordingly, like other courts in analogous circumstances, the Court finds good cause to
28 extend the TRO. In fact, the Federal Rules of Civil Procedure authorize the Court to grant a TRO
for 14 days without hearing from Defendants and to extend that TRO an additional 14 days for

1 good cause for a total of 28 days. *See* Fed. R. Civ. P. 65(b)(2) (“The order expires at the time after
2 entry—not to exceed 14 days—that the court sets, unless before that time the court, for good
3 cause, extends it for a like period or the adverse party consents to a longer extension.”); *see*
4 generally 11A Federal Practice & Procedure, *supra*, § 2953 (collecting cases on 28-day limit). In
5 the instant case, the duration of the Court’s TRO was 12 days, and the Court’s extension in the
6 instant case is seven days or fewer.

7 Other courts have found good cause to extend TROs on the same grounds present in the
8 instant case. *See, e.g., H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 843–
9 45 (7th Cir. 2012) (allowing TRO extensions “to give the parties sufficient time to prepare for a
10 preliminary injunction hearing” so long as the TRO does not last longer than 28 days); *Costa*,
11 2020 WL 2410502, at *2 (finding good cause “because the parties need time to brief, and the
12 Court needs time to consider, the forthcoming motion for a preliminary injunction”); *Acosta*
13 *Ginger Green, Inc.*, No. 2:18-CV-4098, 2018 WL 3361397, at *1 (C.D. Cal. May 18, 2018)
14 (extending TRO for good cause because, among other things, the restrained party failed to comply
15 with a subpoena for documents).

16 Moreover, failing to extend the TRO would fail to “preserv[e] the status quo.” *Granny*
17 *Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415
18 U.S. 423, 439 (1974); *accord, e.g., E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th
19 Cir. 2018) (“a TRO ‘should be restricted to . . . preserving the status quo and preventing
20 irreparable harm just so long as is necessary to hold a hearing and no longer”) (ellipsis in original).

21 To be sure, Defendants have asserted that an extended TRO may effectively become an
22 appealable preliminary injunction. That assertion, however, is inapt here. A TRO only becomes a
23 preliminary injunction in “extraordinary circumstances.” *Washington v. Trump*, 847 F.3d 1151,
24 1158 (9th Cir. 2017) (per curiam). In *Washington*, for example, “[t]he district court’s order has no
25 expiration date, and no [preliminary injunction] hearing has been scheduled.” *Id.* The Government
26 also “argued that emergency relief is necessary to support its efforts to prevent terrorism.” *Id.*; *see*

1 *also Serv. Employees Int'l Union v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061, 1067 (9th
 2 Cir. 2010) (appealable “TRO” lasted longer than three months until preliminary injunction
 3 hearing, and the district court had held two-day evidentiary hearing). Here, the TRO has an
 4 expiration date. A hearing on the motion for preliminary injunction is scheduled on September 22,
 5 2020. The Government does not allege that extending the TRO in the instant case puts our national
 6 security at risk. Thus, extending the TRO to allow Defendants to produce a partial administrative
 7 record will enable the Court to evaluate Plaintiffs’ APA claims when ruling on the motion for
 8 preliminary injunction.

9 Thus, the Court exercises its discretion to extend the TRO up to seven days until the Court
 10 issues its decision on the preliminary injunction motion or through September 24, 2020, whichever
 11 is sooner. The Court understands the gravity of the situation and the parties’ need for a prompt
 12 ruling on the Plaintiffs’ motion for preliminary injunction to allow for appellate review. To that
 13 end, the Court has ruled expeditiously on motions thus far. The Court ruled on Plaintiffs’ motion
 14 for TRO within 48 hours. The Court likewise ordered production of the administrative record at
 15 2:46 a.m. on September 10, 2020—also within 48 hours after Defendants confirmed that the
 16 Replan was “codified” and Plaintiffs moved for production of the administrative record. The Court
 17 issued the Order to Produce Inspector General Document Production within 24 hours of Plaintiffs’
 18 identification of the OIG production and Defendants’ agreement to produce it in the instant case.

19 In sum, based on Defendants’ violation of the Court’s Order to Produce the Administrative
 20 Record as discussed above, an extension of the TRO is necessary for Defendants to produce the
 21 OIG production and a privilege log; for the parties to litigate objections to at least four different
 22 grounds of privilege; for United States Magistrate Judges to resolve the parties’ privilege disputes;
 23 for the parties to file supplemental briefs on the motion for preliminary injunction addressing the
 24 OIG production; and for the Court to hold a hearing on the motion for preliminary injunction and
 25 to issue a reasoned decision. Accordingly, the Court extends the TRO until the Court issues its
 26 decision on the preliminary injunction motion or through September 24, 2020, whichever is

sooner.

IT IS SO ORDERED.

Dated: September 17, 2020

A handwritten signature in black ink that reads "Lucy H. Koh". The signature is written in a cursive, flowing style. The "L" is large and loops around the "u". The "H" is written with a simple crossbar. The "K" has a long, sweeping tail that extends to the right. The signature is positioned above a horizontal line.

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

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 RE: CLARIFICATION OF
STAY AND PRELIMINARY
INJUNCTION**

Re: Dkt. No. 279

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 are two motions: (1) Plaintiffs’ motion to compel and for sanctions

(“motion to compel”); and (2) Plaintiffs’ motion for temporary restraining order pending ruling on Plaintiffs’ motion to compel and for sanctions (“second TRO motion”). Having considered the parties’ submissions on the motion to compel and the second TRO motion; the parties’ arguments at the September 28 and 29, 2020 case management conferences; many briefs and court proceedings discussing Defendants’ alleged violations of the Temporary Restraining Order and the Court’s Order Granting Plaintiffs’ Motion for Stay and Preliminary Injunction (“Injunction Order,” ECF No. 208); the relevant law; and the record in this case, the Court:

- CLARIFIES the scope of the Court’s Injunction Order;
- ORDERS Defendants to issue on October 2, 2020 a new text message to all Census Bureau employees notifying them of the Court’s Injunction Order, stating that the October 5, 2020 “target date” is not operative, and stating that data collection operations will continue through October 31, 2020. On October 2, 2020, after the text message is sent, Defendants shall file a copy of the text message with the Court;
- ORDERS Census Bureau Director Steven Dillingham to file, by Monday, October 5, 2020 at 2 p.m. Pacific Time, a declaration under penalty of perjury that unequivocally confirms Defendants’ ongoing compliance with the Injunction Order and details the steps Defendants have taken to prevent future violations of the Injunction Order; and
- DENIES AS MOOT Plaintiffs’ motion to compel and second TRO motion.

I. BACKGROUND

On Thursday, September 24, 2020, the Court issued an Order Granting Plaintiffs’ Motion for Stay and Preliminary Injunction (“Injunction Order”), ECF No. 208. In the Injunction Order, the Court detailed how Defendants had violated the APA by adopting the “Replan”: a schedule for the 2020 Census that accelerated the deadlines for Census self-responses, non-response follow-up, data processing, and reports to the President and the states. Although the Census Bureau had taken most of a decade to develop the December 2018 Operational Plan Version 4.0 for the 2020 Census, the Bureau developed the Replan in the span of four or five days.

The Court found that Defendants had acted arbitrarily and capriciously in five independent ways: (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

1 explanation that runs counter to the evidence before them; (3) Defendants failed to consider an
 2 alternative; (4) Defendants failed to articulate a satisfactory explanation for the Replan; and
 3 (5) Defendants failed to consider reliance interests. *Id.* at 44–74. Although any one of the five
 4 reasons would have supported a preliminary injunction, the Court found for Plaintiffs on all five.¹

5 The Court also found that Plaintiffs would suffer irreparable injury; that the balance of
 6 hardships tipped sharply in Plaintiffs’ favor; and that a preliminary injunction would serve the
 7 public interest. *Id.* at 74–75. Accordingly, the Court ordered that, effective as of Thursday,
 8 September 24, 2020:

9 The U.S. Census Bureau’s August 3, 2020 Replan’s September 30, 2020 deadline
 10 for the completion of data collection and December 31, 2020 deadline for reporting
 11 the tabulation of the total population to the President are stayed pursuant to 5
 12 U.S.C. § 705; and Defendants Commerce Secretary Wilbur L. Ross, Jr.; the U.S.
 13 Department of Commerce; the Director of the U.S. Census Bureau Steven
 14 Dillingham, and the U.S. Census Bureau are enjoined from implementing these two
 15 deadlines.

16 *Id.* at 78.

17 **II. DISCUSSION**

18 Below, the Court describes (1) the effect of the Injunction Order; (2) Defendants’ repeated
 19 violations of the Injunction Order; and (3) the further relief needed to ensure Defendants’
 20 compliance with the Injunction Order. Given the Bureau’s announcement that it will end field
 21 operations on Monday, October 5, 2020, time is of the essence.

22 **A. The Injunction Order enjoined Defendants from implementing the Replan’s 23 deadlines and reinstated the COVID-19 Plan’s deadlines.**

24 The effect of staying the two Replan deadlines was to reinstate the rule previously in force.
 25 *See, e.g., Dep’t of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1916
 26 & n.7 (2020) (affirming judgment vacating recession and restoring Deferred Action for Childhood
 27 Arrivals (“DACA”) program); *Organized Village of Kake v. USDA*, 795 F.3d 956, 970 (9th Cir.

28 ¹ Before reaching the merits, the Court found that Plaintiffs’ claims are reviewable. *See* Injunction
 Order at 21–44. The Court’s Injunction Order is incorporated herein by reference.

2015) (en banc) (“The effect of invalidating an agency rule is to reinstate the rule previously in force.” (quoting *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005))).

The rule previously in force was the COVID-19 Plan—specifically, the COVID-19 Plan’s deadline of October 31, 2020 for data collection (self-responses and non-response follow-up (“NRFU”)) and deadline of April 30, 2021 for reporting the tabulation of total population to the President. *See, e.g.*, Injunction Order at 6–9 (discussing COVID-19 Plan); 29–32 (discussing the broad scope of a “rule” under the APA). The injunction’s effect was to require Defendants to cure the legal defects identified in the Injunction Order if Defendants were to insist on implementing the two Replan deadlines. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (“If a less drastic remedy (such as partial or complete vacatur of [the agency’s] decision) was sufficient to redress [] injury, no recourse to the additional and extraordinary relief of an injunction was warranted.”); *New York v. United States Dep’t of Commerce*, 351 F. Supp. 3d 502, 676–78, 679 (S.D.N.Y.) (analyzing *Monsanto* and enjoining Secretary Ross until he cured the legal defects identified in opinion), *aff’d in part, rev’d in part and remanded sub nom. Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019). Until those legal defects are cured, the two COVID-19 Plan deadlines remain in force.

B. Defendants violated the Injunction Order by implementing the Replan deadlines.

Despite the Injunction Order, Defendants continued to implement the Replan’s September 30, 2020 deadline for data collection. For instance, as recently as Monday, September 28, 2020, four days after the Injunction Order, the Census Bureau’s website, which is updated daily, declared that the “2020 Census will conclude data collection on September 30, 2020.” ECF No. 243 (attaching screenshot of <https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-28.pdf>). Only after Plaintiffs raised this issue with the Court during the September 28, 2020 case management conference did the Census Bureau finally remove the erroneous statement from the Census Bureau’s website.

As another example, on Saturday, September 26, 2020, a Census Bureau enumerator² forwarded to the Court a text from the Census Bureau's Regional Director in Dallas, Texas stating:

Team,

Even though the courts have made a decision; nothing has changed. Our deadline to count everyone is still September 30, 2020. I will keep everyone as updated as possible. DO NOT SPREAD RUMORS, OR MAKE ASSUMPTIONS. STICK TO THE FACTS! The facts are, we are still moving forward with original plan to finish by September 30, 2020.

ECF No. 214 at 4. Defendants responded to this text by confessing error: the Regional Director in Dallas had in fact sent that text message to staff despite the Injunction Order. ECF No. 219-1 (Christy Decl. ¶ 6). According to James T. Christy, the Bureau's Assistant Director for Field Operations, the information in that text message was "not consistent with [his] understanding of what field offices should be doing." *Id.* ¶ 5.

The level of misinformation and confusion nationwide is not surprising given that the Census Bureau's own website continued to tout the September 30, 2020 end of data collection four days after the Injunction Order. The Court has received a slew of emails from enumerators across the country that include supervisor texts with erroneous information and that express concern about the ending of field operations without adequate counts. The following are just a few examples:

- On Monday, September 28, 2020, a Census Field Supervisor stated that he "learned of this court's September 5, 2020 TRO from media reports. As a Census Field Supervisor[,] I have received zero notice from the Census Bureau about the existence of the TRO issued by this court on September 5, 2020." ECF No. 222. In response, Assistant Director Christy avers that "[t]he implementation of the Court's Temporary Restraining Order and the Preliminary Injunction involved actions by Headquarters and Regional Management Staff." ECF No. 244-1 (Christy Decl. ¶ 14). In the Los Angeles Region where the complainant works, the

² Enumerators are Census Bureau employees who collect data in the field. Specifically, enumerators conduct follow up with housing units that "did not self-respond to the decennial census questionnaire." Injunction Order at 2 (quoting Fontenot Decl. ¶ 48, ECF No. 81-1 and Thompson Decl. ¶ 15, ECF No. 36-2).

1 Regional Director did not email Census Field Supervisors about the TRO or Injunction
2 Order. *Id.* (Christy Decl. ¶ 16).

- 3 • On Tuesday, September 29, 2020, an individual claiming to be an attorney at the
4 Environmental Protection Agency wrote that he and his wife, who are working as
5 enumerators, have been told by their census supervisors “that we are wrapping up
6 tomorrow.” The individual attached a screenshot of text messages that show the Bureau’s
7 instructions “not to enter availability past tomorrow.” ECF No. 248.
- 8 • Again on Tuesday, September 29, 2020, an enumerator wrote that “in the last few days we
9 have been under strict instructions to close down remaining cases by whatever means
10 necessary.” ECF No. 238.

11 *See also, e.g.*, ECF Nos. 214, 224, 229, 235, 254, 257, 263, 268, 270–73, 276, 285 (other
12 allegations).

13 Perhaps the most egregious violation of the Injunction Order occurred on Monday,
14 September 28, 2020. At 1:58 p.m., two minutes before the Court’s case management conference,
15 the Census Bureau tweeted one sentence: “The Secretary of Commerce has announced a target
16 date of October 5, 2020 to conclude 2020 Census self-response and field data collection
17 operations.” @USCensusBureau,
18 <https://twitter.com/uscensusbureau/status/1310685274104569856>. Later, the Census Bureau issued
19 a one sentence press release with the exact same sentence. *See* U.S. Census Bureau, *2020 Census*
20 *Update* (Sept. 28, 2020), [https://www.census.gov/newsroom/press-releases/2020/2020-census-](https://www.census.gov/newsroom/press-releases/2020/2020-census-update.html)
21 [update.html](https://www.census.gov/newsroom/press-releases/2020/2020-census-update.html).

22 Neither the one sentence tweet nor the one sentence press release provided any explanation
23 or information. The Court thus ordered Defendants to produce the administrative record of this
24 announcement. ECF No. 225. The Court notes that Defendants deny that the October 5 end date
25 for data collection constitutes final agency action. For example, minutes after the October 5 “target
26 date” tweet during the Monday, September 28, 2020 case management conference, Defendants
27 stated that the announcement “doesn’t involve a final agency action. It is a giant endeavor with
28 constantly changing pieces. And our position is the tweet does not have an administrative record.
That is our position.” Tr. at 44, ECF No. 237.

Similarly, the next day, at the September 29, 2020 case management conference, the Court

asked whether Defendants had produced the full record of the October 5 “target date” tweet. Tr. at 7, ECF No. 259. Defendants responded in the affirmative, “[s]ubject to not calling it a record because in our view it is not a record.” *Id.* When asked about the Secretary’s approval of the October 5 “target date,” Defendants stated: “[e]ven to call it a decision is perhaps to endow it with significance that it otherwise does not have.” *Id.*

Even though the Census is a \$15.6 billion dollar operation that took nearly a decade to plan, Defendants’ production showed that the Census Bureau developed the October 5 “target date” in the span of four days with the same legal defects as the Replan. For example, Census Bureau Deputy Director Ron Jarmin presented to Secretary Ross two “Proposed Options for Completion of Enumeration”—both of which focused on the December 31, 2020 deadline that the Court had stayed and enjoined Defendants from implementing:

Option 1: Conclude field work by October 5, 2020 *in order to meet apportionment delivery date of December 31, 2020.*

Option 2: Continue field work beyond October 5, 2020 in order to increase state completion rates to 99% and to continue to improve enumeration of lagging sub-state areas, such as tribal areas, rural areas, and hard-to-count communities. *However, this would not allow for delivery of state counts for apportionment by December 31, 2020.*

ECF No. 233 at 148 (italics added). As Deputy Director Jarmin explained to Director Dillingham and other senior officials, Option 2 “would preclude meeting the 12/31 date, *but furthers the goal of a complete and accurate 2020 Census.*” *Id.* at 130 (emphasis added). Option 1, by contrast, would not further that goal.

Option 1’s data processing, like the Replan’s data processing, focuses solely on congressional apportionment and leaves redistricting data for another day. *See id.* at 148 (Presentation to Secretary Ross highlighting “streamlined post data collection processing and focusing only on state counts for apportionment”). This bifurcation of data processing is unprecedented. As the Census Bureau found when considering the Replan, “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

1 deadline and will have a negative impact on the accuracy of the redistricting data.” *E.g.*, Injunction
 2 Order at 55 (quoting DOC_9496 (July 31, 2020 email chain with top Bureau officials)); *id.* at 53
 3 (quoting DOC_8019 (July 24, 2020 Apportionment Data Processing Memo)).

4 In sum, the Census Bureau repeatedly found that “[s]hortening the time period to meet the
 5 original statutory deadlines for apportionment and redistricting data will result in a census that has
 6 fatal data quality flaws that are unacceptable for a Constitutionally-mandated activity.” Injunction
 7 Order at 49 (quoting so-called “Elevator Speech” memo prepared by senior Bureau officials
 8 shared with the Government Accountability Office, DOC_8070). In the words of Timothy Olson,
 9 the Bureau’s Associate Director for Field Operations, “it is ludicrous to think we can complete
 10 100% of the nation’s data collection earlier than 10/31 and any thinking person who would believe
 11 we can deliver apportionment by 12/31 has either a mental deficiency or a political motivation.”
 12 Injunction Order at 52 (quoting DOC_7738).

