No. 20-16868

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. 5:20-cv-05799-LHK

OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Defendants want to stop the 2020 Census count *immediately*. They want to do so in irreversible fashion through an emergency stay that will effectively moot the appeal. They ask for this extraordinary relief in the face of overwhelming evidence from the Census Bureau that doing so will produce an incomplete, inaccurate, and constitutionally deficient count. They do so despite the decade-long harm this will inflict on Plaintiffs and the public who rely on quality census data for apportionment, redistricting, federal funding, and much more. And the only reason Defendants now offer for their hasty, unexplained, and dramatic changes to the Bureau's census timelines is a statutory deadline, still three months away, that by their own admission they cannot meet anyway.

A stay is an exercise of equitable discretion. And the balance of equities tips sharply in Plaintiffs' favor. As the district court found just yesterday, "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." Supp.Add.12. This Court should deny Defendants' stay request and allow the 2020 Census to continue to a complete and accurate count under the Bureau's own COVID-19 Plan.

STATEMENT

The factual and procedural background of this case has been recounted by the district court, in Plaintiffs' opposition to the motion for an administrative stay, and in this Court's order denying an administrative stay. *See* Add.1-78; Admin. Stay Opp. 3-11; Admin. Stay Order 2-4. The attached supplemental addendum provides a further compilation of the many statements made by Census Bureau and other federal officials before, during, and after the Replan, taking the position that completing a sufficiently accurate count before the December 31 deadline is impossible. *See* Supp.Add.16-20. And last night, the district court issued an order finding that Defendants repeatedly violated the preliminary injunction order including, most "egregious[ly]," when the Bureau announced (via tweet) that it was ending field operations on October 5. Supp.Add.6.

ARGUMENT

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). In deciding whether to grant a stay, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other

parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (citation omitted).

A. A Stay Will Inflict Serious And Irreparable Harm On Plaintiffs And The Public

As this Court recognized, a stay would leave "the Bureau's ability to resume field operations . . . in serious doubt." Admin. Stay Order 5. "Thousands 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.* The district court also recently reaffirmed that "[o]nce field operations are terminated, they are difficult to resume; and once data processing begins, no more data can be added for processing." Supp.Add.12-13. Defendants do not argue otherwise. And Associate Director Fontenot said the same. Add.96-97 (¶¶67-68, 98). Granting the stay will end the count for the 2020 Census.

That alone would inflict serious and irreparable harm on Plaintiffs and the public. The Bureau's own projections on September 28 acknowledged that as many as ten states might not reach 99% completion by October 5. Dkt. 233 at 151. The Bureau now asserts they may miss only six states, *see* Fontenot Decl. (¶10), *LUPE v. Trump*, No. 19-cv-2710 (D. Md.) (Dkt. 126-1)—as if 12% of the nation's states is an acceptable error of margin. It is not, and never has been for the 2020 Census—but their state-wide "enumerated" rate fails to tell the whole story in any event.

The Bureau has never averred or provided evidence that its "enumerated" rate is based on the same procedures and metrics as the COVID-19 Plan or prior censuses. And the evidence in the record strongly suggests it is not. The "enumerated" rate includes households that the Bureau has stopped trying to count and, under the Replan, the Bureau is making broader use of counting methods that adversely impact accuracy, including "pop count only," broader reliance on proxies, and increased use of administrative records. *See* Dkt. 131-7 at 7 (listing shortcuts); Add.147 (¶13); DOC_0008779, Dkt. 199-2 (listing shortcuts); Dkt. 260-1 (¶13); Dkt. 266-1 (¶17); Dkt. 233 at 106-111; Dkt. 131-18 at 3.

The presentation delivered to Secretary Ross on September 28 made clear the count would be gravely impacted. It gave the Secretary two options: "Option 1: Conclude field work by October 5, 2020 in order to meet apportionment delivery date of December 31, 2020," *or* "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." Dkt. 233 at 148 (emphasis added). And an email to Mr. Fontenot from the Bureau's Deputy Director confirms that only the second option "furthers the goal of a complete and accurate 2020 Census." Dkt. 233 at 130. The Secretary chose the first.

