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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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; and ADRIAN GARCIA,

Plaintiffs,

v.

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

Defendants.

CASE NO. 20-cv-5799-LHK

DECLARATION OF JOHN THOMPSON IN SUPPORT OF PLAINTIFFS' MOTION FOR STAY AND PRELIMINARY INJUNCTION

BC-DOC-GEN-2020-001802-004492

EXPERT DECLARATION OF JOHN THOMPSON

I. Introduction

1. I served as the Director of the U.S. Census Bureau from August 2013 to June 2017. My responsibilities as Director included overseeing the research and testing that produced the design for the 2020 Census. Prior to becoming Director, I worked at the Census Bureau for 27 years, culminating with my role as the career senior executive in charge of management of all aspects of the 2000 Decennial Census. These experiences and more inform my assessment that the Trump administration's decision to accelerate the timelines for completing the 2020 Census will likely result in significant and material degradation of the quality of the 2020 Census relative to previous censuses.

2. On April 13, 2020 the Secretary of Commerce, Wilbur Ross, and the Director of the Census Bureau, Dr. Steven Dillingham, issued a statement on 2020 Census operational adjustments due to the COVID-19 pandemic. This statement concluded that "[u]nder 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."[1]

3. On August 3, 2020 the Director of the Census Bureau, Dr. Steven Dillingham, issued a statement announcing that the Census Bureau would "accelerate the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce."[2] Based on my experience and expertise, I believe that this August 3 decision will adversely affect the quality and accuracy of the 2020 Census.

4. The 2020 Census results will be of great importance to our nation. The

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[1] 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, April 13, 2020, https://2020census.gov/en/news-events/press-releases/statement-covid-19-2020.html?linkId=100000011751624.

[2] Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count, August 3, 2017, https://2020census.gov/en/news-events/press-releases/delivering-complete-accurate-count.html.

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Constitution requires that the census be used for reapportioning the House of Representatives and the Electoral College. The 2020 Census will also be used for numerous other functions to support good policymaking and economic growth including: redrawing congressional and state legislative voting districts; allocating over $1.5 trillion of federal funds annually; informing sound policy development; providing critical information for state, local and tribal government planning; and supplying important data to large and small businesses to generate growth and job creation. Inaccuracies or errors in the 2020 Census will have grave consequences on these uses for the subsequent 10-year period.

5. I have carefully reviewed the 2020 Census Operational Plans as well as the documentation that the Census Bureau has issued describing the actions it is taking in response to the COVID-19 pandemic and its recently issued documentation regarding its plans to conclude data collection by September 30, 2020. I have evaluated these documents by drawing on my experience and expertise developed over 31 years working on four censuses under seven different presidential administrations. Based on my experience and expertise, it is my opinion that reducing the time for data collection at this late date will most likely have grave and material consequences for the 2020 Census and public perceptions of its legitimacy, because: (1) the time constraints will force the Census Bureau to modify the plans for their data collection operations; (2) these modifications will significantly increase the likelihood of larger total and differential undercounts for the hard-to-count populations, as well as increase the levels of erroneous enumerations and reduce the overall quality of this census, relative to previous censuses; and (3) the Census Bureau is not providing timely measures that will allow stakeholders to assess whether the 2020 Census is succeeding in carrying out a fair and accurate enumeration, undermining the legitimacy of the count.

II. Qualifications and Retainer Information

6. Below I briefly describe specific aspects of my qualifications and work experience that establish my credentials as an accomplished statistician and an expert on the Census Bureau and Decennial Census. I have also attached a copy of my CV to this declaration.

7. I have been retained to evaluate the likely impact of the administration's decision

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to compress data-collection and data-processing operations of the 2020 Decennial Census. My compensation in this case is $150 per hour.

8. I have served both as the Director of the U.S. Census Bureau and as the career senior executive in charge of management of all aspects of the 2000 Decennial Census. I am also a distinguished professional in the areas of statistics and survey design. I have a deep understanding of the processes that are necessary to achieve a complete and highly accurate Decennial Census.

9. I started my career as a mathematical statistician in 1975. I spent the majority of my employment at the Census Bureau focused on the Decennial Census and ultimately served as the Associate Director for the 2000 Decennial Census, with management responsibility for all phases of the 2000 Decennial Census. As I mentioned above, I served as the Director of the U.S. Census Bureau from August 2013 to June 2017 and worked at the Census Bureau for 27 years.

10. The Census Bureau is the country's largest Statistical Agency and produces a wide range of demographic and economic statistics including: the Decennial Census; the American Community Survey; the Current Population Survey; the National Crime Victimization Survey; the National Health Interview Survey; the Economic Census; 13 principal key economic indicators released on a monthly or quarterly basis; and about 100 additional surveys. The Director of the Census Bureau is appointed by the President and confirmed by the Senate.

11. Prior to being appointed Director of the Census Bureau, I was at National Opinion Research Center (NORC) at the University of Chicago, serving as Executive Vice President from 2002 to 2008 and President from 2008 to 2013. NORC is an objective, non-partisan independent research institution that delivers reliable data and rigorous analysis to guide critical programmatic, business, and policy decisions. Clients include government, corporate, and nonprofit organizations around the world who partner with NORC to transform increasingly complex information into useful knowledge. NORC conducts research in five main areas: Economics, Markets, and the Workforce; Education, Training, and Learning; Global Development; Health and Well-Being; and Society, Media, and Public Affairs. NORC services include designing and conducting surveys (telephone, internet, and in-person), as well as

analytical studies.

12. From July 2017 to August 2018, I served as the Executive Director of the Council of Professional Associations on Federal Statistics (COPAFS). COPAFS is an organization with a membership consisting of professional associations and research organizations that depend on and support high quality federal statistics. The Executive Director of COPAFS must have a deep understanding of the Federal Statistical System and the wide range of data products that are produced. Serving as the Executive Director of COPAFS reinforced my appreciation of the importance of high-quality Decennial Census data to the entire Federal Statistical System.

13. In addition to the work experience described above, I am an elected Fellow of the American Statistical Association and was selected to serve on the National Academies of Science, Engineering, and Medicine Committee on National Statistics.

III. Analysis

A. The requirement to end data collection by the end of September 2020 will force the Census Bureau to modify data collection procedures, resulting in a less complete enumeration compared to previous censuses.

14. My responsibilities as Director of the Census Bureau included overseeing the research and testing that produced the design for the 2020 Census. During my tenure, the original operational plan for conducting the 2020 Census was released, as was an updated version 2.0 of this plan.[3] In addition, major field tests were conducted in 2013, 2014, 2015 and 2016. The results of these tests informed the final 2020 Census Design that was tested in the 2018 end-to-end test. This was the final large scale test in advance of the 2020 Census. It combined the results of all previous tests and could be viewed as a dress rehearsal for the 2020 Census. Additionally, during the 2000 Census, I managed all aspects of census operations. These experiences and the expertise that I developed in their course equip me to evaluate the likely systemic effects of the August 3 decision to truncate the 2020 Census.

15. The COVID-19 pandemic forced the delay of key 2020 Census operations out of

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[3] U.S. Census Bureau, *2020 Census Operational Plan, A New Design for the 21st Century*, version 2.0 issued, September 2016.

concerns for the safety of both census workers and the general public. The in-person components of the local partnership program to increase response rates of the traditionally hard-to-count populations were delayed, as was the operation to collect responses from those households that do not self-respond. This operation is referred to as nonresponse follow-up or NRFU. As of August 16, the national self-response rate is 63.8 percent, which means that over 36 percent—or over 50 million housing units and their occupants must still be enumerated.[4] As I will discuss below, the hard-to-count populations are disproportionately represented in the nonresponse universe. A failure to obtain a complete enumeration in NRFU would result in disproportionate undercounts of these populations. Therefore, I view a successful NRFU as the most important census operation to ensuring a fair and accurate count.

16. The NRFU operation had been scheduled to start on May 15, 2020 and run through July 31, 2020. However, as a result of the COVID-19 pandemic, the Census Bureau rescheduled it to start in most of the United States on August 11, 2020 and initially planned to complete it by October 31, 2020.

17. In order to accommodate this delay, the Census Bureau had requested, through the Department of Commerce, a four-month extension of the deadlines[5] to deliver apportionment and redistricting data. For apportionment, the requested extension was from the current deadline of December 31, 2020 to April 30, 2021. For redistricting, the requested extension was from March 31, 2021 to July 31, 2021.

18. However, the Census Bureau has now announced that NRFU will be completed by September 30, 2020.[6] The Census Bureau will have to take steps to complete NRFU more rapidly than it planned, given that it has already lost over a third of the schedule that the career staff had developed under the original plan, all while managing the added difficulties that the

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[4] U.S. Census Bureau 2020 Census daily response rate tracker, https://2020census.gov/en/response-rates.html (last accessed August 16, 2020).

[5] 13 U.S.C. § 141(b), (c).

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

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pandemic has created.

19. The Census Bureau recently released a review of the 2020 Census Operational Plan Schedule[7] that describes actions being taken to complete all data collection, including NRFU, by September 30, 2020. According to the Plan, these actions include:

- Starting NRFU in all areas by August 9, 2020
- Sending enumerators to make up to 6 visits to attempt to obtain an interview with occupied housing units
- Offering bonuses to NRFU enumerators to maximize staff production hours
- Making efforts at "Keeping Staff Levels Up"
- Implementing outbound telephone calling to supplement in-person contact attempts as a means of enumerating hard-to-count populations

20. It is very unlikely that these actions will effectively address the constraints imposed by the revised timelines for completing NRFU. My conclusion is informed by my experiences in managing all aspects of the 2000 Census and by directing the research and development necessary to plan the 2020 Census. The bases for my conclusion are as follows:

- The staffing levels will not be adequate to complete NRFU without accepting lower quality enumerations and incompletely enumerating the traditionally hard-to-count populations. The Census Bureau has lost over 30 percent of the time that had been planned for NRFU, so it stands to reason that they will need more staff to complete this critical undertaking. However, the plan being put forth to end data collection by September 30 is to maintain staffing at levels determined before the advent of the COVID-19 pandemic. The Department of Commerce Office of the Inspector General has recently reviewed the progress of staffing for the NRFU and stated:

> "Bureau management have stated that their target number of enumerators, needed by the end of August 2020 to complete NRFU production, is just above 300,000. As of August 17, 2020, the Bureau has just under 220,000 enumerators trained

[7] U.S. Census Bureau, *Review of 2020 Census Operational Plan Schedule*, August 17, 2020, https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/2020-operational-plan-schedule-review.pdf.