13 Still, to pick between the two options (ending data collection by or after October 5, 2020),
 14 Secretary Ross asked which would implement the December 31, 2020 deadline. Three short
 15 emails on that enjoined topic ensued:

- 16 • On Monday, September 28, 2020 at 3:52 p.m. Eastern, Secretary Ross wrote to Deputy
 17 Director Jarmin and other senior Bureau officials: “As I prepare to make the decision, I
 18 would like to make sure that I understood correctly that your team’s opinion is that if we
 19 stay in the field beyond October 5, we would not be able to meet the statutory deadline of
 20 December 31.” ECF No. 256-1 at 2.
- 21 • At 4:30 p.m. Eastern, Deputy Director Jarmin responded: “Yes sir, we need to finish field
 22 work on 10/5 if we are to have enough time (and assuming all goes well) to finish the
 23 processing of the resident population, federally affiliated overseas and, if requested,
 24 unlawful aliens in ICE Detention Centers by 12/31. Other PM [Presidential Memorandum]
 25 related outputs would be pushed to 1/11/2021.” *Id.* at 1.
- 26 • At 5:12 p.m. Eastern—14 minutes *after* the Bureau’s tweet announcing the Secretary’s
 27 decision—Secretary Ross wrote back: “Thanks for the confirmation. Based on the staff
 28 recommendation I am extending the field operation to October [sic] 5.” *Id.*

ECF No. 256-1.

Thus, Defendants’ production shows three significant things: (1) Defendants set the

1 October 5 date to meet the December 31, 2020 statutory deadline, even though Defendants are
2 “enjoined from implementing” that deadline; (2) the December 31, 2020 statutory deadline
3 intertwined with the President’s July 21, 2020 Memorandum on Excluding Illegal Aliens from the
4 Apportionment Base Following the 2020 Census; and (3) Secretary Ross approved the October 5
5 date 14 minutes after the Census Bureau tweeted the October 5 date.

6 Moreover, Defendants’ claim that October 5 is merely a “target date” is belied by
7 Defendants’ own documents, representations in federal court, and communications with Bureau
8 enumerators:

- 9 • The “Proposed Options for Completion of Enumeration” presentation to Secretary Ross on
10 Monday, September 28, 2020 shows that the Bureau will “[c]onclude field work by
11 October 5, 2020 in order to meet apportionment delivery date of December 31, 2020.” ECF
12 No. 233 at 148.
- 13 • Hours after the tweet on Monday, September 28, 2020, Assistant Director Christy
14 “instructed staff to send a text message to all Decennial field staff (Enumerators and
15 [Census Field Supervisor]s) that read: ‘A federal district court issued a preliminary
16 injunction on 9/24. The Census Bureau is complying with the Court’s Order which moves
17 the finishing date for NRFU operations after September 30. The Secretary announced
18 today that *NRFU operations will finish on October 5*. We will post updated guidance on
19 the content locker.’” ECF No. 234 (Christy Decl. ¶ 14) (emphasis added).
- 20 • Also on Monday, September 28, 2020, an enumerator received a text message that stated:
21 “The Secretary announced today that NRFU operations will finish on October 5.” ECF
22 No. 230-1. Several enumerators have alerted the Court that they have received this text
23 message. *See, e.g.*, ECF No. 238 (“I awoke this morning to an internal message from the
24 Bureau that Secretary Ross has ordered that the NRFU (non response follow up) cases will
25 be terminating on October 5th.”); ECF No. 231 (text message dated September 29, 2020
26 that “NRFU operations will finish on October 5”). Assistant Director Christy confirms that
27 he ordered this message sent to field staff. ECF No. 234 (Christy Decl. ¶ 14).
- 28 • The Government has represented to a three-judge court of the United States District Court
for the District of Columbia that field operations “are set to conclude” on October 5.
Rough Tr. of Oral Argument at 8, *Common Cause v. Trump*, No. 20-cv-02023-CRC-GGK-
DLF (D.D.C. Sept. 29, 2020).

If that were not enough, Defendants’ clear, fast, and concerted advertising of the October 5
date stands in stark contrast with Defendants’ chaotic, dilatory, and incomplete compliance with

1 the Injunction Order. As recounted above, Defendants have violated the Injunction Order in
2 several ways. A flood of emails to the Court and the parties suggests ongoing non-compliance in
3 the field.

4 Even today, in response to Plaintiffs' second TRO motion, Associate Director Fontenot
5 again failed to acknowledge the COVID-19 Plan dates that the Injunction Order reinstated. *See*
6 ECF No. 284-1 (comparing December 2018 Operational Plan Version 4.0, the Replan, and
7 "clos[ing] field data collection on October 5, 2020 and submit[ing] apportionment counts by the
8 statutory deadline, December 31, 2020"); ECF No. 81-1 ¶ 69 (comparing dates under the
9 December 2018 Operational Plan Version 4.0 and the Replan). At no point have Defendants
10 unambiguously communicated to all field staff what the Injunction Order requires: immediate
11 reinstatement of the COVID-19 Plan's deadlines of October 31, 2020 for data collection and April
12 30, 2021 for reporting the tabulation of total population to the President.

13 **C. The Ninth Circuit has denied Defendants' request to stay the Injunction Order.**

14 On September 30, 2020, the Court of Appeals for the Ninth Circuit denied Defendants'
15 motion for an administrative stay of the Injunction Order. ECF No. 277. The Ninth Circuit held in
16 its published opinion that, among other things, this Court's "September 5 temporary restraining
17 order and September 24 preliminary injunction preserve the status quo because they maintain the
18 Bureau's data-collection apparatus." *Id.* at 5.

19 The Ninth Circuit also held that:

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

26 *Id.* at 7–8. Despite the Ninth Circuit's ruling, the Bureau is still "conclud[ing] field work by
27 October 5, 2020 in order to meet [the] apportionment delivery date of December 31, 2020." ECF
28 No. 233 at 148.

Like the Replan, the decision to end data collection on October 5 is a hasty and

1 unexplained change to the Bureau’s operations that was created in 4 days. The decision also risks
 2 further undermining trust in the Bureau and its partners, sowing more confusion, and depressing
 3 Census participation. Consider, for instance, the whiplash inflicted on the Bureau’s partners by the
 4 Bureau’s rapid changes in deadlines. The Bureau recognized its “extensive partnerships” with
 5 organizations such as Plaintiff National Urban League. Injunction Order at 72 (quoting Fontenot
 6 Decl. ¶¶ 28, 41). Before the Replan’s adoption, those partners advertised the COVID-19 Plan’s
 7 October 31, 2020 data collection deadline for four months. After the Replan’s adoption, partners
 8 diverted significant resources to mitigate the widely advertised October 31 deadline:

- 9 • The City of Salinas already promoted the October 31 deadline “on social media and in
 10 thousands of paper flyers.” Gurmilan Decl. ¶¶ 11–12. Thus, “some residents who received
 11 the City’s messaging will fail to respond before the R[eplan] deadline because the City has
 12 limited remaining resources to correct what is now misinformation.” *Id.* ¶ 12. Moreover,
 13 the City “is still advertising for census enumerator job listings because traditional applicant
 14 groups like senior citizens have concerns about the risk of catching COVID-19. With fewer
 15 enumerators working, every extra day the City has to use [] existing staff to support the
 16 count” *Id.* ¶ 13.
- 17 • Harris County “participated in over 150 events,” including “food distribution events,”
 18 during which it “announced the October 31, 2020 deadline for the 2020 Census.” Briggs
 19 Decl. ¶ 12. Consequently, “Harris County will be forced to expend additional resources to
 20 clear confusion about the last date for self-response during the Census, to ensure that
 21 people who have not responded are counted in time.” *Id.* ¶ 16.
- 22 • The Black Alliance for Just Immigration already “publicized the October 31 deadline for
 23 self-response during digital events between April and July” and is diverting resources to
 24 publicize the new September 30 deadline. Gyamfi Decl. ¶¶ 13–14.
- 25 • The League of Women Voters “has already had to spend time and financial resources”
 26 developing and distributing public education materials on the Replan timeline. Stewart
 27 Decl. ¶ 12.
- 28 • 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.

See, e.g., *id.* at 27–28, 37. Yet on Monday, September 28, 2020, the Bureau announced it will end
 field operations by October 5, 2020 in order to meet the December 31, 2020 deadline. This
 announcement gives the Bureau’s partners just one week to advertise yet another accelerated
 deadline.

Moreover, Defendants' sole witness in this case, Associate Director Fontenot, swore under penalty of perjury that the Census Bureau could not meet the December 31, 2020 statutory deadline if data collection were to extend past September 30, 2020. Specifically, Associate Director Fontenot declared under oath that:

We wish to be **crystal clear** that if the Court were to extend the data collection period past September 30, 2020, the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021. The post processing deadlines for the Replan Schedule are tight, and **extending the data collection deadline would, of necessity, cause the Census Bureau to fail to be able to process the response data in time to meet its statutory obligations.** We have already compressed the post processing schedule from 5 months to only 3 months. We previously planned and tested our post processing systems assuming that we would follow a traditional, sequential processing sequence, and the 3-month schedule necessary for the Replan Schedule has already increased risk. **We simply cannot shorten post processing beyond the already shortened 3-month period.**

Letter Order, *La Union Del Pueblo Entero, et al. v. Trump, et al.*, 19-cv-02710-PX-PAH-ELH (D. Md. Oct. 1, 2020) (three-judge court), ECF No. 125 (emphasis in original) (quoting ECF No. 117-1 ¶ 107). As a result of this blatant contradiction, the three-judge court in the District of Maryland ordered Defendants to explain how the Census Bureau would "accomplish an accurate final enumeration given that the post-data processing phase has been shortened further." *Id.* at 2.

D. The Court clarifies the Injunction Order and orders tailored relief to ensure compliance.

Defendants' dissemination of erroneous information; lurching from one hasty, unexplained plan to the next; and unlawful sacrifices of completeness and accuracy of the 2020 Census are upending the status quo, violating the Injunction Order, and undermining the credibility of the Census Bureau and the 2020 Census. This must stop.

Time is of the essence. Every day that passes, the Bureau winds down field operations in order to end data collection by Monday, October 5, 2020 and start data processing. Once field operations are terminated, they are difficult to resume; and once data processing begins, no more data can be added for processing. *See* ECF No. 81-1 (Fontenot Decl. at ¶¶ 67–68) ("[P]ost data

1 collection activities are like building a house There is an order of steps that must be
 2 maintained. . . . [T]here is no opportunity to begin the post data collection processing until data
 3 collection operations close everywhere.”).

4 As Associate Director Fontenot stated on September 5, 2020 in opposition to the motion
 5 for stay and preliminary injunction, the sooner the Court enjoins Defendants, the fewer field staff
 6 Defendants would terminate and not be able to rehire:

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

16 *Id.* (Fontenot Decl. at ¶ 98).

17 The Court thus exercises its authority to enforce compliance with its orders. *See, e.g., Int’l*
 18 *Ladies’ Garment Workers’ Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984) (per curiam)
 19 (holding that “the District Court certainly was empowered to protect” “the interest of the judicial
 20 branch in seeing that an unambiguous mandate is not blatantly disregarded by parties to a court
 21 proceeding”).³

22 Pursuant to that authority, the Court clarifies⁴ that until Defendants cure all the legal

23 ³ Defendants argue that the Court lacks jurisdiction to “radically modify the preliminary
 24 injunction” now that the Injunction Order is on appeal. ECF No. 284 at 3. Defendants’ argument
 25 misses the point. Far from “radically modifying” the Injunction Order, the Court simply enforces
 26 the Injunction Order to halt Defendants’ repeated violations. In any event, even the case that
 27 Defendants cite holds that a district court may modify an injunction “to maintain the status quo
 28 among the parties.” *Id.* (quoting *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204
 F.3d 867, 880 (9th Cir. 2000)). Defendants are upending the status quo here.

⁴ The Court notes that broad swaths of the public and the judiciary understood the Injunction
 Order. For instance, during oral argument in *Common Cause v. Trump*, United States Circuit Judge

1 defects identified in the Injunction Order, Defendants are enjoined from “implementing the
2 September 30, 2020 deadline for the completion of data collection and December 31, 2020
3 deadline for reporting the tabulation of the total population to the President.” Injunction Order at
4 78. In the meantime, the Court’s stay pursuant to 5 U.S.C. § 705 “postpone[s] the effective date
5 of” those two Replan deadlines and so reinstates the rule previously in force: the COVID-19 Plan
6 deadlines of October 31, 2020 for the completion of data collection and April 30, 2021 for
7 reporting the tabulation of total population to the President.

8 Moreover, to preserve the status quo, the Court orders some of the relief requested in
9 Plaintiffs’ motion to compel and second TRO motion. On October 2, 2020, Defendants shall issue
10 a text message to all the Census Bureau’s employees notifying them of the Court’s Injunction
11 Order, stating that the October 5, 2020 “target date” is not operative, and stating that data
12 collection operations will continue through October 31, 2020. On October 2, 2020, after the text
13 message is sent, Defendants shall file a copy of the text message with the Court. In addition, by
14 October 5, 2020 at 2 p.m. Pacific Time, Census Bureau Director Steven Dillingham shall file a
15 declaration under penalty of perjury that unequivocally confirms Defendants’ ongoing compliance
16 with the Injunction Order and details the steps Defendants have taken to prevent future violations
17 of the Injunction Order.

18 The Court will subject Defendants to sanctions or contempt proceedings if Defendants
19 violate the Injunction Order again.

20 The Court sets a case management conference on Tuesday, October 6, 2020 at 2 p.m.

21
22
23 Gregory G. Katsas of the Court of Appeals for the D.C. Circuit stated that census operations
24 “would have stopped September 30, and [Judge Koh] extended it until the end of October.” Judge
25 Katsas further stated, “[a]gain, maybe I misread the Koh order, but I thought that in terms of
26 deadlines, it extended the transmittal date from December 31st to April 1st, and that’s four months
27 [sic; in fact a four-month extension but to April 30, 2021].” Rough Tr. of Oral Argument at 9, 15;
28 *see also, e.g.,* Associated Press, *Federal Judge Says 2020 Census Must Continue for Another
Month*, Wall Street Journal (Sept. 25, 2020), <https://www.wsj.com/articles/federal-judge-says-2020-census-must-continue-for-another-month-11601034711>.

Pacific Time and vacates the Friday, October 2, 2020 hearing on the motion to compel.

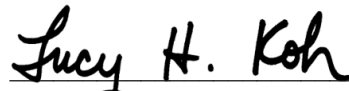
III. CONCLUSION

For the foregoing reasons, the Court:

- CLARIFIES the scope of the Court's Injunction Order;
- ORDERS Defendants to issue on October 2, 2020 a new text message to all Census Bureau employees notifying them of the Court's Injunction Order, stating that the October 5, 2020 "target date" is not operative, and stating that data collection operations will continue through October 31, 2020. On October 2, 2020, after the text message is sent, Defendants shall file a copy of the text message with the Court;
- ORDERS Census Bureau Director Steven Dillingham to file, by Monday, October 5, 2020 at 2 p.m. Pacific Time, a declaration under penalty of perjury that unequivocally confirms Defendants' ongoing compliance with the Injunction Order and details the steps Defendants have taken to prevent future violations of the Injunction Order; and
- DENIES AS MOOT Plaintiffs' motion to compel and second TRO motion.

IT IS SO ORDERED.

Dated: October 1, 2020



LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

From: Timothy P Olson (CENSUS/ADFO FED)
To: Deborah Stempowski (CENSUS/ADDC FED)
Cc: Albert E Fontenot (CENSUS/ADDC FED); Christopher M Denno (CENSUS/ADDC FED); James T Christy (CENSUS/LA FED); Ron S Jarmin (CENSUS/DEPDIR FED)
Subject: Re: 2020 update for Soft Launch at DOC
Date: Thursday, July 23, 2020 11:48:26 AM

We need to sound the alarm to realities on the ground - people are afraid to work for us and it is reflected in the numbers 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.

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.

Actions we are taking?

1. increasing number of selections to training significantly (in other words, front loading the front loaded numbers). Jamey can give us a percent increase as a talking point).
2. field is having CFSs personally contact their enumerators during the online training period to motivate them to fully complete training and deploy to field, giving them encouragement and talk through any challenges they are having). This will save a few that will deploy - but is not a magic bullet.
3. Conducting replacement training at much higher frequency than planned. Specific means we are conducting replacement trainings during evenings, Saturdays, Sundays, and regular day time hours.
4. Recruiting additional applicants in areas with a smaller pool to ensure we have a fresh set of interested applicants(applicants who are very aware of the COVID-19 environment) that can be hired quickly as needed.
5. Extending fingerprint sites so that replacement hires can get fingerprints taken ASAP, cleared quickly, and inserted into training session.

Tim Olson, Associate Director for Field Operations
 U.S. Census Bureau - Washington DC
 301-763-2072 Office
PII Cell

timothy.p.olson@census.gov

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From: Deborah Stempowski (CENSUS/ADDC FED) <Deborah.M.Stempowski@census.gov>
Sent: Thursday, July 23, 2020 11:24 AM
To: Timothy P Olson (CENSUS/ADFO FED) <Timothy.P.Olson@census.gov>
Cc: Albert E Fontenot (CENSUS/ADDC FED) <Albert.E.Fontenot@census.gov>; Christopher M Denno (CENSUS/ADDC FED) <christopher.m.denno@census.gov>; James T Christy (CENSUS/LA FED) <James.T.Christy@census.gov>; Ron S Jarmin (CENSUS/DEPDIR FED) <Ron.S.Jarmin@census.gov>
Subject: Re: 2020 update for Soft Launch at DOC

Food for thought. We had discussed that goals for completion during the soft launch were internal only bc part of the soft launch is working out the 'kinks'. I don't think we want to get into plan versus actual for every cycle, we were ready to roll with that for August 11 but this will open that door. Again just for consideration.

Deb Stempowski
Assistant Director for Decennial Programs, Operations and Schedule Management
phone 301-763-1417
email deborah.m.stempowski@census.gov

Sent from my iPhone

On 23 Jul 2020, at 11:19 AM, Timothy P Olson (CENSUS/ADFO FED) <Timothy.P.Olson@census.gov> wrote:

Agree that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about.