Defendants are also oddly quiet about the critical data processing phase—in which the Bureau transforms data from 100 million households into usable information, weeds out mistakes, and tests quality. The complexity of this process is hard to overstate:

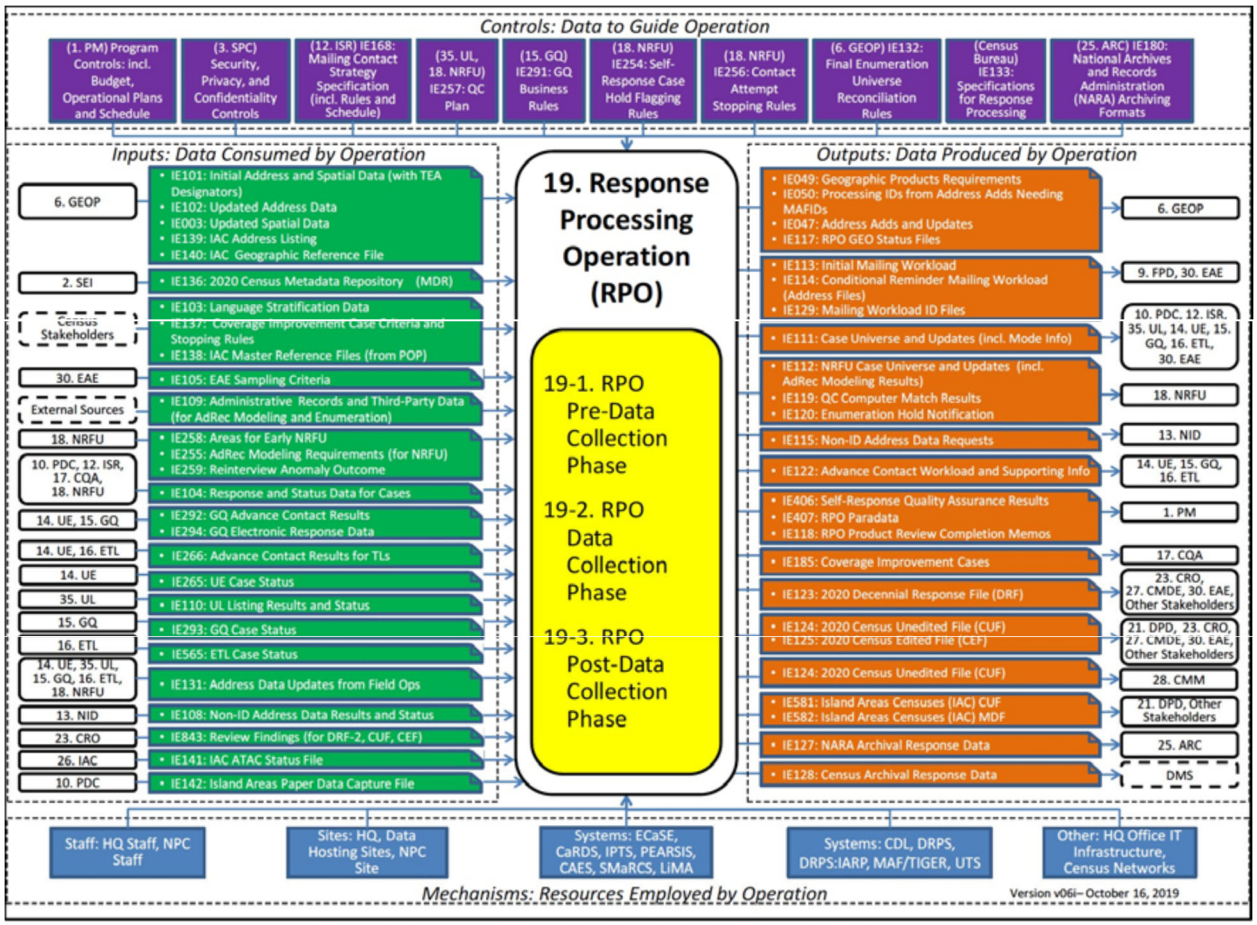

Figure 3: Response Processing Operation (RPO) Context Diagram

Dkt. 36-4 at 17.

The record is replete with statements from the Bureau and other officials warning of significant risks to data quality from rushing data processing. *See* Supp.Add.16-20. The Replan nonetheless cut the time frame in half from six months to three. Add.12. And Defendants' recent "tweet" cut that time by an additional

five days. The harm from a dramatically shorter period to process critical census data stands undisputed and indisputable.

Senior Bureau officials, the Office of Inspector General, the Census Scientific Advisory Committee, the Government Accountability Office, 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* Supp.Add.16-20. 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. Add.23-28.