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and ready to start working on the NRFU operation that is underway—this represents approximately 73 percent of the estimated number of enumerators needed to complete NRFU production. However, 132 out of 248 total Area Census Office (ACOs) are less than 75 percent toward reaching their estimated goals; of those 132 ACOs at less than 75 percent, 37 are less than 50 percent toward reaching their goal."[8]

Briefly, the Bureau has established Area Census Offices (ACO) to carry out the 2020 Census field operations, including NRFU. There are 248 ACOs, each of which has a significant portion of the NRFU workload to carry out. On average, this would be about 226,000 housing units from which a self-response was not received. But the Census Bureau is already falling significantly behind in its plans for staffing NRFU, and these hiring shortfalls for NRFU staff are not uniform. Approximately 15 percent of the NRFU workload is in areas where the Census Bureau is falling 50 percent short of hiring goals. While the Census Bureau stated in the Review of the Operational Plan Schedule that it was making efforts at "keeping staff levels up," it is falling well behind in reaching the staffing levels it had determined were necessary for NRFU. Insufficient staffing will significantly lower the quality and effectiveness of NRFU operations, as I explain below.

- The self-response rates are not uniformly distributed and are disproportionally lower in areas with higher proportions of Black and Hispanic populations, as well as in some rural areas. As of August 6, 2020, there were 50.7 million people living in census tracts in the

[8] Mark H Zabarsky, Principal Assistant Inspector General for Audit and Evaluation, ***2020 Census Alert***: *The Census Bureau Faces Challenges in Accelerating Hiring and Minimizing Attrition Rates for Abbreviated 2020 Census Field Operations Final Memorandum No. OIG-20-041-M.*, Memorandum for Steven D. Dillingham, Director, U.S. Census Bureau, August 18, 2020.

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lowest fifth of self-response.[9, 10] The overall self-response rate for these tracts is less than 51.3 percent, compared to a national average of over 63 percent. Furthermore, while non-Hispanic Blacks make up 12.3 percent of the US population, they represent 22.2 percent of the population in these low response areas. For Hispanics, the corresponding rates are 18.3 and 25.8 percent, respectively. The Census Bureau also noted that, as of August 6, 2020, the self-response rate in update-leave (rural areas) was a little over 34 percent. In addition, since these areas have the lowest self-response rate, they will have the largest NRFU workloads, making recruiting and hiring sufficient staff to achieve a complete enumeration particularly challenging. As I will discuss below, the likely outcome for these areas and populations will be increased undercounts relative to previous censuses and decreased quality of the information collected.

- Given the current NRFU staffing levels, the Census Bureau will have to rely less on direct in-person contact attempts and more on the following in order to try to meet the new September 30, 2020 deadline, with deleterious consequences for the count:
  a. Reduced in-person contact attempts with residents of the NRFU households, leading to increased undercounts of the traditionally hard-to-count populations. While the Census Bureau is planning for up to 6 attempts for most NRFU households, this will not be enough to obtain complete interviews in many hard-to-count communities. The Government Accountability Office (GAO) evaluated the early testing that the Census Bureau carried out to develop the current NRFU procedures. The GAO stated:

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[9] A census tract is a small geographic area that is similar to a neighborhood. *See* https://www.census.gov/programs-surveys/geography/about/glossary.html#par_textimage_13.

[10] Steven Romalewski, Mapping "Self-Response" for a Fair and Accurate Census, Center for Urban Research at the Graduate Center, City University of New York, August 7, 2020, https://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/Centers/Center%20for%20Urban%20Research/Resources/Census2020-self-response-rates-thru-Aug-6-CUNY-Graduate-Center.pdf.

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"according to preliminary 2016 Census Test data, there were 19,721 NRFU cases coded as non-interviews in Harris County, Texas and 14,026 in L.A. County, California, or about 30 and 20 percent of the test workload respectively. According to the Bureau, non-interviews are cases where no data or insufficient data were collected, either because enumerators made six attempted visits without success (the maximum number the Bureau allowed) or visits were not completed due to, for example, language barriers or dangerous situations."[11]

The Census Bureau subsequently refined the NRFU procedures to allow for more contact attempts, as is necessary to reach higher resolution rates comparable to previous censuses.[12]

In addition, hard-to-count communities have significantly lower levels of self-response, and a corresponding larger proportion of households that fall into NRFU. It will not only be more difficult to recruit adequate staff for these areas, but making 6 attempts will be exceedingly difficult, and as I noted above, will not be enough to obtain complete responses from all households in these areas. My experience has shown that the proposed use of outbound telephone calling will be ineffective in reducing the need for in-person interviewing. For example, the Pew Research Center has documented that telephone survey rates have fallen from 36 percent in 1997 to under 6 percent in 2018.[13] In addition, outbound telephone calling for NRFU has not been tested to determine whether it is even effective. Achieving a complete and accurate count in the hard-to-count communities requires a lot of hard work by well-trained enumerators who are very familiar with these areas. Limited staff and a

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[11] United States Government Accountability Office, *2020 CENSUS Additional Actions Could Strengthen Field Data Collection Efforts*, GAO-17-191, a report to congressional requesters, January 2017.

[12] U.S. Census Bureau, *2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU)*, Version 2.0 Final, July 15, 2019.

[13] Courtney Kennedy and Hannah Hartig, *Response rates in telephone surveys have resumed their decline*, Pew Research Center report, February 27, 2019.

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shortened time frame will likely result in serious and material increases in the undercounts for these communities relative to previous censuses.

b. Increased proxy enumerations, resulting in increased levels of erroneous enumerations. The limited NRFU workforce combined with the shortened schedule will result in a higher level of proxy enumerations than in previous censuses. Proxy enumerations are those obtained by asking people other than the actual residents of NRFU households for information about those residents. These proxies can include neighbors, apartment managers, or other knowledgeable persons. The Census Bureau conducted the 2010 Census Coverage Measurement (CCM) program which included an extensive evaluation of the accuracy and quality of the 2010 Census. The CCM found that in the 2010 Census, proxy enumerations were obtained for about 21 percent of the NRFU returns. The erroneous enumeration rate for the proxy enumeration was 6.7 percent—over twice the overall erroneous enumeration rate of 3.3 percent.[14]

c. Increased reliance on administrative records to complete NRFU enumerations, leading to less complete enumerations for the hard-to-count populations. The Census Bureau plans include the use of administrative records (e.g., records from the IRS, Medicare, and the Social Security Administration) to reduce the NRFU workload, where feasible, by using such records to enumerate occupied households that have failed to respond after several contact attempts.[15] The Census Bureau may be forced to rely more heavily on such enumerations if NRFU cannot be completed as planned. Based on the research that the Census Bureau conducted to develop the current NRFU strategy, it had planned to enumerate 12.9 percent of the occupied NRFU housing units after making one visit.[16] Expanding the uses of administrative records

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[14] P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

[15] Albert E. Fontenot, *Intended Administrative Data Use in the 2020 Census*, 2020 Census Program Memorandum Series: 2020.06, May 7, 2020.

[16] U.S. Census Bureau, *2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU),* Version 2.0 Final, July 15, 2019.

to enumerate a higher portion of the NRFU occupied housing units is not supported by the research the Census Bureau has used to date, and the Census Bureau has not released additional research to support such actions. Census Bureau research has shown that the quality and completeness of administrative records is not expansive enough to replace a decennial census.[17] Therefore, the use of administrative records beyond the planned levels for NRFU will be less representative of the hard-to-count populations than a complete NRFU.

d. Likely an increased use of "whole person imputation" relative to previous censuses. Such imputations will not correct for any undercounts that have resulted from an incomplete NRFU. In conducting NRFU in previous censuses, situations have arisen where, despite the best efforts of NRFU enumerators, either minimal or no information was obtained for some housing units by the conclusion of the NRFU. The Census Bureau uses statistical techniques, referred to as imputation, to correct for this missing data problem. The statistical processes are used to estimate—or impute—all of the characteristics of the persons in these housing units. The Census Bureau applies "Count Imputation" for situations where no information is available for a housing unit. This methodology will first estimate whether the unit is occupied, and if so, will estimate or impute a household size – meaning, the number of people in that household. The process will then use "whole person imputation" to estimate characteristics for persons in a household of this size. The Census Bureau also uses whole person imputation in situations where only the count of people residing in a housing unit could be determined. In the 2010 Census, about 2.0 percent of the enumerations fell into the category of whole person imputation – 0.4 percent were the result of count imputation and 1.6 percent resulted when only the population count

[17] Rastogi, Sonya and Amy O'Hara, *2010 Census Match Study,* 2010 Census Planning Memorandum Series, No. 247, November 19, 2012.

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was known.[18] It should be noted that of the 16.3 million persons enumerated by proxy in the 2010 Census, 23.1 percent required whole person imputation.[19] I believe that the levels of housing units requiring whole person imputation will be much larger in 2020 than in 2010, due to the reduction in time and staff limitations for NRFU enumerators to get a complete response. Unfortunately, the statistical methods that the Census Bureau uses for whole person imputation rely on using information from the resolved housing units to estimate or impute for the unresolved housing units. Therefore, any undercounts that are in the resolved housing units will be carried forward and not corrected.

B. The reduced schedule for NRFU will have serious accuracy and quality implications for the 2020 Census

21. Undercounts, particularly for traditionally hard-to-count populations, are likely to increase significantly in 2020 relative to previous censuses as a result of the Bureau's new, reduced schedule. As I discussed above, the NRFU workloads will be relatively higher in areas with lower self-response rates. The Census Bureau uses low self-response as a key measure in determining whether an area is hard-to-enumerate,[20] so by definition the challenge for NRFU to obtain a complete count is in these areas. In addition, these areas also contain higher proportions of Black and Hispanic populations relative to the White non-Hispanic population. The end result for these communities is likely to be incomplete NRFU enumeration due to staffing and time limitations, as well as more use of proxy enumerations and whole person imputation. This will lead to increased undercounts relative to previous censuses. For example, in the 1990 Census the undercount of Black or African American population was 4.6 percent and for the Hispanic population the undercount was 5.0 percent.[21] It is important to understand that in 1990, the

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[18] P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, May 22, 2012, https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

[19] Ibid.

[20] Response Area Outreach Mapper, Census.gov, www.census.gov/roam, July 2018.

[21] P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, May 22, 2012, https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

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Census Bureau had the flexibility to extend the NRFU beyond its planned end date until it had reached a completion rate of 99 percent for NRFU enumeration.[22] However, even with this high completion rate for 1990, serious undercounts were measured. The Census Bureau does not have the flexibility to extend NRFU for the 2020 Census – it has a hard stop at September 30, 2020. In my opinion, there is a high risk that the measures the Census Bureau will be forced to take to complete NRFU by this unmovable deadline (as I discussed above relying more on proxy or count-only enumerations and administrative records), even potentially falling short of the 99 percent completion goal, will likely result in undercounts that will be materially larger than were observed in the 1990 Census.