Tim Olson, Associate Director for Field Operations
U.S. Census Bureau - Washington DC
301-763-2072 Office

PII

 Cell
timothy.p.olson@census.gov

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From: Albert E Fontenot (CENSUS/ADDC FED) <Albert.E.Fontenot@census.gov>
Sent: Thursday, July 23, 2020 10:31 AM
To: Christopher M Denno (CENSUS/ADDC FED) <christopher.m.denno@census.gov>;

Deborah Stempowski (CENSUS/ADDC FED) <Deborah.M.Stempowski@census.gov>;
James T Christy (CENSUS/LA FED) <James.T.Christy@census.gov>; Timothy P Olson
(CENSUS/ADFO FED) <Timothy.P.Olson@census.gov>

Cc: Ron S Jarmin (CENSUS/DEPDIR FED) <Ron.S.Jarmin@census.gov>

Subject: 2020 update for Soft Launch at DOC

On Monday at DOC 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.)

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?

Al

Albert E. Fontenot Jr.
Associate Director, Decennial Census Programs
United States Department of Commerce
Bureau of the Census
Office 8H-122
Office 301-763-4668
Cell PII

Sent from my iPhone

Elevator Speech

High Level Message: 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 national activity.

I. Shortening field data collection operations will diminish data quality and introduce risk.

- a. COVID-19 presents an unprecedented challenge to field data collection. While starting NRFU early in select ACOs is a good idea and has provided the Census Bureau a short window to work out any kinks with our systems, the Census Bureau will likely need to conduct staggered operations all over the country from July until the end of October in order to conduct the most complete NRFU possible. 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.
- b. The Census Bureau is adapting NRFU for the COVID environment, including development of systems for an outbound telephone operation, increased use of administrative records (is this last one true?), and significantly increasing selections for field positions to compensate for a much higher dropout rate from enumerator training to field deployment. These adaptations are designed to adapt NRFU operations to the COVID environment, not to shorten the operation.
- c. NRFU is not the only challenge; the Census Bureau is also adapting its operations for counting the group quarters population, college students and the homeless.
- d. 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.

II. Shortening post processing operations will diminish data quality and introduce risk.

- a. The Census Bureau could, with the introduction of great risk, shorten the post processing schedule, but it is not possible to shorten the schedule appreciably without directly degrading the quality of the results and introducing great risk.
- b. Post processing is a massive and complex operation and the steps of the operation must be performed consecutively. It is not possible, e.g., to establish the final collection geographic framework (question – this one for an outside reader will leave them scratching their head – what the heck are they talking about?) for the nation prior to processing housing units and Group Quarters (GQs) 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, post processing is like building a house – you cannot apply dry wall before erecting the walls, you cannot lay floor tile before the floor is constructed, etc.

- c. Nor 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. This is so because the very first step is geographic processing, which cannot begin until the entire universe is determined. Geographic processing is key because we need to tabulate census results at the block level and then be additive to higher levels of geography such block groups, tracts, counties, and states.
- d. Each and every step in post processing is necessary and eliminating any step would result in a diminished data product. The steps are listed in the table below – no step can be eliminated or overlap with another step.
- e. 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. We routinely discover items that need to be corrected during data review and appreciably shortening data review would be extremely unwise.
- f. The revised schedule requested by the Administration to Congress includes an additional 30-calendar days of schedule contingency. The Census Bureau needs these 30 days for risk mitigation:
 - i. In case we are not able to complete data collection operations everywhere by October 31 (e.g., a hurricane, or a COVID outbreak).
 - ii. 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).

III. Curtailing 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.

- a. The Administration already requested 120 days and Census officials have repeatedly said we need this time.
- b. Producing results in a vastly-diminished time frame may result in great skepticism about the numbers and unwillingness to use them.
- c. There are always winners and losers in census results. Census results have always been about confidence – our nation uses census data because people and politicians have 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.

IV. Summary of Post Processing Timeline

Activity	Completion Date	Description
----------	-----------------	-------------

Complete field data collection operations	10-31-2020	The Census Bureau collects information about both GQ and housing units that it uses during post processing to update the Master Address File (MAF).
Incorporate address updates from the field data collection operations into MAF/TIGER	11-12-2020	Once data collection ends, the Census Bureau updates the MAF to add, delete, or correct housing units and GQs.
Produce Final Collection Address Data Products	12-20-2020	The Census Bureau geocodes all addresses, meaning that it codes each address to the block level so that it is properly reflected in the correct geography. This geography will form a backbone for all remaining processing.
Produce Decennial Response File 1 (DRF1)	1-21-2021	Creating the DRF1 requires the Census Bureau to reconcile status for both the housing and group quarter populations, meaning that we classify each and every address in the nation as occupied, vacant, non-existent or undetermined. We begin the unduplication process and standardize response data across modes, which is necessary because we collect response information from self-response, as well as NRFU and other field operations. Additionally we link continuation forms for specific households, so that individuals are correctly associated with a specific household.
Produce Decennial Response File 2 (DRF2)	2-11-2021	Producing the DRF2 requires the Census Bureau to verify Self Response Quality Assurance (SRQA) results, and to match responses to ensure that individuals and households are not duplicated. For households with more than one return, we select the "primary" return.
Produce Census Unedited File (CUF)	3-8-2021	The CUF is the file used to produce the apportionment data. To create it the Census Bureau ingests administrative record data and then determines the occupancy status for every housing unit in the nation. We append Hispanic origin and race write-in codes, and define and create variables for imputation. Imputation is necessary to provide values for data that we know to be missing, a situation that inevitably occurs in a small percentage of cases.

[PAGE * MERGEFORMAT]

Review and verify data	4-1-2021	Population subject matter experts review and verify data to ensure that the input numbers are correct.
Produce Apportionment Counts	4-30-2021	We receive and ingest the Federally Affiliated Count Overseas (FACO) file, and verify and resolve issues. We verify counts in the CUF and resolve issues before calculating the apportionment counts, conducting multiple independent calculations. We create the apportionment tables and maps, and coordinate review prior to delivery to the Secretary.
Census Edited File (CEF)	4-28-2021	After delivery of the apportionment counts, we begin to work on subsequent data products, products that will include demographic variables. This means we need to merge additional administrative records files, and perform substitution and edit processes necessary to provide complete information.
Produce Microdata Detail File (MDF)	5-12-2021	The MDF is the last major national file and it is used to create all subsequent data products. It involves creating and verifying a person level file for the U.S. and Puerto Rico person level file and transferring the file to the tabulation system. Creating the MDF requires application of complex disclosure avoidance processes necessary to achieve the confidentiality guarantee contained in T13.
Review and verify data processing	6-6-2021	This is a critical review step necessary for data processing where Census Bureau staff conduct quality reviews, including of the disclosure avoidance results.
Finish Delivery of P.L. 94-171 Data Products	7-29-2021	Creating the PL data products involves ingesting the MDF and the final tabulation geography, adding variable recodes, and working with our production system to allow posting of the data, as well as producing the actual tables and metadata. Extensive review is necessary prior to producing the files, which will be released on a flow basis weekly beginning 6-18-2021.

[PAGE * MERGEFORMAT]

Operational and Processing Options to meet September 30, 2020

August 3, 2020

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DOC_0010275

Overview

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.

Nonresponse Followup Operational Options

Early Start of Nonresponse Followup Operations	Potential efficiency gain / applicable costs to implement
Six Cycle 1A Offices began operations on July 16	<p>There are currently 50 days in the production schedule for NRFU. Each additional day of production expands the capacity by 2%.</p>
Six Cycle 1B Offices began operations on July 23	
35 Cycle 2 Offices were scheduled to begin operations on July 30; however, operations began earlier in some offices:	
<ul style="list-style-type: none"> • 1 – July 26 • 1 – July 27 • 3 – July 28 • 12 – July 29 • 18 – July 30 	
39 Cycle 3 Offices will begin operations by August 3:	
<ul style="list-style-type: none"> • 15 – July 31 • 24 – August 3 	
All remaining Offices will begin operations by August 9:	
<ul style="list-style-type: none"> • 4 – August 3 • 36 – August 4 • 6 – August 5 • 4 – August 6 • 3 – August 7 • 109 (all remaining) – August 9 	

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Bonuses for Increased Work

Pay Bonus Options	Potential efficiency gain / applicable costs to implement
Implement Enumerator Pay bonus for meeting minimum "work availability" : Propose \$100 for exceeding 25 hours/week <ul style="list-style-type: none"> 25 hours per week is just over 30% more hours than the 19 planned hours Incorporate an assessment of productivity 	Expect 250,000 to qualify: \$25m/week Increases capacity by 1.5 million work hours, or 80,000 more "traditional" enumerators
Implement Enumerator Pay bonus for working multiple weeks (could be issued multiple times) : Propose \$500 for completing 3 weeks of production <ul style="list-style-type: none"> Would require meeting the \$100 guideline above 	Expect 150,000 to qualify: \$75m total cost
Implement CFS Pay bonus for working multiple weeks (could be issued multiple times) <ul style="list-style-type: none"> Propose \$750 for completing 3 weeks of production (from established start date) Would require 'acceptable' minimum of 32 hours per week 	Expect 15,000 CFSs to qualify: \$11.5m total cost per week

Increased Replacement Training for Enumerators

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Replacement Training Options	Potential efficiency gain / applicable costs to implement
Continued Replacement Training	Expect to conduct replacement training for a total of 135K Enums due to attrition. (Just over 11,000 training sessions) \$90m total training cost
Continue NRFU Increased Upfront Hiring / Expanded Fingerprinting Capacity / Expanded Recruiting	Overselection rates will address higher-than-expected no-show rates of 35%, bringing us closer to our target initial staffing levels.

Outreach Methods to Expand Reach to Underperforming Areas

Options	Potential efficiency gain / applicable costs to implement
Expand the use of NRFU Travel Teams	Using experienced staff minimizes the need to train new staff – particularly in areas where new staff are not available.
Implement outbound phone calling to conduct interviews <ul style="list-style-type: none"> • Use telephone numbers from ERD Contact Frame • Could be used by enumerators in ACOs that are finishing up to help out in other ACOs 	Close Cases in COVID areas

Adjustments to NRFU Contact Strategy

NRFU Adjustment Options	Potential efficiency gain / applicable costs to implement
Close out self-reported vacants that are also AdRec modeled as Vacant	Reduce workload by 140k cases
Reduce contact attempts for self-reported Vacants from 6 to 1. Option to keep the case active if the first visit indicates the unit is occupied (like we do for AdRec Vacants/Deletes)	Increase enumerator productivity rate by 0.06
Reduce contact attempts for RI and SRQA cases from 6 to 3	Reduce attempts from 6 to 3 for 1.9 million cases, increasing enumerator productivity rate by 0.10
Eliminate Random RI, and depend only on analytic sampling	Reduce NRFU workload by 800k cases
Make "pop count only" sufficient earlier in the operation -- at any time or during Phase 2	Still being researched, TBD

Implement Additional Administrative Record Options

Administrative Records Options	Potential efficiency gain / applicable costs to implement
Determine if we can use IRS-only (no corroborating sources) for "pop count only" cases	Reduce attempts from 6 to 1 for estimated 3.8 million cases, contingent on IRS approval, increasing enumerator productivity rate by 0.13
Close out cases that are modeled as both AdRec Vacant and AdRec Delete as Vacant (these cases currently are made No Determination since modeling isn't sure if they're vacant or delete)	Reduce attempts from 6 to 1 for 1.9 million cases, increasing enumerator productivity rate by 0.06

Overview of Backend Processing

This plan presents a revised, highly compressed schedule for 2020 Census data processing. This plan introduces a series of design changes to increase the likelihood of delivering apportionment counts by 12/31/20. It is based on two critical assumptions:

1. Post processing must start by 10/1/2020, which means all Self Response and FLD collection activities close out, and data are reconciled and loaded into our processing systems by that date.
2. Post-processing work activities in this plan are limited to those required to produce apportionment counts, with an understanding that redistricting data products and other non-statutory data products will be taken up later.

All of the changes below, taken together, reduce the time required for 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, 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.

Compressing Backend Processing

Adjusted Activity	Impact and Risks
<p>Adding or deleting any new addresses for the purposes of updating the Mater Address File will stop by 9/4/20. This means that address updates from Field Verification(FV), NRFU, Manual non-ID coding and Office Based Address Validation (OBABV) after 9/4 will not be applied to the MAF.</p>	<p>System change risk – need to determine whether NRFU will have to shut off the add capability in the ENUM instrument (on the handheld device), or if we just suspend processing on the back-end.</p> <p>We do not anticipate that the resulting number of updates not included will be highly significant. However, there is a risk of imputing population to remaining deleted addresses that we were not able to verify in NRFU.</p>
<p>Eliminate the Decennial Statistical Studies Division (DSSD) review of the MAF extract.</p>	<p>Risk of missing and therefore propagating errors.</p>
<p>Move the Final Collection MAF Extract delivery date from the Geography Division (GEO) to the Decennial Information Technology Division (DITD) to 10/14/20 (GEO processes lock on 9/25/20).</p>	<p>Streamline geographic processing activities (locking on 9/25, and MAFX delivery on 10/14) reduces a 35-day processing duration to 19 days. We have determined an approach to complete activities for apportionment only, separating and postponing the redistricting activities. As stated above, there is the risk of unknown impact these changes may have on redistricting data products.</p>

Compressing Backend Processing - Continued

Adjusted Activity	Impact and Risks
<p>Cancel Count Review Event 2 and late Group Quarters Enumeration (GQE) operations</p>	<p>State demographer review of GQ data will be cancelled. The Demographic and Decennial staffs will work together to develop the message and communicate it to the FSCPE/states. The risk is virtually certain vocal objections from the Federal State Cooperative for Population Estimates (FSCPE) State Demographers and the State Governors they serve.</p>
<p>Create a separate processing stream for the Enumeration of Transitory Locations (ETL) and Service Based Enumeration (SBE) operations that follows the Federally Affiliated Count Overseas (FACO) processing approach. This will enable adding ETL and SBE population counts state-by-state significantly later in the CUF production process.</p>	<p>This file needs to be delivered to POP by the time the Census Unedited File (CUF – the basis for the apportionment delivery) review is scheduled to be complete – by December 18. Additionally, ETL permits the reporting of a Usual Home Elsewhere (UHE), which will not be able to be processed with this new approach.</p> <p>The CUF will have to be re-run prior to the processing of the Census Edited File (CEF) in order to add in the SBE/ETL population for the Public Law 94-171/Redistricting file. The Apportionment Team will need to change its processing plans and conduct testing to ensure the proper integration of ETL/SBE state counts.</p>

Compressing Backend Processing - Continued

Adjusted Activity	Impact and Risks
Compress POP division and DSSD review and processing times	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 – due to lack of time to research and understand the root cause or to re-run and re-review one or multiple state files.
DSSD Start nationwide matching earlier (suggest 9/1/2020)	Person data received after 9/1 will not be eligible to be resolved using nationwide matching procedures.
Compress time for creating/verifying apportionment data and preparation of transmittal package for DOC. Note that the Apportionment Team's work will have to be coordinated with the Census Bureau Team working to address the presidential memo.	A compressed review period creates risk for errors being present in the data. It is unclear how the Apportionment Team and the Team working to address the presidential memo are going to coordinate for the preparation of the apportionment transmittal package – which will contain the official delivery of data to the Secretary and to the President.

Other Activities

Self-response 7th mailing: Cut workload now and send to the lowest responding tracts until we run out of packages.

- Cut workload on 8/10/2020
- Mailout 8/21/2020 – 9/15/2020

Accelerate GQE

- Go to field for full GQE starting 7/31/2020
- Complete production work by 8/26/2020

Questions?

Case 5:20-cv-05799-LHK Document 131-7 Filed 09/15/20 Page 1 of 15

EXHIBIT 22

Operational and Processing Options to Meet Statutory Date of December 31, 2020 for Apportionment

August 3, 2020

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Bottom Line Up Front

Objective: We have developed this plan in response to your request to provide an apportionment count by the statutory deadline of December 31, 2020.

- **Maximizing** staff and production hours for field data collection operations to conclude field data collection by September 30, 2020.
- **Compressing** and streamline backend processing to deliver apportionment counts by December 31, 2020.
- **Achieving** an acceptable level of accuracy and completeness, with a goal of resolving at least 99% of Housing Units in every state.

Nonresponse Followup Operational Options

Early Start of Nonresponse Followup Operations

6 Cycle 1a Area Census Offices (ACOs) began operations on July 16

6 Cycle 1b ACOs began operations on July 23

35 Cycle 2 ACOs were scheduled to begin operations on July 30; however, we started operations earlier in some ACOs where staff was available:

- 17 ACOs – Started July 26 – 29
- 18 ACOs – Started July 30

39 Cycle 3 ACOs were scheduled to begin operations by August 3:

- 15 ACOs – Started last week, July 31
- 24 ACOs – Started today, August 3

All remaining ACOs were scheduled to begin August 11, but will begin operations by August 9:

- 53 ACOs – Will start August 3 – 7
- 109 ACOs (all remaining) – August 9
- These ACOs will have to deploy staff regardless of the COVID-19 risk in those areas to open on these dates.

Increased Replacement Training for Enumerators

Replacement Training Options	Potential Efficiency Gain / Applicable Costs to Implement
Inviting More People to Training	Over selection rates will address higher-than-expected no-show rates of 35%, bringing us closer to our target initial staffing levels.
Continual Replacement Training	Expect to conduct replacement training for at least 135K Enumerators due to attrition. Just over 11,000 training additional sessions: \$90m total training cost

Production Staff Awards for Increased Work Hours

Award Options Covers Weeks of August 9, August 16, August 23	Potential Efficiency Gain / Applicable Costs to Implement
Implement Awards to recognize increased work hours: <ul style="list-style-type: none"> • \$50 for exceeding 15 hours/week • \$50 for exceeding 25 hours/week (\$100 total) <ul style="list-style-type: none"> ◦ Must complete 0.75 cases/hour 	Expect 340,000 to qualify: <ul style="list-style-type: none"> • \$30m/week • Increases capacity by 1.5 million work hours per week, or 80,000 more "19 hour" enumerators per week
Implement Award for working multiple 25 hour weeks: <ul style="list-style-type: none"> • \$500 for completing 3 weeks of production 	Expect 150,000 to qualify: <ul style="list-style-type: none"> • \$75m total cost • Lower operational impact as a result of reduced replacement training
Implement CFS Award for working multiple weeks: <ul style="list-style-type: none"> • \$750 for completing 3 weeks of production • Would recognize those who work at least 32 hours per week 	Expect 15,000 CFSs to qualify: <ul style="list-style-type: none"> • \$11.5m total cost per week • Increased data quality due to more effective alert resolution • Improved operational support with experienced supervisor

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Outreach Methods to Expand Reach to Underperforming Areas

Options

Expand the use of NRFU Travel Teams:

- Moving teams that have successfully completed their areas to areas requiring additional attention

Implement outbound phone calling to conduct interviews:

- Use telephone numbers from ERD Contact Frame
- Used by enumerators in ACOs that are finishing up to help out in other ACOs

Potential Efficiency Gain / Applicable Costs to Implement

Using experienced staff minimizes the need to train new staff – particularly in areas where new staff are not available.