B. Defendants Still Have Not Shown Irreparable Harm

Defendants claim that the "Census Bureau may be unable to meet the statutory deadline absent immediate relief, and that injury to the Census would be irreparable." Defs. 9/30 Letter at 2. That is wrong twice over.

First, "the evidence in the administrative record uniformly showed that no matter when field operations end . . . the Bureau will be unable to deliver an accurate census by December 31, 2020." Admin. Stay Order 5-6. Defendants admitted for months before the Replan that it was *already* impossible to meet the December 31

deadline while conducting a constitutionally adequate census. *See* Supp.Add.16-20. On July 23, just after the President issued his memorandum excluding undocumented immigrants from apportionment and the pressure to shorten the count began, Bureau officials again said it could not be done. *See* Supp.Add.16-20. And, contrary to Defendants' unsupported assertion, these dire warnings did not just "precede[]" the Replan. Stay Mot. 15. They persisted between July 29 and August 3—and were included in the presentation to the Secretary the *same day* the Replan was announced. *See* Supp.Add.16-20. More recently, after the Replan's adoption, 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." Supp.Add.12 (citation omitted).

Faced with that mountain of evidence, Defendants look the other way. They now say it was *not* impossible to meet the statutory deadline if counting continued past September 30. Defendants new drop-dead date is October 5. *See* Defs. 9/28 Letter; Dkt. 233 at 148; Dkt. 284 at 4. But the only reason they give for this shift is that conditions on the ground are so favorable they can now complete the field operation 26 days early. That is not credible or correct for the reasons stated above. And Defendants have never explained how data processing operations that originally required *six* months can be completed in less than *three*. The October 5 date is made

for litigation—and, even then, the Bureau still would have needed to begin its "'closeout' processes . . . no later than Friday, October 2, 2020." Dkt. 233 at 148.

In short, Defendants cannot meet the statutory deadline—they never could—so a stay will do nothing to alleviate the only harm they assert.

Second, Defendants' claimed inability to meet the statutory deadline is not the sort of harm that could justify a stay.

In arguing to the contrary, Defendants rely solely 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." Admin. Stay Reply 1 (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). Whether and to what extent that proposition would apply with respect to statutes containing different and contradictory commands is unresolved. Regardless, it has nothing to do with agency compliance with statutory deadlines. Defendants' cases all concerned enjoining enforcement of a statute against third parties for the purpose of protecting the public. The "ongoing and concrete harm" in *King* was "to Maryland's law enforcement and public safety interests" in " remov[ing] violent offenders from the general population." 567 U.S. at 1301. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, the harm was to California's inability to enforce the Automobile Franchise Act, such that businesses could "locate dealerships without undergoing any scrutiny by the State." 434 U.S.

1345, 1351 (1977) (Rehnquist, J., in chambers). And in *Coalition for Economic Equity v. Wilson*, California had been enjoined from enforcing a ballot initiative prohibiting the use of race- and gender-based affirmative action programs—and this Court *denied* the stay. 122 F.3d 718, 719 (9th Cir. 1997).[1]

C. Defendants Have Not Made A Strong Showing That They Are Likely To Succeed On The Merits

Defendants cannot make a strong showing that they are likely to succeed. Defendants do not assert most of the "threshold" arguments they rested on below. Those issues are thus "not properly before" the Court at this time, and lack merit regardless. Admin. Stay Order 10; *see also* Add.22-29. Defendants instead argue that the district court was wrong for two reasons: (1) there was no "discrete" agency action that could be challenged, and (2) there is a statutory deadline that categorically binds the agency and the court. Neither argument has merit.

1. Agency action is "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. §

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[1] Defendants briefly suggest "other states" may be harmed, citing to the amicus brief submitted by Louisiana and Mississippi. Admin. Stay Reply 2. That brief, in turn, alludes to a risk to "redistricting and reapportionment." Br. of Louisiana and Mississippi 8-9. But they fail to explain what deadlines might be missed. Mississippi's state redistricting deadlines are not until 2022 (Miss. Const. Ann. art. 13, § 254; Miss. Const. Ann. art. 4, § 36; Miss. Code Ann. § 5-3-93), and its congressional redistricting deadlines are expressly tied to the date when census results are *published* (Miss. Code Ann. § 5-3-123). Louisiana's deadlines are tied to the date apportionment counts are delivered to the President. *See* La. Const. art. III, § 6.