22. The overall quality of the 2020 Census data will very likely be materially lower than in previous censuses. As I noted above, it is very likely that the Census Bureau will have to rely more on proxy enumeration and whole person imputation that in previous censuses. While this will be a particular problem for the hard-to-count areas, these less accurate enumeration methods will also most likely be used more across the board in the 2020 Census relative to previous censuses. In addition to the increased use of proxy enumeration, as I discussed above, employing a higher level of administrative records and whole person imputation will result in lower quality than would have been achieved through direct in-person contact.

23. The impacts of undercounts and poor quality data will not just be a problem for the immediate uses of the 2020 Census (e.g., apportionment and redistricting), but will remain for the 10 years until they can be corrected in the 2030 Census.

C. Increased transparency is essential to assure stakeholders of the legitimacy of 2020 Census data collection

24. At this point, there is little information available to assess the conduct of the 2020 NRFU. The Census Bureau has been very forthcoming about the self-response portion of the 2020 Census: detailed and granular data have been made available to allow for public assessment of self-response for many areas, including census tracts. This is not true for the

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[22] U.S. Census Bureau, *1990 Census of Population and Housing – History Field Enumeration 6-36*, Report Number CPH-R-2, 1996, https://www.census.gov/library/publications/1996/dec/cph-r-2.html.

NRFU portion of the 2020 Census.

25. The current Census Bureau plan is to release only NRFU resolution rates at the State level. These rates are not helpful in assessing the actual progress of NRFU in achieving a complete enumeration of all population groups and areas. In order to demonstrate that the NRFU is meeting the goal of a complete and accurate enumeration, it is essential that the Census Bureau provide additional data beyond just the resolution rate of housing units in NRFU. These data should include information such as the rate of proxy and count-only enumerations at similar levels of geographic aggregation as the self-response data. The absence of more granular data will compromise public perception of the legitimacy of any final results that the Bureau does release.

26. The public's perception of the legitimacy of the census is already imperiled. The Census Bureau has recently announced three new political appointees, including a new Deputy Director for Policy[23] and a new Deputy Director for Data.[24] Having political appointees with vague responsibilities at the Deputy Director level of the Census Bureau (which has always been a career position) is unprecedented and is raising serious concerns among stakeholders. Perceptions that the results of the 2020 Census have been manipulated for political purposes will erode public and stakeholder confidence, not only in the 2020 Census, but also in our democratic processes more generally. Therefore, it is critical that the Census Bureau release the data that I have described above to demonstrate that it is achieving a complete and fair enumeration through NRFU.

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[23] Statement from Census Bureau Director Steven Dillingham, Release Number CB20-RTQ.20.

[24] Statement from Census Bureau on Deputy Director for Data, Release Number CB20-RTQ.24, August 17, 2020.

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IV. Conclusion

27. It is my conclusion that the current deadlines for delivering the 2020 Census apportionment and redistricting data place unreasonable time constraints on the Census Bureau. These constraints will not allow the Census Bureau to carry out data collection operations that will deliver high quality results These timing constraints will very likely lead to large undercounts for the 2020 Census, and much larger undercounts than measured in previous censuses.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 24, 2020 at Bend, Oregon.

John Thompson

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JOHN H. THOMPSON

BRIEF CAREER HISTORY

Extensive Senior Executive leadership in the non-profit and federal sectors, with experience in social science research and statistics, congressional advocacy, building coalitions, operational management, business development, stakeholder relations, innovation, and strategic vision.

Independent Consultant, August 2018 to present

Consulting service focusing on survey methodology, executive leadership, the Federal Statistical System, and decennial census. Activities have included:

- Expert witness for the plaintiffs in two court cases opposing the addition of a citizenship question to the 2020 Census
  - New York Immigration Coalition, et al v. United States Department of Commerce and Wilbur Ross, U.S. District Court for the Southern District of New York, and
  - Robyn Kravitz et al., v. United States department of Commerce, et al
- Training news media journalists on the 2020 Census with Georgetown University, the Poynter Center, and the Harvard Shorenstein Center.
- Providing consultation services to NORC at the University of Chicago

Executive Director, Council of Professional Associations on Federal Statistics – July 2017 to August 2018

The Council of Professional Associations on Federal Statistics (COPAFS) was founded in 1981 to coordinate activities of a number of Associations, Organizations, and Businesses that rely on federal statistics to support good governance and economic growth. COPAFS now represents a growing body of stakeholders that support the production and use of high quality statistics. The Executive Director represents these stakeholders in realizing their mission to *Advance Excellence in Federal Statistics*. Activities include:

- Advocated on behalf of federal agencies. For example, COPAFS is a co-chair of the Friends of the Bureau of Labor Statistics, and the Friends of the National Center for Health Statistics;
- Worked with stakeholder coalitions to support proper funding for the 2020 Census and the American Community Survey;
- Ensured members of Congress, COPAFS members, and other stakeholders were informed of critical issues facing agencies that produce federal statistics;
- Alerted members and stakeholders of breaking issues that needed immediate support and attention;
- Organized and supported ongoing educational efforts for members of Congress and their staff on the value and importance of federal statistics both nationally and in their own states and districts;
- Created and joined in powerful coalitions of organizations and businesses to advocate on behalf of federal agencies that produce statistics, building broad support across a wide spectrum of data users;

- Built partnerships with foundations that help fund critical research in the statistical agencies and academia to ensure the on-going modernization of how statistical data are created and made available to the public and researchers, and to fund educational efforts;
- Worked closely with the Chief Statistician of the United States and the statistical agencies to help inform and promote modernization efforts underway and assist agencies in keeping abreast of new stakeholder data needs; and
- Hosted events to demonstrate the importance of federal statistics such as the 2018 Federal Committee on Statistical Methodology Research and Policy Conference.

Director, United States Census Bureau – August 2013 to June 2017

Appointed by the President as Director of the largest federal statistical agency, with a staff of over 5,000 headquarters employees and approximately 10,000 to 15,000 staff spread across the United States in six regional offices and a major production facility in Indiana, with an annual budget exceeding $1 billion. Key accomplishments include:

- Worked successfully with the executive and legislative branches of the federal government, including the White House, the Office of Management and Budget, Cabinet officials, and members of Congress and congressional staff, to accomplish a major transformation of the Census Bureau into a forward-looking 21st century statistical agency. Testified at 6 congressional hearings on the Census Bureau;
- Provided a conceptual vision and lead a redesign of the 2020 decennial census that is estimated to save $5 billion through effective use of operations research-driven reengineering of field operations, innovative use of technology, and partnership with key stakeholders;
- Lead outreach to key stakeholders including representatives of state local and tribal governments; advocacy organizations; professional associations, business groups, various media; and academic researchers;
- Put in place a robust research program to support mission critical activities, such as linking administrative records, disclosure avoidance methods, economic studies, statistical research, survey methodology, big data, and data dissemination;
- Lead efforts to maintain congressional support and funding for the American Community Survey, a critical data asset of the federal government, including mobilizing a diverse group of key stakeholders to effectively advocate in support of the survey, personally visiting almost all of the House of Representatives and Senate members of the Census Bureau appropriations and oversight committees, and establishing a program of research directly related to the concerns that had been raised;
- Improved economic statistics through research on using alternatives to direct survey data collection to produce statistics that are timelier and have increased granularity, and carrying out three initiatives to advance the release of principal economic indicators on trade, retail sales and services, which allowed the Bureau of Economic Analysis to significantly reduce revisions to Gross Domestic Product (GDP) estimates;
- Recruited outstanding research staff including new senior leadership for Research and Methodology, the Director of a newly established big data center, and seven former Presidential Innovation Fellows; and
- Improved data dissemination to the public, including development of a platform to deliver data in ways that will meet the rapidly evolving demands of a growing body of users. In addition,

in order to meet immediate targeted demands two new tools were released: City SDK (Software Development Kit) to allow easy developer access; and Census Business Builder a tool that combines small area demographic and economic data in a way that is easily accessible for entrepreneurs and small business owners.

President and Executive Vice President, NORC at the University of Chicago – July 2002 to August 2013

NORC is a national non-profit organization that conducts high quality social science research in the public interest. As President, I had responsibility for all NORC corporate activities and for the quality of all NORC research efforts. I provided vision for NORC to establish the organization as a leader in the social science research industry. My accomplishments included:

- Strengthened the organization's high-quality, diverse staff;
- Broadened the scope of the collaborations between NORC and the University of Chicago;
- Realized nearly 50 percent growth in revenue and greatly expanding NORC's portfolio of business and research programs; and
- Provided leadership in the social science research community - selected to be a Fellow of the American Statistical Association (ASA), elected to serve a term as Chair of the Social Statistics Section of the ASA, and chaired the 2009 ASA Committee on Fellows. Also elected as a member of the Committee on National Statistics, serving on two National Academy of Sciences panels addressing 2010 and 2020 Census concerns.

As Executive Vice President of Survey Operations (2002 – 2008), I provided oversight and direction to the Economics, Labor Force, and Demography Research Department, the Statistics and Methodology Department, and Survey Operations for field and telephone data collection. My major accomplishments included:

- Provided leadership and guidance for a major corporate initiative, the National Immunization Survey, which is conducted on behalf of the Centers for Disease Control and Prevention, and is the largest telephone survey in the United States conducted via random digit dialing for scientific purposes.
- Significantly increased the productivity and cost effectiveness of NORC's overall data collection activities;
- Successfully utilized skills in directing large project start-ups, and in managing large complex operations, directing the project through the completion of the first contract phase, which included the first year of data collection and the delivery of the first data set; and
- All survey operations were completed on schedule, and within budget including the delivery of an extremely complex data set, and a public use file.

Principal Associate Director and Associate Director for Decennial Census Programs, United States Census Bureau – 1997 to July 2002

Served as the senior career executive responsible for all aspects of the 2000 Decennial Census. This was the largest peacetime mobilization undertaken by the U.S. government, with a budget of $6.5 billion, establishment of over 500 field offices, a temporary workforce that peaked at over 500,000, and establishment of telephone capacity to receive over 5 million calls over a period of one month. I was also chairman and director of the Executive Steering Committee for Accuracy & Coverage Evaluation Policy for the 2000 Census. This Committee was charged with making a recommendation as to whether or not to adjust the 2000 Census redistricting data for coverage errors, an issue fraught with political disagreement and controversy. This work was widely recognized as superb – with the Committee's recommendation supported by numerous reviews, including the National Academy of Sciences Panel on evaluating Census 2000.