Enables enumeration in high COVID-19 risk areas and provides additional data collection capability.

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Adjustments to NRFU Contact Strategy

NRFU Adjustment Options	Potential Efficiency Gain / Applicable Costs to Implement
Close out self-reported vacants that are also Administrative Record (AdRec) vacant	Reduce workload by 140k cases
Reduce contact attempts for self-reported vacants from 6 to 1, if HU is confirmed vacant	Increase enumerator productivity
Reduce contact attempts for Re-Interview (RI) and Self-Response Quality Assurance (SRQA) cases from 6 to 3	Reduce attempts from 6 to 3 for 1.9 million cases, increase enumerator productivity
Eliminate Random RI, and depend on analytic sampling	Reduce NRFU workload by 800k cases – potential reduction in quality of enumerator work
Make “pop count only” sufficient earlier in the operation	Still being researched, TBD

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Implement Additional Administrative Record Options

Administrative Records Options	Potential Efficiency Gain / Applicable Costs to Implement
We are in consultation to revise our AdRec strategy to use IRS-only (no corroborating sources) for "pop count only" cases	Reduce attempts from 6 to 1 for estimated 3.8 million cases, contingent on IRS approval, increasing enumerator productivity
Close out cases with conflicting AdRec showing both vacant and delete	Reduce attempts from 6 to 1 for 1.9 million cases, increasing enumerator productivity

Overview of Backend Processing

Assumptions:

1. Highly compressed schedule for 2020 Census data processing and review of data products.
2. Post-processing must start by October 1, 2020.
3. Post-processing work activities are limited to those required to produce apportionment counts. Delivery of redistricting data products will be negatively impacted under this revised plan and we are determining full impacts.
4. All of these activities represent abbreviated processes or eliminated activities that will reduce accuracy.

Compressing Backend Processing

Adjusted Activity

Finalize Master Address File (MAF) updates from remaining field operations by 9/4/20

Address updates from continued field work after 9/4/20 will not be applied to the MAF

Eliminate the step that includes Decennial Statistical Studies Division (DSSD) review of the MAF extract

Lock Geographic processing on 9/25/20 and deliver the final 2020 Census address universe by 10/14/20

Cancel Count Review Event 2, eliminating the need for late Group Quarters Enumeration (GQE) operations

Impact and Risks

We do not anticipate that the resulting number of updates not included will be highly significant. However, increases risk of inaccuracy.

Risk of missing and therefore propagating errors, however the MAF is the most accurate ever.

Reduces a 35 day processing duration to 19 days.

State demographer review of GQ data will be cancelled. The Demographic and Decennial staffs will work together to develop the message and communicate it to the Federal State Cooperative for Population Estimates (FSCPE)/states. The risk is virtually certain vocal objections from the FSCPE State Demographers and the State Governors they serve.

Compressing Backend Processing - Continued

Adjusted Activity

Create a separate processing stream for the Enumeration of Transitory Locations (ETL) and Service Based Enumeration (SBE) operations that follows the Federally Affiliated Count Overseas (FACO) processing approach. This will enable adding ETL and SBE population counts state-by-state significantly later in the Census Unedited File (CUF) production process.

Compress POP division and DSSD review and processing times

Compress time for creating/verifying apportionment data and preparation of transmittal package for DOC

Impact and Risks

This file needs to be delivered to POP by the time the CUF – the basis for the apportionment delivery – review is scheduled to be complete, by December 18. Additionally, ETL permits the reporting of a Usual Home Elsewhere (UHE), which will not be able to be processed with this new approach.

The CUF will have to be re-run prior to the processing of the Census Edited File (CEF) in order to add in the SBE/ETL population for the Public Law 94-171 Redistricting file. The Apportionment Team will need to change its processing plans and conduct testing to ensure the proper integration of ETL/SBE state counts.

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 – due to lack of time to research and understand the root cause or to re-run and re-review one or multiple state files.

A compressed review period creates risk for errors being present in the data.

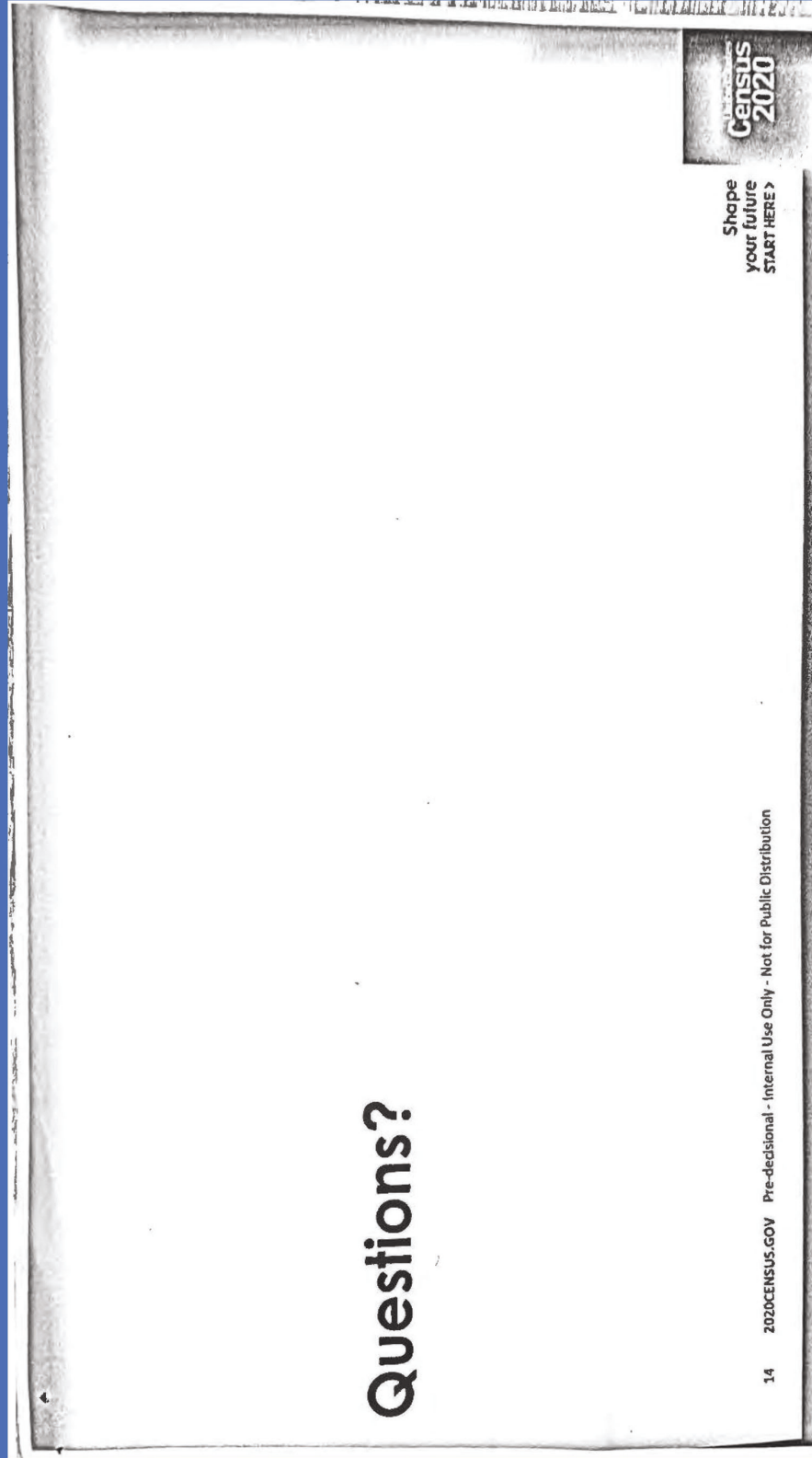
Implementation of the Presidential Memo

A team has been established and is tasked with deriving a process utilizing sound statistical methods and meeting tests of operational feasibility, to achieve the goals of directives from Secretary Ross regarding implementation of the Presidential Memo. To achieve this, the Census will:

- Build upon the work we have already done based on Executive Order 13880, "Collecting Information about Citizenship Status in Connection with the Decennial Census".
- Use all administrative records to the extent they are available. Using these records, in combination with other data already obtained regarding citizenship status, we will further refine the non-citizen category.
- Incorporating this work into the schedule to meet the current legal mandates.

Announcing the Replanned Operational Schedule

- **Announce:** Statement from Director Dillingham issued by Monday afternoon or as approval given with new schedule and re-plan outline.
- **Update Webpage:** We will update central schedule webpage with new dates. (current page reflects re-planning status)
- **Rollout:** We will follow a controlled rollout to give appropriate embargoed heads up to key Congressional offices, and then post and distribute the updated materials to Census Bureau staff, partners, intergovernmental stakeholders, and the media.



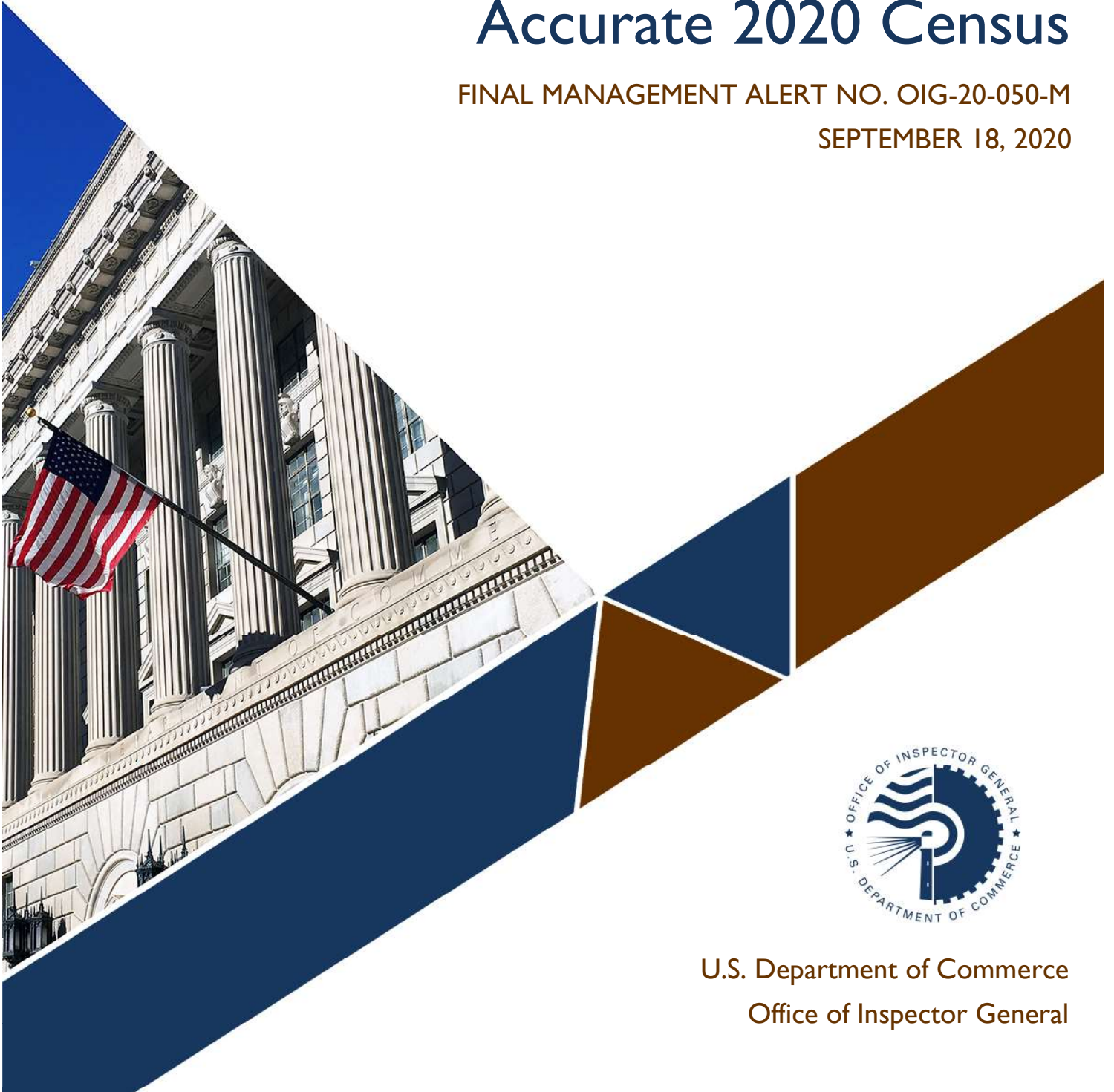
Case 5:20-cv-05799-LHK Document 189 Filed 09/21/20 Page 8 of 29

Attachment A

The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census

FINAL MANAGEMENT ALERT NO. OIG-20-050-M

SEPTEMBER 18, 2020



U.S. Department of Commerce
Office of Inspector General



UNITED STATES DEPARTMENT OF COMMERCE
Office of Inspector General
Washington, D.C. 20230

September 18, 2020

INFORMATION MEMORANDUM FOR SECRETARY ROSS

A handwritten signature in black ink, reading "Peggy E. Gustafson".

FROM: Peggy E. Gustafson
Inspector General

SUBJECT: *The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census*
Final Management Alert No. OIG-20-050-M

On August 3, 2020, the U.S. Census Bureau (the Bureau) issued a press release announcing a decision “to accelerate” the 2020 Census.¹ Following the announced schedule acceleration, our office received several Congressional inquiries expressing concern about the expedited schedule. News articles also highlighted these changes, as did former Directors of the U.S. Census Bureau in a joint statement.

In response, beginning on August 12, 2020, we issued requests for information and notices of interviews. This is our management alert on these pressing and emerging issues that we continue to monitor.

In our review of the circumstances surrounding the accelerated 2020 Census schedule, we found the following:

- I. The decision to accelerate the Census schedule was not made by the Census Bureau.
- II. The accelerated schedule increases the risks to obtaining a complete and accurate 2020 Census.

We are providing a copy of the report for your review. The final report will be publicly posted on OIG’s website on Monday, September 21, 2020.

¹ U.S. Department of Commerce, U.S. Census Bureau, August 3, 2020. *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, Release Number CB20-RTQ.23. Suitland, MD: DOC Census.

If you have any questions concerning this report, please contact me at (202) 482-4661.

Attachment

cc: Karen Dunn Kelley, Deputy Secretary of Commerce
Dr. Steven Dillingham, Director, U.S. Census Bureau

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Cover: Herbert C. Hoover Building main entrance at 14th Street Northwest in Washington, DC. Completed in 1932, the building is named after the former Secretary of Commerce and 31st President of the United States.

Introduction

The U.S. Census Bureau (the Bureau) spent more than a decade planning how it would count the U.S. population in the 2020 Census. In early August 2020, those plans were significantly condensed in a matter of days, despite serious operational interruptions from the coronavirus disease 2019 (COVID-19) pandemic and warnings from senior Bureau personnel that an accelerated schedule would exacerbate risks. Ultimately, the decision to accelerate the Census schedule was not made by the Bureau.

Following the August 3, 2020, announced schedule acceleration,¹ our office received several Congressional inquiries expressing concern about the expedited schedule.² Specifically, we were asked “to closely monitor and assess the implications of operational ‘streamlining’ and changes to the [original post-COVID-19] operational plan for data quality and accuracy.”³ Our office was also asked to “examine the Bureau’s efforts to uphold the highest standards for data quality and analyze whether a compressed schedule interferes with the Bureau’s ability to ensure data quality.”⁴

Numerous news outlets also highlighted the changes and threats to accuracy from the accelerated schedule. Further, four former Directors of the U.S. Census Bureau issued a joint statement expressing concern over the announced accelerated plan and stating that an end result will be the under-representation of certain populations.⁵

In response, we issued requests for information and notices of interviews beginning on August 12, 2020. This is our management alert on these pressing and emerging issues that we continue to monitor.

¹ U.S. Department of Commerce, U.S. Census Bureau, August 3, 2020. *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, Release Number CB20-RTQ.23. Suitland, MD: DOC Census. Available online at <https://2020census.gov/en/news-events/press-releases/delivering-complete-accurate-count.html> (accessed September 15, 2020).

² Attached as appendix A.

³ Vice Chair Jeanne Shaheen to Peggy E. Gustafson, August 10, 2020. *Letter from the Vice Chair of the Senate Subcommittee on Commerce, Justice, Science and Related Agencies to the Inspector General of the U.S. Department of Commerce*, p. 2. See appendix A for the complete letter.

⁴ Chairman José E. Serrano to Peggy E. Gustafson, August 21, 2020. *Letter from the Chairman of the House Subcommittee on Commerce, Justice, Science, and Related Agencies to the Inspector General of the U.S. Department of Commerce*, p. 2. See appendix A for the complete letter.

⁵ Vincent Barabba, Kenneth Prewitt, Robert Groves, and John Thompson, August 4, 2020. *Statement by Former U.S. Census Bureau Directors, August 4, 2020, On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve A Fair and Accurate Enumeration of the United States*. Available online at <https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html> (accessed September 15, 2020).

Background

I. The Office of Inspector General

The Office of Inspector General (OIG) is an independent and objective unit which provides oversight of the programs and operations of the U.S. Department of Commerce (Department), including those of the Bureau.⁶ OIG is statutorily entitled to timely access to all records of the Department,⁷ and Department employees are obligated to cooperate with OIG.⁸ For this management alert, which is part of our ongoing work on the 2020 Census, we reviewed documents from both the Department and the Bureau. We also interviewed senior career Bureau officials working on the 2020 Census, as well as the Director of the Bureau, Dr. Steven Dillingham. We prepared this management alert in alignment with OIG's quality control standards and the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Federal Offices of Inspector General*,⁹ which require that we conduct our work with integrity, objectivity, and independence.