551(13). A "rule," in turn, includes "an agency statement of general or particular applicability and future effect designed to implement . . . policy." *Id.* § 551(4). The August 3 press release announcing the Replan was a "rule." Defendants have never argued otherwise.

Defendants' reliance on *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("*SUWA*") and *NAACP v. Bureau of the Census*, 945 F.3d 183 (4th Cir. 2019), is misplaced. Rhetoric aside, this is not a "broad programmatic attack" on the internal operations of the Bureau. Add.30. Unlike *NAACP*, this is not a "sweeping" challenge, to multiple "design choices" in the 2018 Operational Plan." *Id.* at 189-91. The Bureau, after years of testing and analysis, issued a 200-page 2018 Operational Plan dictating how it would conduct the 2020 Census, and announced it in the Federal Register. 83 Fed. Reg. 26,643 (June 8, 2018). That plan set forth a specific timeframe for critical operations including self-response, NRFU, and data processing. *See* Dkt. 37-5 at 79, 132, 144, 208; Add.3-4. The COVID-19 Plan was a discrete decision moving those timeframes but shortening none of them. Add.6-7. And the decision in the Replan to accelerate and severely curtail those same timeframes was similarly discrete. Add.12, 30-32.[2]

[2] That the Replan eliminated or shortened various operations to meet those new deadlines does not make the timelines any less discrete. Nor does the Bureau's litigation-driven, newfound characterization of the Replan's September 30 deadline as a "target" make it any less final. Stay Mot. 1. The Bureau informed the public

Nor does the district court's order require "hands-on management" by the court. *Cf. NAACP*, 945 F.3d at 191. The court granted the traditional remedy for an APA violation: staying the unlawful action (the Replan) and, returning to the status quo ante, thus allowing the *Bureau*'s previously adopted COVID-19 Plan to govern in the interim. *See Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 & n.7 (2020) (affirming judgment vacating recession and restoring Deferred Action for Childhood Arrivals ("DACA") program); *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc) ("The effect of invalidating an agency rule is to reinstate the rule previously in force." (citation omitted)). That should have been the end of it. The district court's other orders—before and after—were not an effort to micromanage census operations. Stay Mot. 18. They were an effort to ensure compliance with court orders in the face of Defendants' repeated violations. *See, e.g.*, Supp.Add.4-10; Add.135-36.

2. As the district court found, Defendants acted arbitrarily and capriciously in five independent ways by: (1) failing to consider important aspects of the problem; (2) offering an explanation counter to the evidence; (3) by failing to consider an alternative; (4) failing to articulate a satisfactory explanation for the Replan; and (5) failing to consider reliance interests. Add.47-74. Defendants still

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and its partners that the end date for self-response and NRFU *would* be September 30, and it never wavered from that position until days ago, during this litigation.

do not meaningfully argue otherwise. Plaintiffs will not repeat the district court's detailed and comprehensive reasoning here.

Rather than purport to have satisfied the APA's requirements, Defendants argue that they did not need to. The reason: there is a December 31 statutory deadline to report population numbers to Congress, and that will apparently always excuse an agency from abiding by the APA's requirements, no questions asked. Defendants are wrong.

Defendants begin by claiming the district court had no authority to compel the Census Bureau to violate a statutory deadline. But the Supreme Court's decision in *Regents*, 140 S. Ct. at 1910-15, makes clear that an agency's firmly held belief that an action is unlawful (even if correct) does not give it license to violate the APA by failing to consider important aspects of the problem. Nor does it tie a court's hand in vacating agency action that fails to comply with the APA. There, the Attorney General concluded that DACA was illegal and ordered the Secretary to rescind the program. *Id.* at 1915. The 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.* at 1910-15. The federal government and the lead dissent had vigorously argued that DACA's illegality was the beginning and end of the analysis. *Id*. at 1915; *id.* at 1921-26 (Thomas, J., dissenting). The Court disagreed

and affirmed the judgment vacating the recession and restoring the assertedly "illegal" DACA program. *Id.* at 1916 n.7.[3]