EDUCATION

M.S.	Virginia Polytechnic Institute and State University, 1975 Mathematics Graduate course work in statistics - George Washington University 1977-1981
B.S.	Virginia Polytechnic Institute and State University, 1973 Mathematics

PROFESSIONAL SERVICE AND ASSOCIATIONS

American Statistical Association, 1975 to Present

- Chair, Social Statistics Section – 2011
- Chair, ASA Committee on Fellows - 2009

National Academy of Sciences,

- Member of the Committee on National Statistics – 2011 - 2013
- Member of the Panel on the Design of the 2010 Census Program of Evaluations and Experiments
- Member of the Panel to Review the 2010 Census

HONORS AND AWARDS

Virginia Tech College of Science Hall of Distinction inaugural class, 2013

Presidential Rank Award of Meritorious Executive, 2001

Department of Commerce, Gold Medal, U.S. Bureau of the Census, 2000

Elected Fellow of the American Statistical Association, 2000

Department of Commerce, Silver Medal, U.S. Bureau of the Census, 1998

Department of Commerce, Bronze Medal, U.S. Bureau of the Census, 1988

PAPERS AND PUBLICATIONS

2018 Thompson, John H and Yablon, Robert. Issue Brief: "Preparing for the 2020 Census Considerations for State Attorneys General". American Constitution Society., October 10, 2018

2012 Thompson, John H. (Panel Member). "Panel Discussion: Considering Changing Sectors in the Research Industry?: Advice From Those Who Have Done It!" AAPOR 67th Annual Conference, Orlando, Florida, May 19, 2012

2012 Thompson, John H. (Discussant). "Future is Now: Realignment of Current Survey Management and Operations at the Census Bureau". Population Association of America 2012 Annual Meeting, San Francisco, California, May 4, 2012.

2012 Thompson, John H. (Discussant). "Use of Administrative Records in the 2020 Census." Federal Committee on Statistical Methodology, Washington, DC., January 10, 2012

2011 Weinberg, Daniel H. and Thompson, John H., "Organization and Administration of the 2010 U.S. Census." In Margo J. Anderson, Constance F. Citro, and Joseph J. Salvo (eds.) *Encyclopedia of the U.S. Census,* Second Edition, CQ Press., July 2011

2010 Thompson, John H., "Challenges, Innovation and Quality for the 21st Century" Keynote Speech at the 2010 FCSM Statistical Policy Seminar, Washington, DC, December 14, 2010.

2010 Thompson, John H., "The Future of Survey Research: Opportunities and Challenges" Paper presented at the Applied Demography Conference, San Antonio, Texas., January 11, 2010 and at the Population Association of America 2010 Annual meeting, Dallas, Texas, April 15, 2010.

2008 Thompson, John H. (Panel Member). "Panel Discussion: The American Community Survey: Promise, Products and Perspectives." Population Association of America Annual Meeting, New Orleans, Louisiana, April 17, 2008.

2006 Thompson, John H. (Discussant). "Census 2010: A New Census for the 21st Century." Population Association of America Annual Meeting, Los Angeles, California, March 30, 2006.

2004 Thompson, John H., "Interviewer Falsification of Survey Data." Paper presented at the Joint Meetings of the American Statistical Association, Toronto, Canada, August 11, 2004.

2003 Thompson, John H., "Is Interviewer Falsification Scientific Misconduct?" Roundtable paper presented at the American Association for Public Opinion Research 58th Annual Conference, Nashville, Tennessee, May 16, 2003.

2002 Thompson, John H. (Discussant). "Eliminating the 2010 Census Long Form? – Current Status of the American Community Survey." Population Association of America Annual Meeting, Atlanta, Georgia, May 9, 2002.

2001 Thompson, John H., "Decision on Release of Statistically Corrected Redistricting Data." Invited paper presented at the Joint Meetings of the American Statistical Association, Atlanta Georgia, August 6, 2001.

1999 Thompson, John H., "Census 2000 – Innovations and New Technology." Paper presented at the Economic Commission for Europe's Conference of European Statisticians Meeting, Geneva, Switzerland, February 15-17, 1999.

1998 Thompson, John H. and Robert E. Fay, "Census 2000: The Statistical Issues." Paper presented at the Joint Meetings of the American Statistical Association, Dallas, Texas, August 9-13, 1998.

1996 Thompson, John H. and Karen Mills, "Census 2000 Content: Tradeoffs on Cost, Quality, and Quantity." Paper presented at the Annual Meeting of the Population Association of America, New Orleans, Louisiana, May 9-11, 1996.

1995 Thompson, John H., Mary H. Mulry, Susan M. Miskura, "Census 2000: Statistical Issues in Reengineering the Decennial Census." Paper presented at the Annual Meeting of the American Statistical Association, Orlando, Florida, August 13-17, 1995.

1992 Fay, Robert E. and John H. Thompson, "The 1990 Post-Enumeration Survey: Statistical Lessons in, Hindsight." Paper presented at the Annual Research Conference, March 22-25, 1992, Arlington, Virginia.

1989 Edson, Robert G. and John H. Thompson, "1990 Decennial Census Coverage Improvement Program." Paper presented at the Annual Winter Meetings of the American Statistical Association, San Diego, California, January, 1989.

1988 Navarro, Alfredo, John H. Thompson, and Linda Flores-Baez, "Results of Data Switching Simulation." Paper presented to the Census Advisory Committees at the Joint Advisory Committee Meetings, Oxon Hill, Maryland, April, 1988.

1987 Griffin, Richard A. and John H. Thompson, "Confidentiality Techniques for the 1990 Census." Paper presented to the Census Advisory Committees at the Joint Advisory Committee Meetings, Oxon Hill, Maryland, October, 1987.

U.S. Bureau of the Census, "Programs to Improve Coverage in the 1980 Census," by John H. Thompson. Evaluation and Research Reports, PHC80-E3.

1986 Thompson, John H. and David Franklin, 'Test Census Results and Applications for the 1990 Planning." Paper presented at the Census Bureau Second Annual Research Conference, Reston, Virginia, March, 1986.

1984 Miskura, Susan M., John H. Thompson, Henry F. Woltman, "Uses of Sampling for the Census Count." Paper presented at the Annual Meeting of the American Statistical Association, Philadelphia, Pennsylvania, August, 1984.

Fan, Milton C., Martha L. Sutt, and John H. Thompson, "Evaluation of the 1980 Census Precanvass Coverage Improvement Program." Paper presented at the Annual Meeting of the American Statistical Association, Philadelphia, Pennsylvania, August, 1984.

Keeley, Catherine and John H. Thompson, "The 1980 Census Nonhousehold Sources Program." Paper presented at the Annual Meeting of the American Statistical Association, Philadelphia, Pennsylvania, August, 1984.

1983 Miskura, Susan M. and John H. Thompson, "1980 Census Findings and Their Implications for 1990 Census Planning." Presented at the Joint Statistical Meetings, Toronto, Canada, August, 1983.

Taeuber, Cynthia and John H. Thompson, "1980 Census Data: The Quality of the Data and Some Anomalies." Paper presented at the Annual Meeting of the Population Association of America, April, 1983.

1982 Fan, Milton C., John H. Thompson, Jay Kim, and Henry F. Woltman, "Sample Design, Estimation and Presentation of Sampling Errors for the 1980 Census Early Publications National Sample." Paper presented at the Annual Meetings of the American Statistical Association, Chicago, Illinois, August, 1982.

1981 Woltman, Henry F., Susan M. Miskura, John H. Thompson, and Peter A. Bounpane, "1980 Census Weighting and Variance Estimation Studies, Design and Methodology." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.

Kim, Jay, John H. Thompson, Henry F. Woltman, and Stephen M. Vajs, "Empirical Results from the 1980 Census Sample Estimation Study." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.

Fan, Milton, C., John H. Thompson, and Susan M. Miskura, "1980 Census Variance Estimation Procedure." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.

Thompson, John H., "Convergence Properties of the Iterative 1980 Census Estimator." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.

1978 Thompson, John H., "The Nonhousehold Sources Program." Paper presented at the Annual Meetings of the American Statistical Association, San Diego, California, August, 1978.

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 TO PRODUCE 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").

Plaintiffs seek to preliminarily enjoin Defendants from implementing Defendants' August 3, 2020 Replan. The Replan shortens census data collection and processing timelines from the eight months set forth in the Defendants' April 13, 2020 COVID-19 Plan to four months. Plaintiffs claim that the Replan's shortened timelines will unlawfully harm the accuracy of crucial census

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data.

Before the Court are the parties' submissions regarding production of the administrative record. Having considered the parties' submissions; the parties' oral arguments at the September 8, 2020 case management conference; the relevant law; and the record in this case, the Court ORDERS the production of the administrative record.

I. BACKGROUND

A. Factual Background

Before addressing the merits of the parties' submissions, the Court briefly notes the factual context. Defendants acknowledge that the Bureau's Census data collection and processing responsibilities are "a 15.6 billion dollar operation years in the making." Defendants' Opp. to Plaintiffs' Motion for Stay or Preliminary Injunction at 1 ("PI Opp."). The Bureau spent most of a decade preparing the original operational plan for the 2020 Census, which was called the Final Operational Plan and was issued in December 2018. Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the U.S. Census Bureau, describes the extensive work over a period of many years that the Bureau performed to develop the Final Operational Plan, which the Bureau also called Version 4.0. For example, Fontenot discusses eight significant census tests the Bureau performed in 2013, 2014, 2015, 2016, and 2018 to improve their field operations. Fontenot Decl. ¶ 71. Fontenot describes partnerships with stakeholders such as organizations and tribal and local governments. *E.g.*, Fontenot Decl. ¶¶ 12, 28. The Final Operational Plan reflects the conclusions of subject-matter experts such as statisticians, demographers, geographers, and linguists. *See, e.g.*, ECF No. 37-5 at 79, 144 (2020 Census Operational Plan—Version 4.0).

The Final Operational Plan also set timeframes for three operations that especially affect the quality of the count: (1) self-responses to census questionnaires, (2) non-response follow-up ("NRFU"), and (3) post-data collection processing. First, the timeframe for self-responses refers to when people may respond to census questionnaires on their own. Second, NRFU refers to the process of "conduct[ing] in-person contact attempts at each and every housing unit that did not self-respond to the decennial census questionnaire." Fontenot Decl. ¶ 48. "The NRFU Operation is

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entirely about hard-to-count populations." ECF No. 37-5 at 219. NRFU is thus "the most important census operation to ensuring a fair and accurate count." Thompson Decl. ¶ 15. Lastly, post-collection data processing refers to the Bureau's "procedures to summarize the individual and household data that [the Bureau] collect[s] into usable, high quality tabulated data products." Fontenot Decl. ¶ 66.

Under the Final Operational Plan issued in December 2018, self-responses spanned 20.5 weeks from March 12 to July 31, 2020. NRFU spanned 11.5 weeks from May 13 to July 31, 2020. Data processing spanned 22 weeks from August 1 to December 31, 2020. These operational dates would culminate in the Secretary of Commerce reporting (1) by December 31, 2020, "the tabulation of total population by States" to the President for the purpose of Congressional apportionment; and (2) by April 31, 2021, the same tabulation of population to the states for the purpose of redistricting. 13 U.S.C. § 141(b).