II. Overview of the 2020 Census

The decennial census is mandated by the Constitution of the United States. The Constitution requires the "actual Enumeration" of the "whole number of persons" every 10 years, to provide a basis to apportion representatives in the U.S. House of Representatives among the states.¹⁰ Not only does the decennial census fulfill this critical constitutional role, but census data is used for redistricting Congressional districts, state legislative districts, and school districts.¹¹ Census data is also used to enforce voting rights and civil rights legislation.¹² Furthermore, the data shapes communities across the country for the next 10 years because the data is key to the appropriation of hundreds of billions of dollars in federal funds every year to local communities, as well as to the decision-making of local governments, businesses, and non-profits who need accurate data to carry out their activities.¹³

⁶ Inspector General Act of 1978, as amended (IG Act), 5 U.S.C. App. § 2.

⁷ IG Act, § 6(a)(1)(A).

⁸ DOC Office of the Secretary, April 26, 2013. *Inspector General*, DOO 10-13. Washington, DC: DOC OS, § 4.01.

⁹ Council of the Inspectors General on Integrity and Efficiency, August 2012. *Quality Standards for Federal Offices of Inspector General*. Washington, DC: CIGIE.

¹⁰ U.S. Const. art I, § 2 & amend. XIV, § 2.

¹¹ DOC Census Bureau, December 2018. *2020 Census Operational Plan: A New Design for the 21st Century*, Version 4.0. Suitland, MD: DOC Census, p. 5. Available online at <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf> (accessed September 15, 2020).

¹² *Id.* at 5

¹³ Census Bureau. *Importance of the Data* [online]. <https://2020census.gov/en/census-data.html> (accessed September 15, 2020); *2020 Census Operational Plan*, p. 5.

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Congress set by statute the deadline of December 31, 2020, for the 2020 Census tabulation of total population by states, as required for the apportionment of House representatives.¹⁴

To fulfill these duties, Congress delegated responsibility to conduct the decennial census to the Secretary of Commerce (Secretary), who ultimately oversees the Bureau.¹⁵ The Bureau is headed by a Director, who is appointed by the President with the advice and consent of the U.S. Senate.¹⁶ The Bureau's *2020 Census Operational Plan* was developed over more than a decade, with the stated goal "to count everyone once, only once, and in the right place."¹⁷

The 2020 Census is conducted in two phases. The first phase is *data collection*—how the Bureau counts persons and acquires characteristic information about those persons. An example of data collection is self-response, during which people respond to the 2020 Census online, by phone, or by mail.¹⁸ An additional component of data collection is nonresponse followup (NRFU), where Bureau representatives visit households that have not already responded to the 2020 Census.¹⁹ The second phase is *data processing*—how the Bureau takes the data it collected and converts it into accurate and usable information. This phase is sometimes referred to as "post-processing"²⁰ and must occur after data collection ends. As one senior Bureau official stated, if the data is not collected, "there's nothing to process." A few examples of data processing include

- resolving duplicate data,
- repairing missing or conflicting data,
- applying data codes to write-in responses to facilitate data tabulation,
- identifying and resolving potential fraudulent returns,
- identifying the return of record for housing units with multiple returns,²¹
- ensuring all addresses are reflected in the correct geography, and
- using subject matter reviews to identify errors.

One senior official described the processing stage as "vitaly important to the census" and used the following illustration: "the census is a bit like sausage making. A lot of bits and pieces go into it, and they've got to be sorted and cleaned and fixed. ... [T]hat's the part of

¹⁴ See 13 U.S.C. § 141(b).

¹⁵ 13 U.S.C. §§ 2, 4, & 141(a).

¹⁶ *Id.* § 21(a)(1).

¹⁷ *2020 Census Operational Plan*, sec. 2.1, p. 5.

¹⁸ *Id.* at 208.

¹⁹ Census Bureau. *Nonresponse Followup Completion Rates* [online]. <https://2020census.gov/en/response-rates/nrfu-completion.html#:~:text=SHARE%3A,by%20returning%20their%20completed%20questionnaire> (accessed September 15, 2020).

²⁰ *2020 Census Operational Plan*, p. 12.

²¹ *Id.* at 132.

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the census that ... people don't see." In sum, to produce a quality 2020 Census, both the data collection and data processing components are critical.

Findings and Conclusion

I. The Decision to Accelerate the Census Schedule Was Not Made by the Census Bureau

On August 3, 2020, the Bureau issued a press release announcing the decision “to accelerate” the 2020 Census.²² The schedule change was not the Bureau’s decision, nor was it the first time the 2020 Census schedule had been changed. Senior officials at the Bureau, including the Director, did not know who ultimately made the decision to accelerate the Census schedule. As a consequence, this management alert does not identify the decision maker. Some Bureau officials speculated the decision came from the Department, while others thought the decision likely came from the White House. However, Bureau officials confirmed that the decision was not the Bureau’s.

A. *The Bureau extended the Census schedule in April 2020 to account for the COVID-19 pandemic*

In response to the COVID-19 pandemic, the Bureau temporarily suspended certain 2020 Census operations in March 2020. Then, on April 13, 2020, the Department and the Bureau issued a joint statement adjusting the 2020 Census operations.²³ The statement said in part:

In order to ensure the completeness and accuracy of the 2020 Census, the Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts.

Under this plan, the Census Bureau would 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, 2021.²⁴

The language in the statement appeared to condition the extension of the data collection phase to October 31, 2020, on obtaining a statutory extension to the apportionment deadline. It noted that the Bureau “would extend the window” for data collection while seeking a 120-day statutory extension to deliver final apportionment counts.

Multiple Bureau officials confirmed that the feasibility of extending the data collection phase to October 31, 2020, was dependent on receiving statutory relief from the apportionment deadline. This is because the data collection and data processing phases

²² Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

²³ DOC Census Bureau, April 13, 2020. *U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19*, Release Number CB20-RTQ.16. Suitland, MD: DOC Census. Available online at <https://www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html> (accessed September 15, 2020).

²⁴ *Id.*

of the 2020 Census are sequential. As previously described in the **Background** section of this management alert, data collection must end before the data can be processed. And the time allotted for data processing cannot be truncated beyond a certain point. If the data collection phase were to extend to October 31, 2020, the time needed for the subsequent data processing phase would extend beyond the December 31, 2020, apportionment deadline, thus requiring an extension of the statutory deadline.

After the April 13, 2020, press release, Bureau officials planned to conduct data collection through October 31, 2020. They did so under the belief that a statutory extension to the apportionment date would be forthcoming because there was no resistance to the extension. One senior Bureau official stated, “we got feedback that both sides of both houses of [C]ongress were supportive.” Bureau personnel also believed that the Department, and specifically the Secretary, were supportive of this approach. In fact, before the April 13 extension, the Bureau planned to request a 90-day extension, but the Secretary said they should ask for a 120-day extension to account for possible unknowns, like natural disasters.

The announced October 31, 2020, deadline for data collection shifted the Bureau’s planned duration for field data collection activities to account for the COVID-19 shutdown. This shift would allow the Bureau to follow the planned operations it had spent a decade developing.

B. It was not the Bureau’s decision to accelerate the 2020 Census schedule

From the publicized schedule extension in April through mid-July of 2020, Bureau officials continued to believe that a statutory extension to the apportionment deadline was forthcoming. Indeed, both the House of Representatives and Senate introduced legislation that would extend the apportionment deadline for the 2020 Census,²⁵ though only the House of Representatives passed a bill extending this deadline.²⁶

By mid-July 2020, several events occurred that led Bureau officials to believe that executive and legislative branch support for a statutory extension may be in doubt. First, the Department began asking Bureau personnel questions about speeding up field operations, although it was not clear to the Bureau if the Department was motivated by accelerating the 2020 Census schedule to satisfy current statutory deadlines or simply completing necessary fieldwork before any further COVID-19 interruptions. Several Bureau officials felt this pressure from the Department. Second, the Bureau did not see continued movement in Congress to extend the statutory deadline. Third, the Office of Management and Budget (OMB) informed the Bureau that OMB was requesting supplemental appropriations from Congress for the Bureau, in part to “maintain timely delivery.” The OMB request did not address the schedule extension issue, and OMB’s motivation was unclear to Bureau officials. Fourth, the President issued “Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census”

²⁵ See, e.g., Fair and Accurate Census Act, H.R. 7034, 116th Cong., § 2; Fair and Accurate Census Act, H.R. 7974, 116th Cong., § 2; Fair and Accurate Census Act, S. 4048, 116th Cong., § 2.

²⁶ See The Heroes Act, H.R. 6800, 116th Cong., § 70201.

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on July 21, 2020.²⁷ This Presidential Memorandum set forth the Administration's policy to exclude "illegal aliens" from the 2020 Census calculations that allocate Congressional representatives, and directed the Secretary to take all actions that would allow the President to carry out this policy.²⁸ As one senior Bureau official told our office, "I think that the Presidential Memorandum had to have played some role in -- in changing ... what I would say the [A]dministration's policy is ... on the deadline." Another official shared that perspective.

Despite these events in mid-July 2020, the Bureau was not told by Department personnel or external stakeholders that the statutory extension was no longer supported. Nor did the Bureau have an operational plan to meet the December 31, 2020, statutory deadline. According to a senior Bureau official, "[W]e had no plan for ... accelerating the schedule at that time." 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.²⁹

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. Our office heard testimony and reviewed documents demonstrating that the Bureau worked tirelessly over the weekend to analyze its options and devise a plan for meeting the December 31, 2020, apportionment deadline. The Bureau determined that to complete both the data collection and data processing phases by the statutory deadline, it must end field data collection by September 30 instead of October 31, 2020. According to one senior Bureau official:

[I]f you can't complete the data collection – the input to the census until the end of October, you can't deliver those apportionment counts by the legislative requirement of December 31st. You – you can't do it. There's not enough time in ... November and December to put out a quality product with all of the backend processing that has to happen.

The Bureau's analysis, termed the "replan," removed some scheduled operations altogether and streamlined others, creating risks to a complete and accurate count as described below. The Bureau briefed the replan to the Secretary on August 3, 2020, as

²⁷ White House, July 21, 2020. *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*. Washington, DC: White House. Available online at <https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/> (accessed September 15, 2020).

²⁸ *Id.* at §§ 2–3.

²⁹ (1) National Congress of American Indians, May 26, 2020. *2020 Census Webinar: Census Bureau Roundtable Discussion* [online]. <https://www.youtube.com/watch?v=F6lyJMtDDgY> (accessed September 17, 2020); and (2) U.S. Census Bureau, July 8, 2020. *Operational Press Briefing – 2020 Census Update*. Available online at <https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf> (accessed September 17, 2020).

requested. It was the impression of a senior Bureau official that if the plan was feasible, it would be adopted. According to Bureau officials at the meeting, the Secretary reacted favorably to the replan and gave the impression that it should be executed. Later that day, the Bureau issued the press release announcing the acceleration of the 2020 Census schedule.³⁰

The decision to accelerate the 2020 Census schedule was not made by the Bureau. Senior career officials at the Bureau perceived that this decision resulted from the Administration no longer supporting the schedule extension, but ultimately they lacked visibility into this decision process. Bureau leaders continued to believe that the statutory extension was preferable, and would give the Bureau the best chance to create a high-quality, usable census. A statutory extension would permit the Bureau to adhere, as closely as practicable, to the 2020 Census plan it developed over a decade instead of the replan it developed over a weekend. However, a senior official acknowledged, “we at the Census Bureau ... were bound by the statute ... in developing and executing the best possible plan to deliver the results according to the schedule set up by the [C]ongress.”

A statutory extension would permit the Bureau to adhere, as closely as practicable, to the 2020 Census plan it developed over a decade instead of the replan it developed over a weekend.

II. The Accelerated Schedule Increases the Risks to Obtaining a Complete and Accurate 2020 Census

Based on our review of Bureau and Department documents, as well as interviews with senior Bureau officials, we found that the accelerated schedule increases the risks to the accuracy of the 2020 Census. This was the consensus view of the senior Bureau officials we interviewed. The accelerated replan increases risks to both phases of the 2020 Census—i.e., data collection and data processing.

A. *The accelerated timeline for data collection increases risk that the Bureau may not collect sufficient data for an accurate and complete count*

Under the accelerated replan, the time set aside for NRFU went from approximately 80 days to approximately 56 days.³¹ Other changes to data collection included reducing certain contact attempts from six to one, such as contact attempts to housing units with conflicting information.

We found 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. As one senior official put it, there is no “time to spare in the operations anymore.” This risk exists despite efforts to mitigate

³⁰ Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

³¹ These numbers are approximate because some NRFU operations were started earlier under the accelerated replan. It should also be noted that the self-response option stays open until the end of data collection.

the condensed schedule, such as awards to enumerators for increased productivity and maximizing the in-use time for devices in the field.³² One of the biggest threats mentioned was weather—including hurricanes—and the possibility of shutdowns from COVID-19. As one senior official stated, “One of the big concerns right now obviously is whether we can get out of the field by September 30th because, you know, we don’t usually do field work for the census during hurricane season. And ... you do that for a reason.” The senior official continued that “there’s no time in the schedule to recover from a really major storm that affects a large number of ... housing units.” Multiple officials expressed concern about natural disasters that could prevent the completion of data collection by September 30, 2020—i.e., shutdowns in operations or in communities due to COVID-19; wildfires out West; or an earthquake.

The accelerated schedule raises risk besides the potential for natural disasters. As one official explained, the Bureau “no longer [has] the runway” of time to correct discovered errors through re-enumeration, as was necessary in the field portion of the 2010 and 2000 Censuses.

Given this accelerated schedule, the Bureau views “resolving” or “completing” at least 99 percent of housing units in every state, at the end of data collection, to be an acceptable level of accuracy and completeness.³³ “Resolving” or “completing” a housing unit means determining: (1) whether it is in-fact a housing unit; (2) whether it is occupied or vacant; and (3) how many people live there and their basic census characteristics. The 99 percent resolution rate is based on the resolution rates achieved in the fieldwork of the 2010 and 2000 Censuses. Bureau officials expressed confidence that the Bureau could reach the 99 percent figure by the end of data collection.

The Bureau “no longer [has] the runway” of time to correct discovered errors through re-enumeration.

As described by one **senior Bureau official**

³² Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

³³ DOC Census Bureau, August 17, 2020. *Review of 2020 Operational Plan Schedule*. Suitland, MD: DOC Census, p. 9. Available online at <https://2020census.gov/content/dam/2020census/materials/news/2020-operational-plan-schedule-review.pdf> (accessed September 15, 2020).

Senior Bureau officials do not know what will occur if the 99 percent target is not met by September 30, 2020. If the goal is not reached by that date, a decision must be made to either continue data collection to meet 99 percent completeness in every state (and achieve an acceptable level of accuracy and completeness) or cease data collection. There are risks either way. If data collection ends before 99 percent completeness is met in every state, the Bureau will not achieve what it views as an acceptable level of accuracy and completeness. But, if data collection extends beyond September 30, 2020, that will either further condense an already compressed schedule for data processing—which carries its own risks—or the Bureau will miss the December 31, 2020, statutory deadline. According to several senior Bureau officials, the Bureau will miss the December 31, 2020, deadline if data collection goes beyond September 30, 2020.

Senior Bureau officials do not know what will occur if the 99 percent target is not met by September 30, 2020. If the goal is not reached by that date, a decision must be made to either continue data collection to meet 99 percent completeness in every state (and achieve an acceptable level of accuracy and completeness) or cease data collection. There are risks either way.

B. The streamlined data processing under the accelerated plan poses a myriad of risks to accuracy and completeness

The accelerated replan announced on August 3, 2020, “streamlined”³⁴ the data processing component of the 2020 Census. The Bureau determined that to meet the December 31, 2020, deadline, as the Department asked, data processing must begin October 1, 2020. That, in turn, shortened the time that the Bureau had to process the data from 150 days to 90 days. One official described the accelerated processing this way: the Bureau now has “a plan in place that would enable us to get the processing done by December 31st. The plan has taken out some operations and streamlined others. It has an element of increased risk over the plan that we’ve spent the decade designing.” Several senior Bureau officials thought the streamlined data processing portion of the replan posed the greatest risk to the 2020 Census, with one official calling it the Bureau’s “biggest concern” and “the most vulnerable to risk.” One official represented that it was the consensus view of the Bureau’s career staff that the accelerated processing schedule will negatively impact the accuracy of the 2020 Census. The official continued that “[o]nce you start to cut quality assurance programs ... you assume that will have a negative impact on accuracy.”

Senior Bureau officials identified several risks in the data processing phase. One risk is that the processing time has been so compressed that if an error is found, and a program needs to be started again, the Bureau may not be able to do so and still meet the December 31, 2020, statutory deadline. As one official explained, “all these changes squeeze out all of the ... slack that was in the schedule that is there for a reason

³⁴ Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

because we often encounter, you know, oddities ... problems that need to be solved.” This official gave the following overview, given that the census is only conducted once a decade:

it’s not like a lot of [the Bureau’s] other processes or the data processing where [the Bureau is] doing it all the time So the kinks are worked out ... we typically have some ... instances in ... processing a census where some oddities show up in the data or some errors ... in coding or something like that, that ... requires someone to investigate the problem, diagnose the problem, fix the thing, and then rerun, ... to correct the errors ... those often are not known beforehand. And so, typically when ... we’re done in the field in July and, you know, at worst, early August ... that gives us enough time ... if there are those problems, to make sure they get fixed ... but what we have now for the backend schedule is staff are working weekends, holidays ... the schedule is completely crashed. And if you have one of these things ... it may be difficult to recover from and keep us on the critical path to getting done by 12/31.

“[T]he schedule is completely crashed.”

As described by one senior Bureau official

In addition, certain planned data processing reviews have been shortened or removed entirely. One official described the risks from the streamlined processing this way: “the processes ... that were ... abbreviated or eliminated were things that the Census Bureau had developed and put into plan ... because it in fact ... makes the census more accurate.” The official continued that those reviewers are people who are “very intimately ... knowledgeable of the data, ... and not just the data in the sort of a general processing sense, but many of those reviews take place with people who are very close ... to the small area data.” Such reviews have in the past helped the Bureau gain geographic accuracy. The senior official warned that while the Bureau does not expect one of the eliminated reviews to find many errors, that review did find errors in the 2000 and 2010 Censuses.

III. Conclusion

The COVID-19 pandemic prevented the Bureau from implementing its decade of planning for the 2020 Census. The April 2020 extension to the 2020 Census schedule acknowledged these realities and attempted to mitigate for lost time. However, we found that when that schedule was subsequently accelerated in August 2020, the decision came from outside the Bureau and further increased the risks to the accuracy and completeness of the 2020 Census.