That reasoning applies here with even greater force. Unlike *Regents*, there is no contemporaneous statement from Defendants declaring that the COVID-19 Plan is or would become unlawful as of December 31. Indeed, in the limited AR produced, there is no mention of the need to discard the COVID-19 Plan because of the statutory deadline until the Secretary's directive on July 29, and no indication that any factors relevant to that decision were even considered. Defendants' only response is to say that nothing in *Regents* "suggests that an agency can choose to disregard a mandatory statutory deadline." Admin. Stay Reply 3. That misses the point. *Regents* required the agency to administer a program it thought violated a statute (and the Constitution) until it complied with the APA. There is nothing special about a "deadline" that elevates it above other binding legal obligations. The multiple cases holding that a statutory deadline does not automatically provide "good cause" to dispense with notice and comment further prove as much. *E.g.*, *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 810-12 (9th Cir. 1980); *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236 (D.C. Cir. 1994); *cf. Am. Mining Cong.*

[3] Section 705 allows courts to stay unlawful agency action pending final disposition. *Bakersfield City Sch. Dist. of Kern Cty. v. Boyer*, 610 F.2d 621 (9th Cir. 1979). That is all the district court did, and the effect is the same as the vacatur in *Regents*. Supp.Add.3.

v. EPA, 907 F.2d 1179, 1191 (D.C. Cir. 1990) ("That an agency has only a brief span of time in which to comply with a court order cannot excuse its obligation to engage in reasoned decisionmaking under the APA.").

Defendants next claim that "the Replan Schedule was unquestionably designed to achieve an accurate census while meeting the statutory deadline." Stay Mot. 2, 15. They cite *nothing* in the administrative record for support. There is nothing. A post-hoc and conclusory assertion of "confiden[ce]"—made one time, in one line, on September 5, 2020, for a filing created solely for the litigation—cannot fill that gap. Add.111 (¶91); Admin. Stay Order 9; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

Defendants' assertion that agencies have no choice but to comply with statutory deadlines at all costs cannot be squared with reality, or with Defendants' own actions. 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. Courts "cannot responsibly mandate flat . . . deadlines when the [agency] demonstrates that additional time is necessary" to ensure a reasoned decision. *Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1974). This is why a long line of cases have held that an agency still has authority to act after the deadline has passed and late action will not be invalidated. *See* Add.64-67 (citing cases).

Defendants' attempt to distinguish these cases falls flat. Stay Mot. 12-13. The key question is whether Congress imposed a sanction for non-compliance, rather than simply speaking in mandatory "shall" language. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003); *Nielsen v. Preap*, 139 S. Ct. 954, 967 (2019) (plurality opinion). And here, not only did Congress not provide sanctions for any late census report (let alone one necessitated by serious accuracy concerns), every time comparable census deadlines were violated, Congress retroactively extended them. Add.67. And to the extent it matters, there *are* other cases that "involve[d] a requirement to report to Congress itself" (Admin. Stay Reply 3). *See Regions Hosp. v. Shalala*, 522 U.S. 448, 459 n.3 (1998).

Finally, Defendants attack the district court's determination that the APA required them to consider the "statutory and constitutional duties to accomplish an accurate count." Stay Mot. 14. Defendants do not dispute that such duties exist. Nor could they. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568-69 (2019) (Congress has imposed 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") (citation omitted); *see also Utah v. Evans*, 536 U.S. 452, 478 (2002) (recognizing a "strong constitutional interest in accuracy"); *cf.* 1998 Appropriations Act, Pub. L. No. 105-119, § 209(a), 111 Stat. 2480, 2480–81 (1997) (codified at 13 U.S.C. § 141 note). They argue instead that "accuracy" is too

amorphous a concept to provide any "judicially administrable standard." Stay Mot. 14; Admin. Stay Reply 4. That argument fails for several reasons.

For one, it misunderstands the district court's APA holding. The court held that Defendants failed to sufficiently consider their (undisputed) constitutional and statutory duties to conduct an accurate census. Add.47-59. Whether a court can enforce such a standard, and what precisely that standard might be, the agency charged with conducting the census must at a minimum meaningfully consider accuracy when deciding to cut the census timeline in half during a global pandemic. For another, the Census Act's requirement to conduct an "accurate" census is no more amorphous than the myriad other standards courts use to assess agency compliance. *See, e.g.*, *WorldCom, Inc. v. FCC*, 238 F.3d 449, 457-64 (D.C. Cir. 2001) (requirement to ensure "just and reasonable" rates).

Defendants thus had to at least weigh the overwhelming evidence in the record raising significant concerns about accuracy. *See* Supp.Add.16-20; Add.47-59; *id.* at 57-58. They had to at least acknowledge that they were drastically changing position as to what was needed to conduct an accurate census. *Organized Vill. of Kake*, 795 F.3d at 968. And they had to at least consider alternatives—including that Congress still had *five* months to extend the deadline and had been actively working to do so until Defendants rescinded their request. Add.63-68.