On March 18, 2020, however, the Bureau announced that it would suspend all field operations for two weeks because of the COVID-19 pandemic. *See* Press Release, U.S. Census Bureau, *U.S. Census Bureau Director Steven Dillingham on Operational Updates* (Mar. 18, 2020), https://www.census.gov/newsroom/pressreleases/2020/operational-update.html. On March 28, 2020, the Bureau announced another two-week suspension. Press Release, *Census Bureau Update on 2020 Census Field Operations* (Mar. 28, 2020), https://www.census.gov/newsroom/press-releases/2020/update-on-2020-census-field-operations.html. The Bureau halted all hiring and training of hundreds of thousands of Census field staff known as "enumerators," who implement NRFU by trying to contact people who do not respond to the Census questionnaire. Fontenot Decl. ¶ 49. The Bureau also experienced staffing shortages at its call centers and the contractor responsible for printing the six mail-in self-response forms. ECF No. 37-7 at 8 (GAO, *COVID-19 Presents Delays and Risks to Census Count* (June 2020)).

As a result, on April 13, 2020, the Bureau issued an adjustment to its Final Operational Plan to account for the impact of COVID-19 (the "COVID-19 Plan"). ECF No. 37-3 (April 13,

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2020 statement of Secretary of Commerce Wilbur Ross and Census Bureau Director Steven Dillingham). The COVID-19 Plan extended the operational deadlines.

Specifically, first, the COVID-19 Plan expanded the timeframe for self-responses from 20.5 weeks to 33.5 weeks (March 12 to October 31, 2020) to account for the pandemic's disruptions to Bureau operations and the public's ability to respond to the census. For instance, the Bureau had to adapt to staffing shortages at call centers and the self-response printer. ECF No. 37-7 at 8. The Bureau also had to cope with "delays to the Update Leave operation, in which [census] field staff hand-deliver questionnaires," *id.* at 6, to "areas where the majority of the housing units do not have mail delivery . . . or the mail delivery information for the housing unit cannot be verified." Fontenot Decl. ¶ 46. In sum, as of June 2020, "self-response rates var[ied] widely across states and counties," with "markedly different operational environments and challenges" facing the Bureau "from one locale to another." ECF No. 37-7 at 6 (citing self-response rates "below 3 percent" in counties in Alaska, Texas, Utah, and South Dakota).

Second, NRFU likewise expanded from 11.5 weeks (May 13 to July 31, 2020) to 12 weeks (August 11 to October 31, 2020). The pandemic disrupted NRFU in at least two ways. One, the pandemic made it harder to hire and retain enumerators to contact households. *See, e.g.*, Gurmilan Decl. ¶ 13 ("Monterey County is still advertising for census enumerator job listings because traditional applicant groups like senior citizens have concerns about the risk of catching COVID-19"). Two, "door-to-door visits for NRFU interviewing may be less effective" during a pandemic. ECF No. 37-7 at 18.

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

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

Although these delays would result in the Bureau missing statutory deadlines, Bureau officials publicly stated that meeting the December 31, 2020 deadline would be impossible in any event. For instance, on May 26, 2020, the Bureau's head of field operations, Tim Olson, stated that "[w]e have passed the point where we could even meet the current legislative requirement of December 31. We can't do that anymore. We -- we passed that for quite a while now." Nat'l Conf. of Am. Indians, 2020 Census Webinar: American Indian/Alaska Native at 1:17:30–1:18:30, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY. Similarly, on July 8, Associate Director Fontenot confirmed that the Bureau is "past the window of being able to get" accurate counts to the President by December 31, 2020. U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 20–21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

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

On July 31, 2020, the Bureau removed from its website the October 31, 2020 deadlines for self-responses and NRFU. *Compare* ECF No. 37-8 (July 30 Operational Adjustments Timeline), *with* ECF No. 37-9 (July 31 Operational Adjustments Timeline).

On August 3, 2020, the Bureau issued a press release announcing the Replan. ECF No. 37-1. In Fontenot's declaration, Fontenot avers that the Secretary approved the Replan on the day it was announced. Fontenot Decl. ¶ 85.

The Replan accelerated and compressed the Bureau's data collection and processing

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timeframes from eight months to four months. Specifically, self-response compressed from 33.5 weeks to 29 weeks, with the deadline advancing from October 31 to September 30. *Id.* ¶ 100. NRFU compressed from 11.5 weeks to 7.5 weeks, with the deadline advancing from October 31 to September 30. Lastly, data processing was halved from 26 weeks to 13 weeks with the deadline advancing from April 30, 2021 to December 31, 2020.

B. Procedural History

On August 18, 2020, Plaintiffs filed suit to challenge the Replan's advancement of the deadlines for self-responses, field operations to attempt to count NRFU, and data processing. To allow Plaintiffs to effectively challenge the Replan, including the September 30, 2020 end of field operations, the parties stipulated to a briefing schedule and hearing date of September 17, 2020 on Plaintiffs' motion for stay and preliminary injunction (hereafter, "motion for preliminary injunction" or "Mot."). ECF No. 35. Pursuant to that schedule, Plaintiffs filed a motion for a preliminary injunction on August 25, 2020 based on their claims under the Enumeration Clause and the APA. ECF No. 36.

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

To assist the Court in determining by what date a ruling on Plaintiffs' motion for preliminary injunction must be issued, Defendants agreed to file a statement by September 2, 2020 as to when the winding down of field operations would begin relative to the September 30, 2020

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deadline for ending data collection. Defendants filed the following statement:

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

ECF No. 63. Based on Defendants' statement, Plaintiffs moved on September 3, 2020 for a temporary restraining order to preserve the status quo for 12 days until the September 17, 2020 preliminary injunction hearing. ECF No. 66. On September 4, 2020, Defendants opposed the motion, and the Court held a hearing on the motion.

At the hearing on the motion for a temporary restraining order, Defendants reiterated their position that no administrative record existed, ECF No. 82 at 33:13–:15, but disclosed that there were documents contemporaneously explaining the Replan. Defendants stated:

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

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

Only a few minutes later, however, Defendants retracted their assertion of deliberative process privilege. *Id.* at 36:15–:17 ("[T]o be clear, we are not asserting the deliberative process privilege because there is no record and there's nothing to consider."). Defendants conceded that "[i]f there is final agency action that is reviewable and the APA applies, we would have an obligation to produce the administrative record." *Id.* at 35:24–36:1. Defendants instead urged the Court to rely solely on a declaration that Defendants would file that night 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.").

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Later on September 4, 2020, Defendants filed their opposition to Plaintiffs' motion for preliminary injunction. As Defendants stated at the TRO hearing, Defendants' sole evidence against Plaintiffs' motion for temporary restraining order and motion for preliminary injunction is the declaration of Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the U.S. Census Bureau.

On September 5, 2020, the Court granted a temporary restraining order until the September 17, 2020 preliminary injunction hearing. On September 8, 2020, Defendants filed a notice regarding compliance with the TRO. ECF No. 86.

Also on September 8, 2020, the Court held another case management conference. At that conference, Defendants again stated that "there is no administrative record in this case because there is no APA action." ECF No. __ (forthcoming) at 62:15–:16. Even so, Defendants confirmed their statements from the TRO hearing that the Replan is "indeed codified." *Id.* at 21:7. The Replan simply was "not necessarily codified in one particular document." *Id.* at 21:9–:10. Accordingly, Plaintiffs asked the Court to order Defendants to produce the administrative record. *E.g.*, id. at 43:16–:17. The parties briefed the issue on September 8 and 9, 2020. *See* ECF Nos. 88–89, 92.

II. DISCUSSION

The Court first addresses threshold issues raised by Defendants. However, the Court notes that the cases that require determinations of those threshold issues before production of the administrative record are distinguishable from the instant case. Thereafter, the Court explains why the administrative record must be produced. Given the September 17, 2020 hearing and the Census Bureau's September 30, 2020 deadline for data collection, the analysis herein is necessarily brief. The Court will provide a more fulsome analysis in its ruling on Plaintiffs' motion for preliminary injunction promptly after the September 17, 2020 hearing. Thus, the Court's conclusions herein are provisional and may be subject to change after production of Defendants' administrative record.

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A. The Instant Case is Reviewable.

Defendants argue that the instant case is unreviewable on four grounds: (1) the Replan presents a political question; (2) Plaintiffs lack standing; (3) the Replan is not final agency action, and (4) the Replan is committed to agency discretion by law. The Court addresses each ground in turn.

1. The Replan does not present a political question.

A "political question" is one which is "outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). "Among the political question cases the Court has identified are those that lack 'judicially discoverable and manageable standards for resolving [them].'" *Id.* at 2494 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Defendants argue that whether the Replan violates the Administrative Procedure Act is a political question. Their argument is essentially the following syllogism. *First*, Congress has "virtually unlimited discretion in conducting the decennial 'actual enumeration.'" *Wisconsin*, 517 U.S. at 19. *Second*, Congress has used that discretion to set a statutory deadline of December 31, 2020 for when the Secretary must report a "tabulation of total population" to the President. 13 U.S.C. § 141(b). *Third*, Defendants replaced the COVID-19 Plan with the Replan in order to meet the statutory deadline. *Therefore*, the promulgation of the Replan is under Congress' virtually unlimited discretion; there "is no evident standard" for review; and the Replan poses a political question. PI Opp. 6.

The Court disagrees. Defendants' syllogism breaks down at its third step and conclusion. To start, the whole reason why the Court and Plaintiffs need the administrative record is to identify the contemporaneous justifications for the Replan. Only then can those justifications be reviewed under the deferential standard that the APA provides. That deferential APA review, as discussed in Section C below, includes determining if the agency considered—and gave a contemporaneous explanation of—all relevant aspects of a problem before taking action. Here, Congress has set forth more than just the December 31, 2020 statutory deadline as a relevant

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aspect of the census. The Census Act also "imposes 'a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Franklin*, 505 U.S. at 819–820 (Stevens, J., concurring in part and concurring in judgment)) (discussing 2 U.S.C. § 2a). Similarly, the text, structure, and history of the Constitution evinces "a strong constitutional interest in accuracy." *Utah v. Evans*, 536 U.S. 452, 479 (2002).