U.S. DEPARTMENT OF COMMERCE

OFFICE OF INSPECTOR GENERAL

Appendix A: Related Congressional Correspondence

RICHARD C. SHELBY, ALABAMA, CHAIRMAN
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 LAMAR ALEXANDER, TENNESSEE
 SUSAN M. COLLINS, MAINE
 LISA MURKOWSKI, ALASKA
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 MARCO RUBIO, FLORIDA
 JAMES LANKFORD, OKLAHOMA
 SHANNON HUTCHERSON HINES, STAFF DIRECTOR
 CHARLES E. KIEFFER, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON APPROPRIATIONS
 WASHINGTON, DC 20510-6025
<http://appropriations.senate.gov>

August 10, 2020

Inspector General Peggy E. Gustafson
 U.S. Department of Commerce
 Office of the Inspector General
 1401 Constitution Ave. NW
 Washington, DC 20230

Dear Inspector General Gustafson:

I write to express my concerns about the U.S. Census Bureau's expedited schedule for 2020 Decennial Census data collection and processing operations announced in an August 3, 2020, statement.¹ I am very worried that the rushed schedule will lead to a significant undercount in hard-to-count communities, which puts the accuracy and quality of the Constitutionally-mandated count at risk. Further, I believe that this deviation in schedule is driven not by expert opinions of career Census Bureau employees but by external pressure from the White House and the Department of Commerce for perceived political gain. I request that you investigate whether the decision to expedite operations comports with the statutory requirements under title 13, U.S. Code. I also ask that as the data collection and processing operations unfold, you continue to monitor and assess changes from both the original and April 2020 pandemic-adjusted Decennial Census operational plans and schedules that might impact data quality and, ultimately, the accuracy of the results.

The COVID-19 pandemic has understandably necessitated modification of the original 2020 Decennial Census schedule. The largest and most important field data collection operation, nonresponse followup, was originally scheduled to take place from May 13 to July 31, 2020. However, due to the pandemic, Census Bureau Director Steven Dillingham and Secretary of Commerce Wilbur Ross released a joint statement on April 13, 2020, announcing that the Census Bureau would delay field operations, including nonresponse followup, by three months to protect public health. The release states: "The Census Bureau would extend the window for field data collection and self-response to October 31, 2020."² As part of the statement, Secretary Ross and Director Dillingham also requested a four-month delay in the statutory deadlines for reporting apportionment and redistricting counts to no later than April 30, 2021, and July 31, 2021, respectively.

¹ "Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count," U.S. Census Bureau, 3 August 2020, <https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html>.

² "U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19," U.S. Census Bureau, 13 April 2020, <https://2020census.gov/en/news-events/press-releases/statement-covid-19-2020>.

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However, over the past several weeks it was widely reported in the press that the Trump Administration was looking to rush 2020 Decennial Census operations in order to allow the Secretary of Commerce to transmit the apportionment counts to the president by December 31, 2020.³ Then, on August 3, 2020, Director Dillingham announced that field data collection and self-response operations will be shortened by a month, ending on September 30, 2020. I fear that compressing these critical operations will force the Census Bureau to reduce the number of attempts to enumerate households and significantly increase the use of administrative records, proxy interviews and whole household imputations. The greater use of enumeration methods that are known to produce less reliable data could lead to a substantial undercount, especially in historically hard-to-count communities.

Director Dillingham also announced that data processing operations will be “streamlined.” This clearly suggests that quality check, data processing and external review operations, which were originally expected to take about five months, will have to be compressed by several months and curtailed to meet the December 31, 2020, deadline. Given that most data collection operations will occur long after the April 1, 2020, Census Day due to pandemic-related disruptions and delay, careful quality check and data processing activities will be particularly important to ensure that individuals are counted in the correct location and duplicates are removed.

Previous statements from career Census Bureau leadership lead me to believe that this new, rushed schedule is not based on the need to execute a complete and accurate count, but instead on external pressure. For the past several months, Census Bureau experts consistently have made clear that additional time provided by delaying the statutory deadlines is needed for a successful count. In May, Tim Olson, director of field operations for the 2020 Decennial, stated, “We have passed the point where we could even meet the current legislative requirement of Dec. 31... We can’t do that anymore.”⁴ In July, Albert Fontenot, Jr., associate director for Decennial Census Programs, said in reference to the statutory deadlines, “We are past the window of being able to get those counts by those dates at this point.”⁵ Further, Bureau experts believe that the results of accelerating the data collection operations under current conditions could be disastrous. An unnamed career official stated, “I’m very fearful we’re going to have a massive undercount.”⁶

It is critical that the Census Bureau execute a complete and accurate 2020 Decennial Census for the purposes of apportionment of the House of Representatives, as well as distribution of \$1.5 trillion annually in Federal funding to States, localities, individuals and businesses. I request that the Department of Commerce (DOC) Office of Inspector General

³ Wines, M. (2020, July 28). New Census Worry: A Rushed Count Could Mean a Botched One. *New York Times*, <https://www.nytimes.com/2020/07/28/us/trump-census.html>

⁴ Lo Wang, H. (2020, May 27). ‘We’re Running Out Of Time’: Census Turns To Congress To Push Deadlines. *National Public Radio*, <https://www.npr.org/sections/coronavirus-live-updates/2020/05/27/863290458/we-re-running-out-of-time-census-turns-to-congress-to-push-deadlines>

⁵ Lo Wang, H. (2020, July 28) Republicans Signal They’re Willing To Cut Census Counting Short, *National Public Radio*, <https://www.npr.org/2020/07/28/895744449/republicans-signal-theyre-willing-to-cut-short-census-counting>

⁶ Lo Wang, H. (2020, July 30). Census Door Knocking Cut A Month Short Amid Pressure To Finish Count. *National Public Radio*, <https://www.npr.org/2020/07/30/896656747/when-does-census-counting-end-bureau-sends-alarming-mixed-signals>

U.S. DEPARTMENT OF COMMERCE

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(OIG) investigate whether compressing data collection and processing operations comports with the relevant statutory requirements, as well as traditional lines of authority for making relevant decisions governing the execution of the Decennial Census. Further, I request that the OIG continue to closely monitor and assess the implications of operational “streamlining” and changes to the April 13, 2020, Decennial Census operational plan for data quality and accuracy. I ask that you report periodically on your findings to the Senate and House Committees on Appropriations, the House Committee on Oversight and Reform and the Senate Committee on Homeland Security and Governmental Affairs.

The OIG plays a crucial role in informing Congress and the public of Census Bureau operations. The OIG has received \$3,556,000 in each of fiscal years 2019 and 2020 by transfer from the Census Bureau to carry out investigations and audits related to the 2020 Decennial Census. I appreciate the work of the OIG thus far to help improve the planning, execution and outcome of the Census. I expect DOC employees to fully cooperate and assist the OIG, in this, and all other investigative matters. I request that you keep me and my staff informed of any attempts to prevent you from completing your work in direct contravention of the Inspector General Act of 1978. I look forward to the results of your investigation.

Sincerely,



Jeanne Shaheen
Vice Chair
Subcommittee on Commerce,
Justice, Science and Related Agencies

U.S. DEPARTMENT OF COMMERCE

OFFICE OF INSPECTOR GENERAL

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Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515-6015

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 WILL HURD, TEXAS

SHALANDA YOUNG
 CLERK AND STAFF DIRECTOR
 (202) 225-2771

August 21, 2020

Inspector General Peggy E. Gustafson
 U.S. Department of Commerce
 1401 Constitution Ave NW
 Washington, D.C. 20230

Dear Inspector General Gustafson:

I write to express my deep concerns regarding the Department of Commerce's conduct around the 2020 Decennial Census operation and potential external pressures to expedite the U.S. Census Bureau's ("the Bureau") schedule outside of the recommendations of senior career professional staff. I request the Office of Inspector General (OIG) examine the timing and justification for decisions around the various schedules consistent with your authorities under the Office of Inspector General Act of 1978.

Several actions taken by the Department in the past several weeks raise serious concerns about the integrity and accuracy of the 2020 Census. For example, due to the challenges resulting from the novel coronavirus pandemic in early 2020, the Associate Director of Decennial Census Programs and the Associate Director of Field Operations repeatedly informed congressional staff on weekly phone calls that the Bureau would need to continue its field operations, specifically Non-Response Follow-up, until October 31, 2020 to ensure an accurate count and to ensure the health and safety of those conducting the enumeration as well as the public. Further, these career staff communicated that it was simply no longer possible for the Bureau to finish its operations and report initial results by the December 31, 2020 statutory deadline. However, despite the rising number of coronavirus cases this summer and passage by the House of Representatives of a measure that would allow for statutory deadline extensions¹, as initially requested by the Department, it is my understanding that the Secretary subsequently requested that the Bureau develop a new plan to comply with statutory deadlines. This request was made only after the

¹ The House of Representatives took immediate action and included this request to shift the decennial statutory deadlines as part of the HEROES Act (H.R. 6800, Sec. 70201). Additionally, the HEROES Act included an additional \$400 million to allow the Bureau to address any additional issues that may arise through the remainder of the 2020 Decennial Census operation.

U.S. DEPARTMENT OF COMMERCE

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Gustafson – Department of Commerce / Decennial Census
Page 2

arrival of two new political appointees in mid-July and the issuance of the Presidential Memorandum on July 21, 2020. The revised plan abandons the Department's prior proposal for legislative relief that would result in a four-month delay in the completion of the 2020 Decennial Census². Additionally, as part of this new effort, the Administration communicated a \$1 billion supplemental funding request to support this expedited schedule. However, this communication was sent only to Majority staff of the Senate Appropriations Committee, rather than to all relevant House and Senate Appropriations staff.

It appears that in the three months after the House passage of a statutory extension and the arrival of now three³ new political appointees, rather than working with the Senate to support the legislative action taken by the House, the Administration opted to work on a plan to unnecessarily expedite the Bureau's revised schedule, against the recommendations of senior career staff.

I would like to further note that the compressed schedule will also force a shortened timeframe for data processing, ultimately cutting that time in half, compared to both the Bureau's original and initial revised plans. I am gravely concerned that a compressed timeline will greatly impact the quality of data used to ensure an accurate and complete count which will inform congressional apportionments, legislative redistricting, and future Federal spending. It is deeply troubling that this Administration appears to be politicizing the Bureau's operation – one that was a decade in the making. These actions jeopardize our ability to ensure an accurate count, especially for hard-to-count communities.

I request that the Office of Inspector General review: the process used to arrive at the revised schedule announced on August 3rd, 2020 to ensure the proposed changes were and are absent political considerations, whether these changes were made after intervention from political appointees at the Department or from individuals employed at the White House, and if partisan influence impacted communications with Congress about these proposed changes and associated funding needs. Additionally, I request that the OIG examine the Bureau's efforts to uphold the highest standards for data quality and analyze whether a compressed schedule interferes with the Bureau's ability to ensure data quality. Lastly, I request that the OIG determine whether any violations of law, regulation, or policy occurred as a result of actions taken at the Department concerning the 2020 Census since July 1, 2020.

Thank you for your attention to this important matter. I appreciate the work the OIG has done toward ensuring transparency in the 2020 Decennial operation and trust that DOC employees will assist you in your investigation. However, I would ask that you swiftly notify us if there are any attempts to contravene your efforts. I further ask that you periodically update the House and

² Under 13 USC 141(b), the Secretary of Commerce is required to complete and report to the President within 9 months after the decennial census date (defined as the first day of April) the tabulation of the total population by State as required for apportionment of the Representatives in Congress among the several States. The legislation requested by the Administration in early April 2020 extended that deadline for the 2020 Census to 13 months after the census date of April 1, 2020.

³ Lo Wang, H. (2020, August 17). Amid Partisan Concerns Another Trump Appointee Joins Census Bureau Top Ranks. *National Public Radio*, <https://www.npr.org/2020/08/17/903222947/amid-partisan-concerns-another-trump-appointee-joins-census-bureaus-top-ranks>.


U.S. DEPARTMENT OF COMMERCE

OFFICE OF INSPECTOR GENERAL

Gustafson – Department of Commerce / Decennial Census
Page 3

Senate Committees on Appropriations, as well as the House Oversight and Reform and Senate Homeland Security and Governmental Affairs Committees on your findings.

Sincerely,



Jose E. Serrano
Chairman
Subcommittee on Commerce, Justice, Science, and
Related Agencies

1 JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
2 ALEXANDER K. HAAS
Branch Director
3 DIANE KELLEHER
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10 *Attorneys for Defendants*

11
12
13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
SAN JOSE DIVISION

15
16 NATIONAL URBAN LEAGUE, *et al.*,

17 Plaintiff,

18 v.

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

20 Defendants.
21
22
23
24
25
26
27
28

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

**DECLARATION OF
ALBERT E. FONTENOT, JR.**

DECLARATION OF ALBERT E. FONTENOT, JR.
Case No. 5:20-cv-05799-LHK

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

4 **I. Executive Summary**

5 1. I am the Associate Director for Decennial Census Programs at the U.S. Census
6 Bureau. This supplements my prior declaration in this case. In this declaration I:

- 7 • Explain that the Census Bureau is currently required by statute to produce
8 apportionment counts by December 31, 2020;
- 9 • Explain the steps that are necessary to conclude field operations by the December 31,
10 2020 deadline, and identify the ways in which the Temporary Restraining Order
11 (TRO) in this case is interfering with these steps;
- 12 • Explain the steps in post processing that must occur on the completion of field
13 operations and reiterate that if these steps do not begin on October 1, 2020, the Census
14 Bureau may fail to meet its statutory deadline.

15 **II. Statutory Deadline**

16 2. The Census Act 13 U.S.C. Section 141 provides that “the tabulation of total
17 population by States under subsection (a) of this section as required for the apportionment of
18 Representatives in Congress among the several States shall be completed within 9 months after
19 the census date and reported by the Secretary to the President of the United States.” For the 2020
20 Census, this means that the tabulation must be completed and reported to the President by
21 December 31, 2020. While various bills have been introduced in Congress to extend this statutory
22 deadline, as of today the December 31, 2020 deadline remains in effect. The Census Bureau
23 designed the Replan schedule to allow us to meet this statutory deadline.

24 **III. Steps to Conclude Field Operations**

25 3. I explained in my September 5 declaration in this case that nonresponse follow-up,
26 NRFU, is the field operation designed to complete enumeration of nonresponding housing unit
27 addresses and that it involves census field staff (known as enumerators), attempting to contact
28 nonresponding addresses. I will not repeat the background information about NRFU, but will

DECLARATION OF ALBERT E. FONTENOT, JR.
Case No. 5:20-cv-05799-LHK

1 attempt to further assist the court's understanding of decennial field operations by explaining in
2 more detail the steps necessary to conclude field operations.

3 4. Concluding field operations in Area Census Offices (ACOs) as they complete their
4 workload is a normal part of the NRFU operation, and is not specific to the Replan Schedule. The
5 Census Bureau manages NRFU out of "Census Field Supervisor areas" or "CFS areas" within each
6 of the nation's 248 ACOs. CFS areas are supervisory work assignment areas consisting of 4,000-
7 5,500 housing units. As of September 21, 2020, roughly 70.7% (9,576) of CFS areas nationwide
8 are eligible for what we call "the closeout phase," 8,682 are actually in the closeout phase, and
9 roughly 1,578 have actually reached conclusion, meaning that we have zero unresolved addresses
10 in the CFS area.

11 5. The closeout phase refers to the process of focusing our best enumerators to resolve
12 the remaining cases in that area. At the time both the COVID-19 Plan and the Replan were decided
13 upon, CFS areas were eligible for closeout procedures when they crossed the 85% completion
14 mark, or at the passage of a particular date, whichever occurred first. We increased this percentage
15 to 90% independent of the Replan to improve accuracy¹. Under the Replan, all CFS areas would
16 have become eligible for closeout procedures on September 11. This does not mean that all CFS
17 areas would have been moved to closeout procedures on that date, only that regional directors
18 could have made this decision. Under the TRO, we have directed that no CFS area be moved into
19 closeout procedures until it reaches 90% completion. The Census Bureau is continuing to work
20 across the nation to obtain responses from all housing units, and has not begun closeout procedures
21 for any CFS area with under 90% completion.

22 6. On September 5, 2020 this Court enjoined the Census Bureau from "implementing
23 the August 3, 2020 Replan or allowing to be implemented any actions as a result of the shortened
24 timelines in the August 3, 2020 Replan, including but not limited to winding down or altering any
25 Census field operations." This TRO is preventing the Census Bureau from taking the steps it needs

26
27 ¹ In my September 5 declaration in this case I said the threshold for moving to Closeout Procedures was 85%. I was
28 incorrect. We had initially planned for an 85% threshold, but increased the threshold to 90% on August 17, 2020 as
a way to increase the quality of the data we collected. As discussed above, under the TRO, the Census Bureau has
not begun closeout procedures for any CFS area with under 90% completion.

1 to conclude data collection in an efficient and effective manner in time to meet our statutory
2 deadline, including:

3 Preventing Use of Highest Performing Enumerators. Because of the TRO restriction on
4 releasing staff, we are unable to execute our strategy of assigning the remaining work in CFS
5 Areas eligible for the Closeout Phase to our highest performing enumerators. We define our
6 highest performing enumerators as those who have high case completion rates, are good at
7 converting refusals, know where to look for proxies, have a lot of available hours to work
8 cases, and may have a special skill, like a second language, that assists them to complete
9 cases. This strategy would have ensured that the most difficult NRFU cases were handled
10 by the highest performing enumerators, which would have improved both data quality and
11 efficiency. The data quality improvements come from having enumerators who have a
12 demonstrated ability to work with respondents to get their cooperation completing interviews
13 handling the final NRFU cases (which are often the most difficult cases to complete). We
14 gain efficiency because these enumerators achieve higher rates of completion and resolve
15 cases more quickly.

16 7. The Census Bureau assigns cases using its optimization software. This software is
17 designed to assign cases, via an assigned smart phone, to all enumerators with available hours in
18 a given CFS area, based on a variety of factors – geographic proximity, number of case attempts,
19 best time to contact and other factors. For Closeout, the optimization software – in conjunction
20 with our effort to keep the highest performers - is designed to stabilize the closeout process by
21 assigning high performing enumerators a dedicated set of more permanently cases in a CFS Area.
22 By giving these enumerators more ownership of a set of cases, they can be more strategic in how
23 they attempt to contact them. For instance, if they get a lead on a proxy one day, they will be able
24 follow through on that proxy on a subsequent day.