Finally, while the district court did not reach the question, application of the statutory deadline in these extraordinary circumstances would be unconstitutional as applied. That Defendants cannot achieve perfect accuracy (Stay Mot. 14) does not mean that they can adopt policies that bear no "reasonable relationship" to that goal. *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). While that standard is undoubtedly deferential, it is not meaningless. (Defendants could not decide, for example, to complete the 2020 Census in a week, using one enumerator per State.) A truncated timeline that does not even meet the Bureau's *own* standards for accuracy bears no such relationship. And it would require the Bureau to use statistical imputation in ways that cannot be squared with the Constitution's requirements. *See Utah*, 536 U.S. at 472-79.

CONCLUSION

The Court should deny Defendants' motion for an emergency stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion response complies with the type-volume limitation of Circuit Rules 27-1(1)(d) and 32-3(2) because the document together with the Compilation of Key Record Cites in Plaintiffs' Supplemental Addendum contains 5,592 words according to the count of Microsoft Word, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f) and Circuit Rule 27-1(1)(d).

This response complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

By: s/ Melissa Arbus Sherry
Melissa Arbus Sherry

SUPPLEMENTAL ADDENDUM

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, et al.,

Defendants.

Case No. 20-CV-05799-LHK

ORDER 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

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

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

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

Id. at 78.

II. DISCUSSION

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

A. The Injunction Order enjoined Defendants from implementing the Replan's deadlines and reinstated the COVID-19 Plan's deadlines.

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

[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 enumerator[2] 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).

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

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

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

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

Neither the one sentence tweet nor the one sentence press release provided any explanation or information. The Court thus ordered Defendants to produce the administrative record of this announcement. ECF No. 225. The Court notes that Defendants deny that the October 5 end date for data collection constitutes final agency action. For example, minutes after the October 5 "target date" tweet during the Monday, September 28, 2020 case management conference, Defendants stated that the announcement "doesn't involve a final agency action. It is a giant endeavor with 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

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

In sum, the Census Bureau repeatedly found 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." Injunction Order at 49 (quoting so-called "Elevator Speech" memo prepared by senior Bureau officials shared with the Government Accountability Office, DOC_8070). In the words of Timothy Olson, the Bureau's Associate Director for Field Operations, "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." Injunction Order at 52 (quoting DOC_7738).

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

- On Monday, September 28, 2020 at 3:52 p.m. Eastern, Secretary Ross wrote to Deputy Director Jarmin and other senior Bureau officials: "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." ECF No. 256-1 at 2.
- At 4:30 p.m. Eastern, Deputy Director Jarmin responded: "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." *Id.* at 1.
- At 5:12 p.m. Eastern—14 minutes *after* the Bureau's tweet announcing the Secretary's decision—Secretary Ross wrote back: "Thanks for the confirmation. Based on the staff recommendation I am extending the field operation toOctober [sic] 5." *Id.*

ECF No. 256-1.

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

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

Moreover, Defendants' claim that October 5 is merely a "target date" is belied by Defendants' own documents, representations in federal court, and communications with Bureau enumerators:

- The "Proposed Options for Completion of Enumeration" presentation to Secretary Ross on Monday, September 28, 2020 shows that the Bureau will "[c]onclude field work by October 5, 2020 in order to meet apportionment delivery date of December 31, 2020." ECF No. 233 at 148.
- Hours after the tweet on Monday, September 28, 2020, Assistant Director Christy "instructed staff to send a text message to all Decennial field staff (Enumerators and [Census Field Supervisor]s) that read: 'A federal district court issued a preliminary injunction on 9/24. The Census Bureau is complying with the Court's Order which moves the finishing date for NRFU operations after September 30. The Secretary announced today that *NRFU operations will finish on October 5*. We will post updated guidance on the content locker.'" ECF No. 234 (Christy Decl. ¶ 14) (emphasis added).
- Also on Monday, September 28, 2020, an enumerator received a text message that stated: "The Secretary announced today that NRFU operations will finish on October 5." ECF No. 230-1. Several enumerators have alerted the Court that they have received this text message. *See, e.g.*, ECF No. 238 ("I awoke this morning to an internal message from the Bureau that Secretary Ross has ordered that the NRFU (non response follow up) cases will be terminating on October 5th."); ECF No. 231 (text message dated September 29, 2020 that "NRFU operations will finish on October 5"). Assistant Director Christy confirms that he ordered this message sent to field staff. ECF No. 234 (Christy Decl. ¶ 14).
- 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

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

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

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

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

The Ninth Circuit also held that:

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

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

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

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

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

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

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

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

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

Id. (Fontenot Decl. at ¶ 98).