Thus, in its decision on the census citizenship question last year, the Supreme Court rejected Defendants' claim that there is "no meaningful standard against which to judge the agency's exercise of discretion." *Dep't of Commerce v. New York*, 139 S. Ct. at 2568 (quoting *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)). The standard is provided by the Census Act, the Constitution, and APA. Accordingly, it is no surprise that the overwhelming weight of authority rejects applying the political question doctrine to census-related decisionmaking. *See, e.g., U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458–59 (1992) (holding that "political question doctrine presents no bar"); *Franklin v. Massachusetts*, 505 U.S. 788, 801 n.2 (1992) (noting that the Court "recently rejected a similar argument" in *Montana* that "the courts have no subject-matter jurisdiction over this case because it involves a 'political question'"); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (per curiam) (rejecting the Census Bureau's argument that "allegations as to mismanagement of the census made in the complaint involve a political question," and holding the case reviewable under the Constitution and APA); *New York v. United States Dep't of Commerce*, 315 F. Supp. 3d 766, 791 (S.D.N.Y. 2018) (rejecting political question doctrine in citizenship question litigation; and collecting cases); *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980) (rejecting political question doctrine), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 674 (E.D. Pa. 1980) (same); *Texas v. Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992) (same); *District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1185 (D.D.C. 1992) (same); *City of N.Y. v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 764 (E.D.N.Y. 1990) (same); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 95

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(D.D.C. 1998) (three-judge court) (same; and stating "the court sees no reason to withdraw from litigation concerning the census"), *aff'd*, 525 U.S. 316 (1999); *see also Utah v. Evans*, 536 U.S. 452 (2002) (engaging in review without noting any jurisdictional defect stemming from political question doctrine); *Wisconsin v. City of N.Y.*, 517 U.S. 1 (1996) (same); *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000) (same), *aff'd sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001) (unpublished); *Prieto v. Stans*, 321 F. Supp. 420, 421 (N.D. Cal. 1970) (finding jurisdiction over a motion to preliminarily enjoin the census's "mail-out, mail-back procedure" and "community education and follow-up procedures"). In sum, the political question doctrine does not bar the Court from ordering Defendants to produce the administrative record.

2. Plaintiffs have standing to challenge the Replan.

"To have standing, a plaintiff must 'present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019). Plaintiffs here allege—and support with affidavits—the same injuries that the Supreme Court found supported standing in the citizenship question case: "[1] diminishment of political representation, [2] loss of federal funds, [3] degradation of census data, and [4] diversion of resources." *Id.* at 2565 (agreeing that "at least some" plaintiffs had standing).

First, Plaintiffs allege that "[t]he undercount resulting from the Rush Plan will likely result in an unfair apportionment that will cause local government Plaintiffs, individual Plaintiffs, and members of multiple organizational Plaintiffs, to lose their fair share of representation." Mot. at 29. For example, given the historically low census response rates in the City of Los Angeles and City of Salinas in California, and in Harris County, Texas, the Replan creates a substantial risk that their residents will not be counted, and a substantial risk of diminished political representation. *See* M. Garcia Decl. ¶¶ 8–15; Briggs Decl. ¶¶ 7, 15–17; Gurmilan Decl. ¶¶ 6, 8–14. Specifically, 57% of the residents in the City of Los Angeles, which is home to roughly 4 million people, live in census block groups that are hard or very hard to count. M. Garcia Decl. ¶ 7. Similarly, the City of Salinas comprises 38.5% of Monterey County's hard to count population, and the City's response

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rate is 9.5% below its response rate from the 2010 Census. *Id.* ¶ 6. The Replan's shortened schedule for data collection imposes a substantial risk that the hard to count populations will be undercounted, and that therefore their political representation will be diminished.

Second, local government Plaintiffs are recipients of multiple sources of federal funding that turn on census data. For example, King County, Washington and the City of Los Angeles receive Community Development Block Grants and other funds in the millions of dollars; and Seattle received over $108 million in Transit Formula Grants. Dively Decl. ¶ 7; Westall Decl. ¶¶ 34–36. The Replan will likely diminish both localities' funding because both localities have many hard to count persons who risk being undercounted because of the Replan's shortened schedule for data collection. M. Garcia Decl. ¶¶ 7–8; Dively Decl. ¶ 5; Hillygus Decl. ¶¶ 12, 19, 39. As another example, "approximately $90,529,359 of the grants expended by Harris County in FY2019 depended on accurate census data." Wilden Decl. ¶ 5. In fact, as the Supreme Court found last year, undercounting even a subset of the hard to count population can result in the loss of federal funding. *See Dep't of Commerce v. New York*, 139 S. Ct. at 2565 (finding standing, in the context of state-wide undercounting, because "if noncitizen households are undercounted by as little as 2% . . . [states] will lose out on federal funds").

Third, the local government Plaintiffs allege that the Replan will degrade granular census data that they rely on to deploy services and allocate capital. For instance, King County, Washington uses census data to place public health clinics, plan transportation routes, and mitigate hazards. Dively Decl. ¶ 6. The City of Los Angeles uses "reliable, precise, and accurate population count data" to deploy the fire department, schedule trash-pickups, and acquire or improve park properties. Westall Decl. ¶ 32.

Lastly, Plaintiffs will divert resources to mitigate the undercounting that will likely result from the Replan. For instance, 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,

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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 the existing staff to support the count." *Id.* ¶ 13.

As more examples, 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. "Harris County will be forced to expend additional resources to clear confusion about the last date for self-response during the Census, to ensure that people who have not responded are counted in time." *Id.* ¶ 16. The Black Alliance for Just Immigration already "publicized the October 31 deadline for self-response during digital events between April and July" and is diverting resources to publicize the new September 30 deadline. Gyamfi Decl. ¶¶ 13–14. The League of Women Voters "has already had to spend time and financial resources" developing and distributing public education materials on the Replan timeline. Stewart Decl. ¶ 12. The National Urban League has similarly had "to divert resources from other programs and projects" to "alleviate the confusion" about the change in deadlines. Green Decl. ¶ 15. Indeed, even now, the Census Bureau boasts of how its communications program was "more integrated than ever before" with Plaintiffs such as National Urban League. Fontenot Decl. ¶ 40. Mitigating those now-counterproductive education campaigns and a likely undercount will only be harder in the midst of a pandemic. *E.g.*, M. Garcia Decl. ¶¶ 14–14; Gurmilan Decl. ¶¶ 11–14; Briggs Decl. ¶¶ 11–12, 15–17.

The above harms are "concrete, particularized, and actual or imminent." *Dep't of Commerce v. New York*, 139 S. Ct. at 2565 (quoting *Davis*, 554 U.S. at 733). They are also "fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Id.* (quoting *Davis*, 554 U.S. at 733). As the Supreme Court stressed last year, "Article III 'requires no more than de facto causality.'" *Id.* at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). Here, Plaintiffs' theory of standing rests "on the predictable effect of Government action on the decisions of third parties"—specifically, the predictable harms of accelerating census deadlines, without warning, after months of publicly operating under a plan

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tailored to COVID-19. *Id.* Accordingly, enjoining the Replan's last-minute change in deadlines would redress those harms. *See, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 328–34 (1999) (affirming injunction against the planned use of statistical sampling to prevent apportionment harms, among others); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 675 (S.D.N.Y.) (issuing injunction to prevent "the loss of political representation and the degradation of information"), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551.

3. The Replan constitutes final agency action.

The Replan constitutes final agency action. "To maintain a cause of action under the APA, a plaintiff must challenge 'agency action' that is 'final.'" *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2013) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004)).

Courts should take a "'pragmatic' approach" to finality. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.,* 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). For an agency's action to be final, two conditions must be met. First, the action "must mark the consummation of the agency's decisionmaking process —it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Second, the action "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* Five years earlier, the Supreme Court found that the same two requirements applied in a census case. *Franklin*, 505 U.S. at 797 (the central question "is [1] whether the agency has completed its decisionmaking process, and [2] whether the result of that process is one that will directly affect the parties.").

The Replan meets both criteria. First, the Replan marks the consummation of the agency's decisionmaking process. *Id.* An agency action marks the consummation of the agency's decisionmaking process when the decision is "not subject to further agency review." *Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012); *see also Hawkes*, 136 S. Ct. at 1813–14 (holding that an agency action was final because the determination was "typically not revisited"); *Fairbanks North Star*

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Borough v. U.S. Army Corps of Engineers, 543 F.3d 586, 593 (9th Cir. 2008) (holding that an agency's action was final where "[n]o further agency decisionmaking on the issue can be expected"). According to Fontenot's declaration, the Secretary approved the Replan. Fontenot Decl. ¶ 85. No further agency decisionmaking will be conducted on the Replan. These facts support the conclusion that the agency has reached a definite position that the census will be conducted according to the schedule set forth in the Replan. *Fairbanks*, 543 F.3d at 593.

Second, the Replan is a decision by which rights or obligations have been determined. The Replan determines the rights and obligations of the Census Bureau because it determines the dates on which the Census Bureau will end its data collection and processing. The Replan also determines the rights and obligations of people who seek to participate in the census by preventing them from participating in the census after September 30, 2020. *See Sackett*, 566 U.S. at 126 (holding that an agency action determined rights and obligations of property owners where it "severely limit[ed] [the owners'] ability to obtain a permit . . . from [the agency]"); *Alaska, Dep't of Environmental Conservation v. E.P.A.*, 244 F.3d 748, 750 (9th Cir. 2001) (holding that an agency action determined rights and obligations where its effect was to halt construction at a mine facility). These people will be unable to participate despite the Census Bureau's previous representations that they could participate until October 31, 2020. Because the Replan determines rights and obligations, the Replan constitutes final agency action.

Disputing this conclusion, Defendants rely on the Supreme Court's decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). That case concerned the Secretary of Commerce's transmission of the census report to the President. *Franklin*, 505 U.S. at 797–98. The data presented to the President was still subject to correction by the Secretary. *Id.* In addition, the President could instruct the Secretary to reform the census. *Id.* at 798. Accordingly, the report was a "moving [target]" or a "tentative recommendation," rather than a "final and binding determination," so it carried "no direct consequences for the reapportionment." *Id.* Based on these characteristics, the Supreme Court held that the transmission of the census report was not final agency action. *Id.* at 798.

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Defendants argue that the Replan also does not constitute final agency action. However, *Franklin* underscores why the Replan constitutes final agency action. The Replan is not a tentative recommendation that will be revisited by the agency, or reviewed by a higher official. Rather, no further review of the Replan will be conducted. Moreover, the Replan does have direct consequences for the reapportionment. The Replan determines the date on which data collection will end, past which people can no longer participate in the census. Thus, the Replan constitutes final agency action.

Defendants also argue that the Replan does not constitute agency action at all. Agency action includes "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). To satisfy this requirement, the matter must be a "circumscribed, discrete agency action[]." *S. Utah Wilderness All.*, 542 U.S. at 62–63. This requirement "precludes [a] broad programmatic attack" on an agency's operations. *Id.* at 64.

Defendants analogize this case to *NAACP v. Bureau of the Census*. 945 F.3d 183 (4th Cir. 2019). In *NAACP*, the plaintiffs brought a challenge in 2018 to the census "methods and means," which the Fourth Circuit repeatedly referred to as "design choices." *NAACP*, 945 F.3d at 186. The plaintiffs' complaint alleged insufficient numbers of enumerators, insufficient networks of area census offices, the insufficiency of the Bureau's plan to rely on administrative records, and insufficient partnership program staffing. *Id.* at 190. Each of these factors was "expressly . . . tied to one another." *Id.* at 191. As a result of these relationships, "'[s]etting aside' one or more of these 'choices' necessarily would impact the efficacy of the others, and inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations." *Id.* (citing *S. Utah Wilderness All.*, 542 U.S. at 66–67). The Fourth Circuit further held that the cancellation of a specific field test in 2016 did not give rise to legal consequences, rights or obligations. *Id.* In concluding that there was not final agency action, the Fourth Circuit emphasized that its holding was "based on the broad, sweeping nature of the allegations that the plaintiffs have elected to assert under the APA." *Id.* at 192.