25 Preventing the Movement of CFS Areas into Closeout Before 90%

26 8. The Census Bureau's plan has always involved making all CFS areas eligible for
27 Closeout Phase when that CFS area either reaches a percentage completion threshold, or on a date
28 certain, approximately 2 - 3 weeks prior to scheduled conclusion of field operations. The date

DECLARATION OF ALBERT E. FONTENOT, JR.
Case No. 5:20-cv-05799-LHK

1 under the Replan when all CFS areas would have become eligible for Closeout Procedures was
2 September 11. Without the TRO, all CFS areas would be currently eligible for Closeout Phase.

3 9. Closeout procedures are used in every Census to finalize data collection because
4 they provide us with a consistent way to finish the census. Every CFS area is treated the same
5 way, which minimizes variability in how the data is collected. Consistency is an important element
6 of data quality. We would also be able to finish more effectively using Closeout Procedures
7 because this would allow us to accept what we call "POP count only" (population count only,
8 without associated demographic information) is the minimal acceptable data necessary to fulfil the
9 requirements for apportionment. Under the Replan, for households that have not responded to the
10 Census in the final stage of the operation, we were going to utilize arrangements we had made
11 with the Internal Revenue Service (IRS) to allow us to use IRS population count information (a
12 high quality single administrative record source) as the sole source of POP count only information.
13 We still planned to make an attempt to contact these households, and if an enumerator could obtain
14 full information we would take that as a first choice. We have used POP count only enumeration
15 in all censuses since 1990; it is an established technique to convert the final and most difficult
16 cases, to meet the requirements for apportionment and to reduce the number of cases requiring
17 imputation.

18 Ceasing Assignment of Reinterview Cases

19 10. In order to finish field operations by a given deadline, we would normally cease
20 assigning new reinterview cases two weeks prior to conclusion. (The reinterview operation
21 involves reinterviewing selected addresses for quality assurance.) Continuing to assign
22 reinterview cases beyond that point would produce and continual cycle of new cases coming into
23 the field. If we were not under the TRO, we would have ceased assigning reinterview cases, SRQA
24 (Self Response Quality Assurance) cases, and field verification cases by September 16, 2020.
25 Every day that we are forced to send these reinterview cases prevents from deploying these
26 enumerators elsewhere, hindering our ability to complete the Census.

1 11. The Census Bureau Detailed Operations Plan for NRFU states in chapter 2.3.5.3
2 (page 39)² we have 3 types of reinterviews during NRFU –

- 3 • Analytic: Based on statistical calculations, enumerators whose work differs
4 significantly from other enumerators are flagged as outliers. Cases completed by
5 these enumerators are chosen so that an analytic reinterview can be used to further
6 investigate these enumerators to determine if they are following proper
7 enumeration procedures.
- 8 • Random: Random reinterview involves reinterviewing a random sample of the
9 eligible cases completed by every enumerator.
- 10 • Supplemental: Supplemental reinterview allows the National Processing Center
11 (NPC) staff to select additional cases for reinterview for any enumerator at any time
12 during NRFU, if they suspect an enumerator may not be following procedures. This
13 can be done through manual selection, where the user selects a specific case for
14 supplemental RI, or future selection, where the user selects an enumerator and the
15 next two cases checked in for that enumerator are selected for supplemental RI.

16
17 12. The Census Bureau assessed whether we were getting sufficient quality control
18 using analytic and supplemental reinterviews, and as a part of our ongoing process management,
19 and under the Replan, we determined that we would discontinue sending random reinterview cases
20 to the field. In prior censuses, we selected cases for the Reinterview operation primarily through
21 random selection because the paper-based enumeration did not provide us with a method of near
22 real-time assessment of enumerator performance. In the 2020 Census, however, we can obtain
23 information from the handheld devices used by enumerators, such as information about where they
24 were at the time of the interview, the length of the interview, time spent on each question, and
25 other detailed metrics. The elimination of random reinterview was introduced at the same time as
26 the Replan and therefore we are enjoined from making the decision to discontinue this unnecessary

27
28 ² This is posted on the Census Bureau's public website at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan_v20.pdf

1 operation. The mandatory continuation of random reinterview simply diverts enumerators who
2 could be used to enumerate hard-to-count addresses.

3 Reversing Reduced Contacts for Vacant Units

4 13. As part of the Replan, the Census Bureau reduced the field work required to verify
5 that a vacant housing unit is, in fact, vacant. We do some follow up with housing units that
6 respondents report as vacant, simply to verify the information. Our original plan required us to
7 make as many as six visits to housing units that had previously been self-reported as vacant. Under
8 the Replan we reduced these six visits to one, and required no visit for self-reported vacant units
9 where we had confirmation of vacancy from administrative records. The TRO's requirement that
10 we visit housing units that respondents reported to be vacant as many as six times, even if we have
11 confirmation of the vacancy from administrative records, also imperils our ability to complete the
12 data collection prior to September 30, 2020. As of September 21, 2020 we are finished with 88.8%
13 of the NRFU field work and 95.8% of the housing units in the nation have been enumerated - and
14 those numbers increase daily. Additionally, 4 states have 99% or more of their housing unit
15 enumeration completed. A total of 49 states, plus Washington D.C. and the Commonwealth of
16 Puerto Rico, have completed 90% or more of the housing units.

17 14. In my September 5 declaration, ECF No. 81-1, I stated that as of that date, and at
18 the completion rate we were then experiencing, we would be able to conclude data collection
19 operations by September 30 and achieve a 99% completion rate for every state. On September 11,
20 2020 I revised my assessment and stated that we were facing significant risks to complete all states
21 by September 30, due to factors beyond the Census Bureau's control, such as wildfires in the
22 western part of our country, major storms, resurgence of COVID-19 restrictions and other similar
23 disruptions. My concerns in this regard continue. In the midst of major West Coast fires and air
24 quality issues that have accelerated since September 11, and the current impacts of Hurricane Sally
25 across the states of Louisiana, Mississippi, Alabama, the Florida panhandle area, parts of Georgia,
26 and South Carolina, I stated publicly on September 17, 2020 in the Census Scientific Advisory
27 Committee meeting that I did not know whether Mother Nature would allow us to meet the
28 September 30 date. Mother Nature, however, is not the only factor; every day that Court

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1 injunctions preclude us from following our normal field procedures makes it more difficult for us
2 to complete a timely and complete census.

3 15. The Census is a dynamic operation, conducted across the entire nation, and the
4 situation changes rapidly. We are now dealing with the effects of wildfires, smoke, and multiple
5 hurricanes, including storms still forming that may affect the Gulf Coast area. As of today, we
6 still have 1 state with a completion rate below 90%, thus demonstrating our urgent need to revert
7 to our planned completion strategies to meet the statutory deadline.

8
9 **IV. Steps to Conclude Post-data Collection Processing**

10 16. The next major step, after the completion of data collection operations, is post
11 processing, which refers to the Census Bureau's procedures to summarize the individual and
12 household data into usable, high quality tabulated data products. Our Replan schedule was
13 premised on beginning post processing on October 1 and was designed to allow the Census Bureau
14 to finish NRFU and post processing before the statutory deadline of December 31, 2020.

15 17. Our post processing procedures and systems are meticulously designed, tested and
16 proven to achieve standardized, thoroughly vetted, high quality data products that we can stand
17 behind. The 2020 Census leveraged significant advances in computing technology that have
18 occurred since the 2010 Census. Internet data collection, use of smart-phones for field data
19 collection, digital input of phone data collection, and state-of-the-art paper data capture have
20 enabled the Census Bureau to consolidate and prepare the raw census data for processing more
21 rapidly than ever before. Additionally, our computer applications include built-in quality controls
22 that guide respondents through the data collection process and help to ensure higher data accuracy
23 at the point of data input than ever before.

24 18. The computer processing systems at Census Headquarters have also been optimized
25 in partnership with industry leaders using the latest hardware, database, and processing technology
26 available. Taking advantage of this processing power and speed, we were able to accelerate our
27 processing time to fit within the Replan schedule.

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1 19. Nonetheless, post data collection processing is a particularly complex operation,
2 and the steps of the operation must generally be performed consecutively. It is not possible, e.g.,
3 to establish the final collection geograph (establishing the number of housing units for all
4 geographic boundaries in the nation) prior to processing housing units and group quarters that are
5 added or corrected during NRFU. Similarly, it is not possible to unduplicate responses prior to
6 processing all non-ID responses (responses submitted online or via telephone without a census
7 ID). In this sense, the post data collection activities are like building a house – one cannot apply
8 dry wall before erecting the walls, any more than one could lay floor tile before the floor is
9 constructed. There is an order of steps that must be maintained.

10 20. As part of developing the Replan schedule, we looked at the possibility of starting
11 the post data collection processing activities on a flow basis and reaffirmed that there is little
12 opportunity to begin until data collection operations close everywhere. As explained above, it is
13 generally necessary to perform processing steps consecutively, as each step depends upon
14 completion of the prior step. The only processing step we could adjust in the schedule was initial
15 processing of addresses, which we advanced by 26 days. It is not possible, however, to begin final
16 census response processing in one region of the country while another region is still collecting
17 data.

18 21. In my prior declaration I provided information about the various operations
19 comprising post processing and their original and Replan dates. I will not repeat that information
20 here.

21 22. Finally, we wish to be crystal clear that if the Court were to extend the data
22 collection period past September 30, 2020, the Census Bureau's ability to meet its statutory
23 deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior
24 to April 1, 2021 would be seriously jeopardized. The post processing deadlines for the Replan
25 schedule are tight, and extending the data collection deadline would, of necessity, cause the Census
26 Bureau would be at risk of failure of being unable to process the response data in time to meet its
27 statutory obligations. We have already compressed the post processing schedule from 5 months
28 to only 3 months. We previously planned and tested our post processing systems assuming that

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1 we would follow a traditional, sequential processing sequence, and the 3-month schedule
2 necessary for the Replan Schedule has already increased risk. We simply cannot shorten post
3 processing beyond the already shortened 3-month period without significant risk.

4 23. The harms discussed in this declaration will be particularly severe in the states that
5 are lagging in total response, primarily those states impacted by storms and weather conditions.
6 Without full latitude to follow our standard completion procedures, these states are more likely to
7 suffer an incomplete enumeration.

8 24. Both field operations and post processing are necessary to conduct the most
9 complete and accurate Census. Spending too much time or effort on one at the expense of the other
10 can result in a less complete or accurate Census. We at the Bureau use our expertise and
11 knowledge to determine the right balance between the two in light of the applicable constraints,
12 including the December 31 statutory deadline to complete the Census and the Secretary's report
13 to the President. Were this Court's actions to compress our timeline still further, the Census Bureau
14 would be at risk of not completing post processing without eliminating critical steps that are needed
15 to insure the accuracy of the enumeration and the apportionment counts. If the court requires us
16 to extend field operations past September 30, it necessarily will come at the expense of post
17 processing, given the statutory deadline of December 31. We currently compressed post
18 enumeration processes to the extent we believe feasible. Any shortening of the allotted time would
19 force us to decide whether to delete operations that are critical and necessary to preparing the
20 apportionment count. Under the current Census Act, neither the Census Bureau nor the Secretary
21 have missed the statutory deadline.

22 23 **V. Conclusion**

24 25. The Census Bureau is doing everything it can to meet the statutory completion
25 deadline and to comply with the Court's TRO. Continued requirement to comply with the
26 restrictions of the TRO means that the Census Bureau will risk missing its statutory deadline to
27 deliver apportionment data.

28
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1
2
3 26. I have read the foregoing and it is all true and correct.
4

5 DATED this ____ day of September, 2020

6 **Albert E Fontenot**

Digitally signed by Albert E
Fontenot
Date: 2020.09.22 11:52:54 -04'00'

7
8 Albert E. Fontenot, Jr.

9 Associate Director for Decennial Census Programs

10 United States Bureau of the Census
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Case No. 5:20-cv-05799-LHK

Proposed Options for Completion of Enumeration

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Proposed Options for Completion of Enumeration

Background:

The Office of General Counsel (OGC) **AC/AWP**

Projections for state completion rates for 9/30 and 10/5:

Projection A*		Projection B**	
September 30: 13 states below 99%	Georgia	September 30: 17 states below 99%	Florida
• Kentucky	• Montana	• Wyoming	• Arizona
• Arizona	• Mississippi	• Iowa	• North Carolina
• Colorado	• South Carolina	• Delaware	• New Mexico
• New Mexico	• Louisiana	• Colorado	• Georgia
• Florida	• Alabama	• Oklahoma	• Mississippi
• South Dakota		• South Dakota	• South Carolina
• North Carolina		• Kentucky	
		October 5: 10 states below 99%	Mississippi
October 5: 1 state below 99%		• Arizona	• South Carolina
• Alabama		• North Carolina	• Montana
		• Florida	• Louisiana
		• New Mexico	• Alabama
		• Georgia	

• Montana
• Louisiana
• Alabama

- Note: Even for states over 99% completion rates, there will be sub-state areas that are substantially below 99%, particular Tribal Areas due to COVID-19 restrictions.
- As in previous censuses, the Census Bureau will use count imputation to accurately account for households for which we have field evidence that are occupied.

- If field work is completed anytime after October 5, Census Bureau will be unable to deliver state counts for apportionment by December 31, 2020 due to necessary post processing activities. Any delay beyond October 5, 2020 would require a corresponding delay to the delivery of state counts for apportionment.

2 2020CENSUS.GOV

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*Based on one-day change as of September 26, 2020

**Based on state NRFU caseload and available enumerators as of September 26, 2020

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Proposed Options for Completion of Enumeration

The Census Bureau recommends closing out field operations no earlier than Monday, October 5, 2020.

Post Data Collection Processing

- Streamlined post data collection processing and focusing only on state counts for apportionment in order to complete all post data collection processing by December 19, 2020.
- This assumes that there are no unanticipated delays in post data collection processing.
- The latest date to begin post data collection processing that allows Census Bureau to deliver state counts for apportionment to the Secretary of Commerce by December 31, 2020 is October 6, 2020.

The Census Bureau needs advanced notice before beginning “closeout” procedures.

- There are currently more than 18,000 enumerators on travel whose travel status either needs to be suspended or extended.
- Assuming field work is concluded on October 5, 2020, a decision on “closeout” processes including enumeration travel is required no later than Friday, October 2, 2020.

Option 1: Conclude field work by October 5, 2020 in order to meet apportionment delivery date of December 31, 2020.

Option 2: Continue field work beyond October 5, 2020 in order to increase state completion rates to 99% and to continue to improve enumeration of lagging sub-state areas, such as tribal areas, rural areas, and hard-to-count communities. However, this would not allow for delivery of state counts for apportionment by December 31, 2020.

Projections To Finish NRFU

Projection A – Previous Day Method

This is a simple straight-line projection of a state's progress based on previous day's rate of completion. The projected pace of work completion is constant, meaning the percentage of work completed yesterday will be the same every day until 99% is reached. It assumes no decline in productivity.

Advantages:

- Incorporates the current staffing and productivity.
- An accurate "predictor" for close-day calculations (the next day or two)

Disadvantages:

- For areas with current progress of 90-95%, it can be highly optimistic as it does not account for the slowdown that takes place with the most difficult cases as progress approaches 99%.
- It is susceptible to predictable, daily fluctuations in productivity. Sundays are less productive than Tuesdays. NRFU productivity during SBE activities was lower.
- Can be highly variable based on local conditions – weather, fires, civil unrest, etc.

Projection B – "Banded" Method

This is a projection based on the pattern of completion for previous states, based on the progress at different intervals of completion. It uses "bands" of completion rates which apply to all states within the "band". It incorporates a higher rate of productivity at lower rates of completion and assumes a significant slowing as rates approach 99%. It uses average rates of completion for states which have already passed these intervals.

Advantages:

- Reflects the decline in productivity as completion rates near 99%
- Uses "real" completion data

Disadvantages:

- Does not account for recent interventions, such as staffing, travelers and workload reconfigurations. Some of these are significant.
- Reflects work during the period when restrictions were in place as a result of the TRO.
- Includes the "learning curve" of managers figuring out the system and the finishing process. We know the first few states were very difficult to finish because of issues with systems and procedures.

Projection A - When a State will hit 99% Enumeration Completion											
State	28-Sep	29-Sep	30-Sep	1-Oct	2-Oct	3-Oct	4-Oct	5-Oct	6-Oct		
Kentucky	98.00%	98.46%	98.92%	99.37%							
Arizona	97.58%	98.14%	98.71%	99.27%							
Colorado	98.09%	98.39%	98.68%	98.98%							
New Mexico	97.38%	98.03%	98.68%	99.32%							
Florida	97.67%	98.15%	98.62%	99.10%							
South Dakota	97.67%	97.97%	98.26%	98.56%	98.85%	99.15%					
North Carolina	97.21%	97.71%	98.20%	98.70%	99.19%						
Georgia	96.60%	97.12%	97.65%	98.17%	98.69%	99.22%					
Montana	96.14%	96.81%	97.49%	98.16%	98.84%	99.51%					
Mississippi	96.16%	96.72%	97.28%	97.84%	98.41%	98.97%					
South Carolina	96.05%	96.59%	97.12%	97.66%	98.19%	98.73%	99.26%				
Louisiana	95.50%	96.09%	96.67%	97.25%	97.84%	98.42%	99.00%				
Alabama	94.37%	95.01%	95.65%	96.29%	96.93%	97.57%	98.21%	98.85%			99.49%

Note: Projected based on actual progress in state as of previous day. Projection as of September 26, 2020.