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

Pursuant to that authority, the Court clarifies[4] that until Defendants cure all the legal

---

[3] Defendants argue that the Court lacks jurisdiction to "radically modify the preliminary injunction" now that the Injunction Order is on appeal. ECF No. 284 at 3. Defendants' argument misses the point. Far from "radically modifying" the Injunction Order, the Court simply enforces the Injunction Order to halt Defendants' repeated violations. In any event, even the case that Defendants cite holds that a district court may modify an injunction "to maintain the status quo 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

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

Moreover, to preserve the status quo, the Court orders some of the relief requested in Plaintiffs' motion to compel and second TRO motion. On October 2, 2020, Defendants shall issue a text message to all the Census Bureau's 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. In addition, by October 5, 2020 at 2 p.m. Pacific Time, Census Bureau Director Steven Dillingham shall file 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.

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

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

Gregory G. Katsas of the Court of Appeals for the D.C. Circuit stated that census operations "would have stopped September 30, and [Judge Koh] extended it until the end of October." Judge Katsas further stated, "[a]gain, maybe I misread the Koh order, but I thought that in terms of deadlines, it extended the transmittal date from December 31st to April 1st, and that's four months [sic; in fact a four-month extension but to April 30, 2021]." Rough Tr. of Oral Argument at 9, 15; *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

LUCY H. KOH
United States District Judge

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."	Add.7
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. Given the important uses of census data collection processing, it is vital that we not short cut these efforts or quality assurance steps."	Add.8; Add.49
May 8, 2020	Census Bureau, "Operational Timeline V5 Clean"	"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."	Add.9
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."	Add.7
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, "Census Bureau Restarts as States Re-Open"	"[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
July 23, 2020	Census Bureau, "Elevator Speech"	"High Level Message: 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."	Add.49-50

DATE	SPEAKER	STATEMENT	RECORD CITE
		"[I]t is not possible to shorten the schedule appreciably without directly degrading the quality of the results and introducing great risk."	
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."	Add.10
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."	Add.10
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."	Add.58
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, atleast [sic] 99% of Housing Units in every state must be resolved." "All of these activities represent abbreviated processes or eliminated activities that will reduce the accuracy of the 2020 Census."	Add.11; Add.55
August 3, 2020	Census Bureau, "Operational and Processing Options to Meet Statutory Date of December 31, 2020 for Apportionment"	"Post processing must start by 10/1/2020." "All of these activities [in the Replan] represent abbreviated processes or eliminated activities that will reduce the accuracy of the 2020 Census." "A compressed review period creates risk for serious errors not being discovered in the data—thereby significantly decreasing data quality."	Dkt. 156-4 at DOC_10283-86

DATE	SPEAKER	STATEMENT	RECORD CITE
		"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."	
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 17
September 5, 2020	Associate Director Fontenot	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." "[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." "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."	Add.111; Add.113;
September 9, 2020	Department of Justice, Alexander Sverdlov, Trial Attorney	"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 …."	9/8 Tr. at 9:6-9
September 11, 2020	Associate Director Fontenot	"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."	Dkt. 131-8 ¶ 82

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"	"The accelerated schedule increases the risks to obtaining a complete and accurate 2020 Census." "According to several senior Bureau officials, the Bureau will miss the December 31, 2020 deadline if data collection goes beyond September 30, 2020."	Dkt. 189 at 10, 22
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"	"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."	Add.14
September 22, 2020	Associate Director Fontenot	"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." "[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." "We simply cannot shorten post processing beyond the already shortened 3-month period without significant risk."	Add.147; Add.149; Add.150

DATE	SPEAKER	STATEMENT	RECORD CITE
STATEMENTS MADE AFTER NEW OCTOBER 5 "TARGET DATE"			
September 28, 2020	Census Bureau, "Proposed Options for Completion of Enumeration"	"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." "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."	Dkt. 233 at 148
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] outputs would be pushed to 1/11/2021."	Dkt. 256-1 at 1-2
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