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NAACP is inapposite. The instant case does not challenge the census "methods and means" or "design choices." The instant case does not challenge multiple aspects of the census that are expressly tied to one another such that the Court must engage in "hands-on" management of the Census Bureau's operations. The Replan itself concerns only one aspect of the Bureau's operations—the census schedule. The Replan does give rise to legal consequences, rights, and obligations. In addition, the Replan was announced in a single press release. *See* ECF No. 37-1. These facts support the conclusion that the Replan is a circumscribed, discrete agency action.

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

The Replan is not committed to agency discretion. The APA creates a "strong presumption favoring judicial review of administrative action." *Weyerhaeuser*, 139 S. Ct. at 370 (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015)). However, the APA precludes courts from reviewing actions that are committed to agency discretion by law. 5 U.S.C. § 701(a)(2). Courts have read this exception "quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Weyerhaeuser*, 139 S. Ct. at 370 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)).

The Replan does not fit into this narrow exception. In *Department of Commerce v. New York*, the Supreme Court explained that "[t]he taking of the census is not one of those areas traditionally committed to agency discretion," acknowledging that "courts have entertained both constitutional and statutory challenges to census-related decisionmaking." 139 S. Ct. at 2568. The Supreme Court explained that there were meaningful standards against which to judge the agency's action, including the Census Act, which requires that the agency "conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Id.* at 2568–69 (citing *Franklin*, 505 U.S. at 819–20 (Stevens, J., concurring in part and concurring in judgment)). Therefore, there are meaningful standards against which to judge the Replan, and the Replan is not committed to agency discretion.

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B. Although Defendants rely on cases holding that reviewability must be decided before production of the record, those cases are distinguishable.

Defendants argue that the Court cannot order production of the administrative record before deciding whether the case is reviewable. For the reasons stated below, the Court disagrees. The cases cited by Defendants are readily distinguishable. Furthermore, several district courts have ordered production of the administrative record prior to deciding reviewability.

Defendants rely on *In re United States*, a mandamus action stemming from challenges to the termination of the Deferred Action for Childhood Arrivals (DACA) program. 138 S. Ct. 443 (2017). In that case, the Supreme Court reversed a district court order requiring the government to complete the administrative record and concluded that the district court should have first decided whether the case was reviewable. *Id.* at 445.

However, *In re United States* is easily distinguishable from this case for at least three reasons. First, the government had already produced an administrative record. *Id.* at 444. Accordingly, *In re United States* addressed completion of the administrative record, and not whether an administrative record must be produced in the first instance. *Id.* As explained below, the government is always required to produce an administrative record for the purposes of APA review. Second, *In re United States* concerned the government's assertions of the deliberative process privilege. *Id.* By contrast, in the instant case, the government initially asserted deliberative process privilege, but then immediately withdrew such assertion and has not asserted any other privilege. ECF No. 82 at 32:14–:16; 36:15–:17. Finally, *In re United States* concerned an overly broad district court order, which compelled the production of "all DACA-related materials considered by persons (anywhere in the government) who thereafter provided [the Secretary] with written advice or input . . . [or] verbal input" on the decision. *In re United States*, 138 S. Ct. at 444. Such an overly broad order is not at issue here. In light of the Supreme Court's instruction that *In re United States* be cabined to "the specific facts of [the] case," we cannot apply its ruling here. *Id.* at 145.

Defendants additionally rely on *NAACP v. Bureau of the Census*, --- F. Supp. 3d ---, 2020 WL 1890531 (D. Md. Apr. 16, 2020). In that case, the Fourth Circuit resolved threshold issues

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before an administrative record was produced and concluded that there was not final agency action. *NAACP v. Bureau of the Census*, 945 F.3d 183, 190 (4th Cir. 2019). However, *NAACP* is distinguishable from this case in at least two respects. First, in *NAACP*, the plaintiffs initially brought only an Enumeration Clause claim, not APA claims. *Id.* at 187–88. Second, in *NAACP*, the plaintiffs had access to information outside of the administrative record, including discovery that had already been ordered on the Enumeration Clause claim and a public record. *See NAACP v. Bureau of the Census*, 382 F. Supp. 3d 349, 356 (D. Md. 2019) (ordering discovery on the plaintiffs' constitutional claims). In the instant case, Defendants have produced only a single declaration drafted for this litigation, which attempts to give contemporaneous reasons for the agency action.

Moreover, while the Fourth Circuit ruled on reviewability before the production of the administrative record, other courts have demanded the production of the administrative record before deciding reviewability. *See Ctr. for Popular Democracy Action v. Bureau of the Census*, No. 1:19-cv-10917-AKH (S.D.N.Y. Jan. 9, 2020) (granting motion to expedite production of administrative record before deciding reviewability); *see also Doe # 1 v. Trump,* 423 F. Supp. 3d 1040, 1046 (D. Ore. 2019) (holding that production of administrative record was appropriate because the court required the administrative record to determine whether the agency action is final); *Friends of the River v. U.S. Army Corps of Engineers*, 870 F. Supp. 2d 966, 976 (E.D. Cal. 2012) ("Determining whether [the challenged actions] are final agency actions in the instant case requires a review of the full administrative record, because . . . 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits' of [the] action.").

C. Defendants must produce the administrative record.

Defendants' position that they need not produce the administrative record must be evaluated in the context of the APA. Under the APA, "judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Security v. Regents of the Univ. of Ca.*, 140 S. Ct. 1891, 1907 (2020). The agency cannot provide new reasons after the action is taken because such reasons would be "post hoc rationalization[s]" that do not

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represent the agency's reasons for acting. *Id.* at 1908 (quoting *Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1972)).

To permit the Court to review the agency's reasons for acting, the agency must produce an administrative record, which consists of "all documents and materials directly or indirectly considered by agency decision-makers" at the time of the decision. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The Court must then use the administrative record to evaluate Plaintiffs' APA claims. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (explaining that "[t]he focal point for judicial review [of APA claims] should be the administrative record"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Overton Park*, 401 U.S. at 420 (holding that "[APA] review is to be based on the full administrative record that was before the Secretary at the time he made his decision").

Defendants argue that this Court should instead decide the APA claims based on Fontenot's declaration. However, this Court cannot engage in APA review based on "[a] new record made initially in the reviewing court," especially a declaration drafted for litigation, because the declaration would be an impermissible post hoc rationalization that does not reveal the agency's reasons for acting at the time of the action. *Camp*, 411 U.S. at 142. Accordingly, the Supreme Court has held that a district court erred in relying on litigation affidavits, which were impermissible "post hoc rationalizations." *Overton Park*, 401 U.S. at 419; *see also Cmty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990) (R. Ginsburg, Thomas, Sentelle, JJ.) (concluding that relying on litigation affidavits is "manifestly inappropriate"). In *Overton Park*, the Supreme Court remanded in order for the district court to conduct its review based on the administrative record. *Overton Park*, 401 U.S. at 419–20; *see also Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 580 (D.C. Cir. 2001) (vacating and remanding because the district court should have required the FDA to file the administrative record and the circuit court could not "tell on what basis the Food and Drug Administration took the agency action the plaintiff seeks to enjoin"). In accordance with this case law, the Court must require the agency to file an administrative record on which it can review Plaintiffs' APA claims.

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If the agency claims that some parts of the administrative record are privileged, the Defendants shall produce a privilege log according to the same production deadlines. *See Ctr. for Food Safety v. Vilsack*, No. 15-cv-01590, 2017 WL 1709318, at *5 (N.D. Cal. May 3, 2017) (requiring the production of a privilege log when the agency asserted privilege); *Inst. For Fisheries Res. v. Burwell*, No. 16-cv-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017) (same).

III. CONCLUSION

For the foregoing reasons, the Court orders Defendants to produce an administrative record. For the purposes of the immediate production of the administrative record for the preliminary injunction motion, the administrative record shall be limited by subject matter, date range, and custodians in the following ways:

By September 13, 2020, Defendants Bureau Director Steven Dillingham and Secretary of Commerce Wilbur Ross and all of their direct reports/subordinates shall file the following, and a privilege log for any privileged documents: All documents comprising the Replan and its various components for conducting the 2020 Census in a shortened time period, 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.

By September 16, 2020, Associate Director Fontenot, his subordinates, and the individuals engaged with Fontenot to consider and prepare the Replan shall file the following, and a privilege log for any privileged documents: All documents and materials directly or indirectly considered when making the decision to replace the COVID-19 Plan with the 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.

Plaintiffs' reply in support of their motion for preliminary injunction shall be filed on September 15, 2020.

The administrative record cannot be artificially constrained in time. If the Replan was

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informed by the Bureau's prior planning, then such documents must be included. Thus, the Court will consult with the parties on a schedule for the production of the complete administrative record after the Court's ruling on Plaintiffs' motion for preliminary injunction.

IT IS SO ORDERED.

Dated: September 10, 2020

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, Plaintiffs, v. DONALD TRUMP, *in his official Capacity as President of the United States,* et al., Defendants.	No. 20-CV-5770 (JMF)
NEW YORK IMMIGRATION COALITION, *et al.*, Plaintiffs, v. DONALD TRUMP, *in his official Capacity as President of the United States,* et al., Defendants.	No. 20-CV-5781 (JMF)

Declaration of John M. Abowd, Ph.D.

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

Qualifications

1. I am the Chief Scientist and Associate Director for Research and Methodology at the United States Census Bureau. I have served in that capacity since June 2016. The following statements are based on my personal knowledge or on information supplied to me in the course of my professional responsibilities. These statements are provided in support of the Defendants' opposition to the Plaintiffs' motion for partial summary judgment or in the alternative for a preliminary injunction.

2. In 1977, I received my Ph.D. in economics from the University of Chicago with specializations in econometrics and labor economics. My B.A. in economics is from the University of Notre Dame.

3. I have been a university professor since 1976. My first appointment was assistant professor of economics at Princeton University. I was also assistant and associate professor of econometrics and industrial relations at the University of Chicago Graduate School of Business. In 1987, I was appointed associate professor of industrial and labor relations with indefinite tenure at Cornell University. I am currently on unpaid leave from Cornell University to work in my current position at the Census Bureau as part of the Career Senior Executive Service.