Projection B - When a State will hit 99% Enumeration Completion														
State	28-Sep	29-Sep	30-Sep	1-Oct	2-Oct	3-Oct	4-Oct	5-Oct	6-Oct	7-Oct	8-Oct	9-Oct	10-Oct	11-Oct
Wyoming	98.39%	98.62%	98.86%	99.10%										
Iowa	98.32%	98.56%	98.80%	99.03%										
Delaware	98.07%	98.31%	98.55%	98.79%	99.02%									
Colorado	97.92%	98.16%	98.40%	98.63%	98.87%	99.11%								
Oklahoma	97.59%	97.83%	98.08%	98.32%	98.57%	98.82%	99.06%							
South Dakota	97.52%	97.77%	98.01%	98.26%	98.51%	98.75%	99.00%							
Kentucky	97.36%	97.61%	97.85%	98.10%	98.35%	98.59%	98.84%	99.08%						
Florida	96.97%	97.22%	97.47%	97.71%	97.96%	98.20%	98.45%	98.70%	98.94%	99.19%				
Arizona	96.78%	97.08%	97.38%	97.68%	97.98%	98.28%	98.58%	98.88%	99.18%					
North Carolina	96.63%	96.93%	97.23%	97.53%	97.83%	98.13%	98.43%	98.73%	99.03%					
New Mexico	96.34%	96.64%	96.94%	97.24%	97.54%	97.84%	98.14%	98.44%	98.74%	99.04%				
Georgia	95.93%	96.23%	96.53%	96.83%	97.13%	97.43%	97.73%	98.03%	98.33%	98.63%	98.93%	99.23%		
Mississippi	95.50%	95.84%	96.18%	96.52%	96.86%	97.20%	97.54%	97.88%	98.22%	98.56%	98.90%	99.25%		
South Carolina	95.47%	95.81%	96.15%	96.49%	96.83%	97.17%	97.51%	97.86%	98.20%	98.54%	98.88%	99.22%		
Montana	95.14%	95.48%	95.82%	96.16%	96.50%	96.84%	97.18%	97.52%	97.87%	98.21%	98.55%	98.89%	99.23%	
Louisiana	94.89%	95.26%	95.64%	96.02%	96.39%	96.77%	97.15%	97.52%	97.90%	98.28%	98.66%	99.03%		
Alabama	93.76%	94.19%	94.63%	95.06%	95.50%	95.93%	96.37%	96.80%	97.24%	97.67%	98.11%	98.54%	98.98%	99.41%

Note: Projected based on progress curve of previous states. Does not fully account for additional enumerators sent to finish these areas. Projection based on progress through September 26, 2020.

Re: Thank you and questionWilbur Ross PII

Mon 9/28/2020 5:12 PM

To: Ron S Jarmin (CENSUS/DEPDIR FED) <Ron.S.Jarmin@census.gov>**Cc:** Albert E Fontenot (CENSUS/ADDC FED) <Albert.E.Fontenot@census.gov>; James T Christy (CENSUS/LA FED) <James.T.Christy@census.gov>; Timothy P Olson (CENSUS/ADFO FED) <Timothy.P.Olson@census.gov>; Enrique Lamas (CENSUS/DEPDIR FED) <Enrique.Lamas@census.gov>; Kelley, Karen (Federal) <KKelley@doc.gov>; Steven Dillingham (CENSUS/DEPDIR FED) <steven.dillingham@census.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>

Dear Ron, Thanks for the confirmation. Based on the staff recommendation I am extending the field operation to October 5. Best regards , Wilbur Ross

Sent from my iPhone

On Sep 28, 2020, at 4:30 PM, Ron S Jarmin (CENSUS/DEPDIR FED) <Ron.S.Jarmin@census.gov> wrote:

Yes sir, we need to finish field work on 10/5 if we are to have enough time (and assuming all goes well) to finish the processing of the resident population, federally affiliated overseas and, if requested, unlawful aliens in ICE Detention Centers by 12/31. Other PM related outputs would be pushed to 1/11/2021.

Thanks

Ron S Jarmin, PhD., Deputy Director

U.S. Census Bureau

o: 301-763-1858 | m: PII

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From: Wilbur Ross PII >

Sent: Monday, September 28, 2020 3:52 PM

To: Ron S Jarmin (CENSUS/DEPDIR FED) <Ron.S.Jarmin@census.gov>; Albert E Fontenot (CENSUS/ADDC FED) <Albert.E.Fontenot@census.gov>; James T Christy (CENSUS/LA FED) <James.T.Christy@census.gov>; Timothy P Olson (CENSUS/ADFO FED) <Timothy.P.Olson@census.gov>; Enrique Lamas (CENSUS/DEPDIR FED) <Enrique.Lamas@census.gov>

Cc: Kelley, Karen (Federal) <KKelley@doc.gov>; Steven Dillingham (CENSUS/DEPDIR FED)

<steven.dillingham@census.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>

Subject: Thank you and question

Thank you for the excellent briefing this afternoon. As I prepare to make the decision, I would like to make sure that I understood correctly that your team's opinion is that if we stay in the field beyond October 5, we would not be able to meet the statutory deadline of December 31. Please confirm at your earliest convenience as I understand you would like to make an announcement today. Thank you again.

COMPILATION OF KEY RECORD CITES

DATE	SPEAKER	STATEMENT	RECORD CITE
STATEMENTS MADE BEFORE REPLAN			
April 13, 2020	President Donald Trump	“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.”	Def’s. App. 7a*
April 17, 2020	Census Bureau, “High Level Talking Points”	“We have examined our schedule and compressed it [in the COVID-19 Plan] as much as we can without risking significant impacts on data quality.”	Def’s. App. 49a
April 19, 2020	Census Bureau, “Talking Points Re: 2020 Census Extension & Shift in Field Operations”	“The reality is that we can’t make the deadline as of right now.”	Dkt. 198-5 at DOC_1692
April 27, 2020	Census Bureau, Director Dillingham, Draft Mem. for Sen. Comm. on Homeland Security and Governmental Affairs & House Comm. on Oversight and Reform	“[The COVID-19 Plan] not only protects our employees and the public, but it also allows us to fulfill our mission to conduct a complete and accurate count of all communities across the nation, including hard-to-count communities.”	Dkt. 198-7 at DOC_2232

* “Def’s. App.” refers to the Appendix to the Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in This Court and Request for an Immediate Administrative Stay, filed in this Court on October 7, 2020 by Applicants-Defendants. “Pls. App.” refers to the Appendix to the Response to the Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in This Court and Request for an Immediate Administrative Stay by Respondents-Plaintiffs. “Dkt.” refers to documents filed below in the United States District Court for the Northern District of California, No. 5:20-cv-05167-LHK.

DATE	SPEAKER	STATEMENT	RECORD CITE
April 28, 2020	Census Bureau, “Call with Representative Jamie Raskin”	<p>“We have examined our schedule and compressed it as much as we can without risking significant impacts on data quality. Given the important uses of census data collection processing, it is vital that we not short cut these efforts or quality assurance steps.”</p> <p>“The proposal underwent 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.”</p>	Dkt. 198-7 at DOC_2227-28
May 8, 2020	Census Bureau, “Operational Timeline”	“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.”	Def’s. App. 9a
May 26, 2020	Census Bureau, Timothy Olson, Associate Director for Field Operations	“[W]e have passed the point where we could even meet the current legislative requirement of December 31 . . . We can’t do that anymore.”	Def’s. App. 7a
July 8, 2020	Census Bureau, Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs	“We are past the window of being able to get those counts by [the statutory deadlines] at this point.”	Dkt. 37-11 at 3
July 21, 2020	Census Bureau, “Restart Cannot Compress Timeline”	“[E]ven if the White House Task Force guidance permitted the Census Bureau to restart operations in every state and locality tomorrow, the Census Bureau assesses it currently cannot complete 2020 Census field operations in time to deliver apportionment counts by December 31, 2020, and redistricting data by April 1, 2021. . . . If specific operations are cut or reduced, the effect would be to miss specific parts of the population lead[ing] to an undercount of specific groups.”	Dkt. 198-11 at DOC_7167-68

DATE	SPEAKER	STATEMENT	RECORD CITE
July 23, 2020	Census Bureau, "Elevator Speech"	<p>"Curtailing census operations will result in a census that is of unacceptable quality. . . . 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 national activity."</p> <p>"[I]t is not possible to shorten the schedule appreciably without directly degrading the quality of the results and introducing great risk."</p> <p>"[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."</p>	Pls. App. 37a-38a
July 23, 2020	Associate Director Fontenot	"On Monday at DOC I plan to talk about the difference between goal and actual case enumeration ([c]urrently a shortfall . . . and attribute it to the higher drop out rate . . .). I think it is critical to lay the groundwork for the reality of the COVID Impacts and challenges."	Pls. App. 35a-36a
July 23, 2020	Associate Director Olson	"[E]levating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about."	Defs. App. 10a
July 23, 2020	Associate Director Olson	"We need to sound the alarm to realities on the ground – people are afraid to work for us . . . 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."	Defs. App. 10a

DATE	SPEAKER	STATEMENT	RECORD CITE
July 27, 2020	Associate Director Fontenot	“[W]e were unable [to] reduce the post data collection schedule by an appreciable amount without significantly reducing the accuracy and quality of apportionment counts and . . . redistricting data products and without introducing substantial risk.”	Dkt. 199-1 at DOC_8086
July 27, 2020	Census Bureau, “House Committee on Oversight and Reform – Decennial Hearing Prep Materials”	“The current methodology that has been researched, developed and tested over the decade based on proven processes used in prior Census[es] and upgraded with improved current technology and processes will not enable us to meet the statutory deadlines based on projected current field completion dates.”	Dkt. 155-9 at DOC_8158
STATEMENTS MADE DURING ADOPTION OF REPLAN			
July 29, 2020	Census Bureau, “High Level Summary of the Post-Data Collection Activities”	“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.”	Def’s. App. 58a
July 31, 2020	Census Bureau, “Operational and Processing Options to Meet September 30”	“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.”	Def’s. App. 11a, 55a

DATE	SPEAKER	STATEMENT	RECORD CITE
		<p>“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, 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 April 30, 2021.”</p>	
July 31, 2020	Census Bureau, Patrick Cantwell, Chief of Decennial Statistical Studies Division	<p>“Many of these changes delay activities required for developing the remaining data products following apportionment, some of them (but not all) until after 12/31/20, increasing the risk that they will not be completed on time, whatever that schedule becomes.”</p> <p>“Many of these changes, separately or in combination, have not been previously studied or analyzed for their effects on data quality. We risk decreasing the accuracy of apportionment counts and other statistics released later.”</p>	Dkt. 199-3 at DOC_9073-74
August 1, 2020	Christa Jones, Chief of Staff to Director Dillingham	<p>“I REALLY think we need to say something on page 2 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.”</p> <p>“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.”</p>	Def’s. App. 55a

DATE	SPEAKER	STATEMENT	RECORD CITE
August 1, 2020	Census Bureau, “Operational and Processing Options to meet September 30, 2020”	“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 census data. In order to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved.”	Dkt. 156-4 at DOC_10276
August 3, 2020	Census Bureau, “Operational and Processing Options to meet September 30, 2020”	<p>“Post-processing must start by October 1, 2020.”</p> <p>“All of these activities [in the Replan] represent abbreviated processes or eliminated activities that will reduce accuracy.”</p> <p>“A compressed review period creates risk for serious errors not being discovered in the data—thereby significantly decreasing data quality.”</p> <p>“Additionally, serious errors discovered in the data may not be fixed—due to lack of time to research and understand the root cause or to re-run and re-review one or multiple state files.”</p>	Dkt. 131-7 at 10, 12
STATEMENTS MADE AFTER REPLAN			
August 27, 2020	Government Accountability Office, “2020 Census: Recent Decision to Compress Census Timeframes Poses Additional Risks to an Accurate Count”	Decision to accelerate deadlines “increases the risks with NRFU system performance” and “with conducting the response processing operation,” and “could . . . undermine the overall quality of the count.”	Dkt. 131-6 at 14, 16, 1

DATE	SPEAKER	STATEMENT	RECORD CITE
September 5, 2020	Associate Director Fontenot	<p>Changes to post processing operation “necessitated” by the Replan Schedule “increase the risk the Census Bureau will not identify errors during post processing in time to fix them.”</p> <p>“[W]e wish to be crystal clear that if the Court were to extend the data collection period past September 30, 2020, the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021.”</p> <p>“The post processing deadlines for the Replan Schedule are tight, and extending the data collection deadline would, of necessity, cause the Census Bureau to fail to be able to process the response data in time to meet its statutory obligations. We have already compressed the post processing schedule from 5 months to only 3 months. . . . We simply cannot shorten post processing beyond the already shortened 3-month period.”</p>	Def. App. 110a-11a, 113a
September 8, 2020	Department of Justice, Alexander Sverdlov, Trial Attorney, September 8, 2020 Hearing	<p>“It is important to emphasize, Your Honor, that extending the timeline of the count past September 30th would make it impossible for the Bureau to comply with Section 141’s statutory deadline”</p>	Dkt. 98 at 9:6-9
September 11, 2020	Associate Director Fontenot	<p>“We are . . . facing significant risks to complete all states by [September 30], due to factors beyond the Census Bureau’s control, such as wildfires in the western part of our country, major storms, resurgence of COVID-19 restrictions and other similar disruptions.”</p>	Dkt. 131-8 ¶¶ 82, 107

DATE	SPEAKER	STATEMENT	RECORD CITE
September 18, 2020	Department of Commerce OIG, "The Acceleration of the Census Schedule Increases Risks to a Complete and Accurate 2020 Census"	<p>"[W]e wish to be crystal clear that if the Court were to extend the data collection period past September 30, 2020, the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021."</p> <p>"The accelerated schedule increases the risks to obtaining a complete and accurate 2020 Census."</p> <p>"If data collection ends before 99 percent completeness is met in every state, the Bureau will not achieve what it views as an acceptable level of accuracy and completeness."</p> <p>"According to several senior Bureau officials, the Bureau will miss the December 31, 2020 deadline if data collection goes beyond September 30, 2020."</p> <p>"The Bureau determined that to meet the December 31, 2020, deadline, as the Department asked, data processing must begin October 1, 2020."</p>	Pls. App. 72a, 84a
September 18, 2020	Census Scientific Advisory Committee, "Recommendations and Comments to the Census Bureau from the Census Scientific Advisory Committee Fall 2020 Meeting, September 18, 2020"	<p>"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."</p>	Defs. App. 14a

DATE	SPEAKER	STATEMENT	RECORD CITE
September 22, 2020	Associate Director Fontenot	<p>“In my September 5 declaration . . . I stated that as of that date, and at the completion rate we were then experiencing, we would be able to conclude data collection operations by September 30 and achieve a 99% completion rate for every state. On September 11, 2020 I revised my assessment and stated that we were facing significant risks to complete all states by September 30, due to factors beyond the Census Bureau’s control, such as wildfires in the western part of our country, major storms, resurgence of COVID-19 restrictions and other similar disruptions. My concerns in this regard continue.”</p> <p>“[W]e 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.”</p> <p>“We simply cannot shorten post processing beyond the already shortened 3-month period without significant risk.”</p> <p>“Were this Court’s actions to compress our timeline [past September 30], the Census Bureau would be at risk of not completing post processing without eliminating critical steps that are needed to ensure accuracy. . . . We currently compressed post enumeration processes to the extent we believe feasible. Any shortening of the allotted time would force us to decide whether to delete operations that are critical and necessary to preparing the apportionment count.”</p>	Pls. App. 98a (¶ 14), 100a-01a (¶¶ 22, 24)

DATE	SPEAKER	STATEMENT	RECORD CITE
STATEMENTS MADE ABOUT NEW OCTOBER 5 “TARGET DATE”			
September 25, 2020	Ron Jarmin, Deputy Director and Chief Operating Officer	“We . . . pose two options. One closes out field work on 10/5 to begin processing on 10/6 and allows us to meet the 12/31 deadline . . . The second[] stays in the field longer to allow additional states to reach the 99% completion rate goal and for better completion rates in hard to count areas such as tribal lands. This option would preclude meeting the 12/31 date, but furthers the goal of a complete and accurate 2020 Census.”	Dkt. 233 at 130
September 28, 2020	Census Bureau, “Proposed Options for Completion of Enumeration”	<p>“If field work is completed anytime after October 5, [the] Census Bureau will be unable to deliver state counts for apportionment by December 31, 2020 due to necessary post processing activities. Any delay beyond October 5, 2020 would require a corresponding delay to the delivery of state counts for apportionment.”</p> <p>“The latest date to begin post data collection processing that allows Census Bureau to deliver state counts for apportionment to the Secretary of Commerce by December 31, 2020 is October 6, 2020.”</p> <p>“Assuming field work is concluded on October 5, 2020, a decision on ‘closeout’ processes including enumeration travel is required no later than Friday, October 2, 2020.”</p> <p>“Option 2: Continue field work beyond October 5, 2020 in order to increase state completion rates to 99% and to continue to improve enumeration of lagging sub-state areas, such as tribal areas, rural areas, and hard-to-count communities. However, this would not allow for delivery of state counts for apportionment by December 31, 2020.”</p>	Dkt. 233 at 147, 148

DATE	SPEAKER	STATEMENT	RECORD CITE
September 28, 2020	Email from Wilbur Ross, Secretary of Commerce, to Ron Jarmin, Deputy Director and Chief Operating Officer	Ross: "I would like to make sure that I understood correctly that your team's opinion is that if we stay in the field beyond October 5, we would not be able to meet the statutory deadline of December 31." Jarmin: "Yes sir, we need to finish field work on 10/5 if we are to have enough time (and assuming all goes well) to finish the processing of the resident population, federally affiliated overseas and, if requested, unlawful aliens in ICE Detention Centers by 12/31. Other PM [Presidential Memorandum] related outputs would be pushed to 1/11/2021."	Pls. App. 109a-10a
September 30, 2020	Judge Patrick J. Bumatay (dissenting)	"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."	Def's. App. 134a
October 1, 2020	Defendants' Response to Plaintiffs' Motion for a Temporary Restraining Order	The Census Bureau "need[s] to conclude field operations by October 5 in order to keep open the possibility of meeting the deadline Congress set for reporting census figures to the President."	Dkt. 284 at 4
October 2, 2020	Supplemental Brief of Donald J. Trump et al.	"[T]he Deputy Director of the Bureau . . . explains that the Bureau must 'finish field work on 10/5 if we are to have enough time (and assuming all goes well) to finish the processing of the resident population, federally affiliated overseas and, if requested, unlawful aliens in ICE Detention Centers by 12/31.'"	Suppl. Br. 4, <i>Trump v. New York</i> , No. 20-366 (U.S. Oct. 2, 2020)

DATE	SPEAKER	STATEMENT	RECORD CITE
October 2, 2020	Associate Director Fontenot	“If the California injunction remain in place, it is unlikely that the Census Bureau will be able to meet the December 31 statutory deadline. If, on the other hand, the California injunction is stayed . . . and the Census Bureau is able to complete field operations by October 5, then the Census Bureau anticipates a complete and accurate census by the statutory deadline.”	<i>La Unión del Pueblo Entero v. Trump</i> , No. 8:19-cv-2710 (D. Md.) (Dkt. 126-1) (Declaration of Albert E. Fontenot, Jr. ¶ 8)