4. I am a member and fellow of the American Statistical Association, Econometric Society, and Society of Labor Economists (president 2014). I am an elected member of the International Statistical Institute. I am also a member of the American Economic Association, International Association for Official Statistics, National Association for Business Economists, American Association for Public Opinion Research, Association for Computing Machinery, American Association for the Advancement of Science, and American Association of Wine Economists. I regularly attend and present papers at the meetings of all of these organizations.

5. I have served on the American Economic Association Committee on Economic Statistics. I have also served on the National Academy of Sciences Committee on National Statistics, the Conference on Research in Income and Wealth Executive Committee, and the Bureau of Labor Statistics Technical Advisory Board for the National Longitudinal Surveys (chair: 1999-2001).

Relevant professional experience

6. In 1998, the Census Bureau and Cornell University entered into the first of a sequence of IPAs and other contracts under which I served continuously as Distinguished Senior Research Fellow at the Census Bureau until I assumed my current position in 2016, under a new IPA contract. Since March 29, 2020, I have been in the Associate Director position at

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the Census Bureau as a career Senior Executive Service employee. While I was a senior research fellow, I worked with numerous senior executives. This includes Directors (Martha Riche, Kenneth Prewitt, C. Louis Kincannon, Stephen Murdoch, Robert Groves, and John Thompson), Deputy Directors (Hermann Habermann, Thomas Mesenbourg, and Nancy Potok), Chief Scientists (Roderick Little and Thomas Louis), and numerous other associate directors, assistant directors, and division chiefs. I also worked with Chief Economists John Haltiwanger, J. Bradford Jensen, Daniel Weinberg, and Lucia Foster, and researchers in all program areas.

7. I was one of three senior researchers who founded the Longitudinal Employer-Household Dynamics (LEHD) program at the Census Bureau. This program produces detailed public-use statistical data on the characteristics of workers and employers in local labor markets using large-scale linked administrative, census and survey data from many different sources. The program is acknowledged as the Census Bureau's first 21st Century data product: built to the specifications of local labor market specialists without additional survey burden, and published using state-of-the-art confidentiality protection. In addition to very substantial financial support from the Census Bureau, this project was supported by a $4.1 million grant from the National Science Foundation (NSF) on which I was the lead Principal Investigator.

8. From 2004 through 2009, I was the lead Principal Investigator on the $3.3 million NSF-supported collaborative project with the Census Bureau to modernize secure access to confidential social science data. This project led to the first production implementation worldwide of differential privacy1 for OnTheMap—a product of the LEHD program. It also produced prototype confidential data access systems with public-use synthetic micro-data supported by direct analysis of the confidential data on validation servers. These projects were the precursors to the Census Bureau's current program to implement central differential privacy for all publications from the 2020 Census of Population and Housing, which will be the first large-scale production implementation worldwide.

9. From 2011 until I assumed my position as Chief Scientist at the Census Bureau in 2016, I was the Principal Investigator of the Cornell University node of the NSF-Census Research Network (NCRN), one of eight such nodes that worked collaboratively with the Census Bureau and other federal statistical agencies to identify important theoretical and applied research projects of direct programmatic importance to the agencies. The Cornell node produced the fundamental science explaining the distinct roles of statistical policymakers and computer scientists in the design and implementation of differential privacy systems at statistical agencies.

10. I have published more than 100 scholarly books, monographs, and articles in the disciplines of economics, econometrics, statistics, computer science, and information science. I have been the principal investigator or co-principal investigator on 35 sponsored research projects. My full professional resume is attached to this report.

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Scope of work

11. I have been asked to provide expert opinion responding to the expert report submitted in this case by Dr. Matthew H. Barreto.

Expert opinion

12. The most significant challenge to the quality of 2020 Census data is the COVID-19 pandemic. The effects of the pandemic and the multiple reprograms of the field operations of the 2020 Census make it nearly impossible to predict with any certainty whether any groups will be differentially disadvantaged in the final count. There are no natural or field experiments that speak to disruptions on this scale.

13. The Census Bureau's randomized controlled trial of a census questionnaire with and without a citizenship question, in June 2019, showed no statistically significant difference in the self-response rates with and without a citizenship question. With a sample of 480,000 housing units, capable of detecting differences as small as 0.5 percentage points (see https://www.census.gov/programs-surveys/decennial-census/2020-census/research-testing/testing-activities/2019-census-test/2019-census-test-report.html), this test was large-scale and properly designed to measure the differential self-response rates using the 2020 Census contact and self-response protocols. The June 2019 Census Test did not inform the question of whether overall self-response might have been lower because of the possibility of receiving a question about citizenship (the macro environment), nor did it inform the quality of the overall census procedures, including and especially non-response follow-up (NRFU).

14. An overview of the changes to the 2020 Census field and post-processing operations because of the COVID-19 pandemic and the shortened time window for the NRFU operation are detailed in the declaration of Albert E. Fontenot, Jr., Associate Director of the Decennial Census Programs for Census Bureau.

15. Pursuant to the President's July 21, 2020 *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census* ("the PM"), and based on information currently available to it, the Census Bureau is in the process of determining the appropriate methodologies and finalizing, to the extent possible, how it may exclude illegal aliens in keeping with the stated purpose of the PM to use the data for apportionment. At this time, the Census Bureau does not know exactly what numbers the Secretary may report to the President, and it is therefore impossible to assess precisely the effects of the PM on apportionment. The Census Bureau is remaining consistent with best practices for a federal statistical agency.

Comments on Dr. Barreto's report

16. With regard to Dr. Barreto's paragraph 14 (in which he concludes that the PM will reduce participation in the 2020 Census and reduce the accuracy of the 2020 census), paragraph 19 (in which he concludes that the PM erodes trust that many community-based organizations with experience serving immigrants built up over the past year), and paragraph 21 (in which he cites studies finding that Census participation drops in immigrant communities when federal immigration enforcement is perceived to be connected with the Census): As stated

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above in paragraph 12, the most significant challenge to the quality of 2020 Census data is the COVID-19 pandemic. The effects of the pandemic and the coinciding multiple reprograms of the field operations of the 2020 Census required to adapt to the circumstances of the COVID-19 pandemic make it nearly impossible to predict with any certainty whether any groups will be differentially disadvantaged in the final count. There are no natural or field experiments that speak to disruptions on this scale. Additionally, as demonstrated in paragraph 13 above, a randomized trial of the actual protocol used would be the best evidence to properly draw any conclusions.

17. With regard to Dr. Baretto's paragraph 68, in which he references 2018 survey research that he conducted in relation to the citizenship question on the 2020 decennial, and his conclusions that participation in the Census would increase after removing any fear of immigration status being exposed: The best way to accurately develop such conclusions is to conduct a randomized trial of the actual protocol being used in the 2020 Census, as referenced in paragraph 13 above. His research failed to do this making his conclusions as set out in paragraph 68 less reliable.

18. With regard to Dr. Baretto's paragraph 77, in which he concludes that administrative records are less useful than direct responses: More field visits by enumerators are still scheduled to occur. After some number of visit attempts, the enumerator will only try to get a population count, which does not have any associated characteristics (like Hispanic ethnic origins). Such a population count does not present the same incentives to avoid responding nor to misrepresent the number of people in the household. As long as the NRFU reaches comparable levels of completeness in getting population counts for address identifiers (MAFIDs), the differential effects of administrative record linkage with respect to apportionment are controlled.

19. With respect to Dr. Baretto's paragraph 79, his assertions that the count imputation process is biased by non-ignorable non-response are speculative. In the presence of the pandemic, it is very difficult to predict which neighborhoods will have larger count imputation rates and which will have smaller ones.

20. With respect to Dr. Baretto's paragraph 81, he misuses Rubin's missing data definitions. MCAR means that no variables-measured or unmeasured can predict which units are missing. Ignorable missing data (the standard assumption used by statistical agencies) means that the observed responses can be reliably used to predict the unobserved ones. Since the observed responses are all the agency typically has (including data in the sampling frame), that is all the data it can use for imputation. Non-ignorable missing data means that some unobserved information on the non-respondents is required to accurately predict their missing responses. Such information comes from extra-survey sources. The quote from my previous testimony was taken out of context. As I have previously explained, accuracy has at least two dimensions. These are commonly called bias—the statistic's tendency to systematically overcount or undercount its target—and variance—the statistic's tendency to fluctuate around its target. Count imputation is a statistical measure not based on sampling that has both of these accuracy components. I was commenting on the variance of imputations not the bias. The Census Bureau's count imputation procedure is tested for unbiasedness before use.

JOHN ABOWD

Digitally signed by JOHN ABOWD
Date: 2020.08.19 16:15:22 -04'00'

_____

John M. Abowd, Ph.D.
Chief Scientist and Associate Director for Research
And Methodolgy
Bureau of the Census

Dated: _____

BC-DOC-CEN-2020-001602-004542

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, -v- DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5770 (RCW) (PWH) (JMF)
NEW YORK IMMIGRANT COALITION, et al., Plaintiffs, -v- DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5770 (RCW) (PWH) (JMF) (Consolidated) FINAL JUDGMENT AND PERMANENT INJUNCTION

Before: RICHARD C. WESLEY, United States Circuit Judge
PETER W. HALL, United States Circuit Judge
JESSE M. FURMAN, United States District Judge

Pursuant to the Court's Opinion and Order of September 10, 2020, it is ORDERED, ADJUDGED, and DECREED as follows:

FINAL JUDGMENT

Final judgment is entered for Plaintiffs and against Defendants on Plaintiffs' claims arising from an *ultra vires* violation of 2 U.S.C. § 2a and 13 U.S.C. § 141 (namely, the Fifth Claim for Relief in the Governmental Plaintiffs' Amended Complaint and Count Two in the NGO Plaintiffs' Amended Complaint).

DECLARATION AND PERMANENT INJUNCTION

The July 21, 2020 Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census (the "Presidential Memorandum"), announcing that it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status, is DECLARED unlawful as an *ultra vires* violation of Congress's delegation of authority to conduct the decennial census and apportionment calculation pursuant to 2 U.S.C. § 2a and 13 U.S.C. § 141.

The Secretary of Commerce in his official capacity, the Director of the Census Bureau in his official capacity, the U.S. Department of Commerce, and the U.S. Census Bureau, and any successors to those offices, together with their agents, servants, employees, attorneys, and other persons who are in active concert or participation with the foregoing, *see* Fed. R. Civ. P. 65(d)(2), are PERMANENTLY ENJOINED from including in the Secretary's report to the President pursuant to Section 141(b) any information permitting the President to exercise the President's discretion to carry out the policy set forth in section 2 of the Presidential Memorandum — that is, any information concerning the number of aliens in each State who are not in a lawful immigration status under the Immigration and Nationality Act.

SO ORDERED.

Dated: September 10, 2020
New York, New York

/s/
RICHARD C. WESLEY
United States Circuit Judge

/s/
PETER W. HALL
United States Circuit Judge

/s/
JESSE M. FURMAN
United States District Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Lucy H. Koh, Judge

NATIONAL URBAN LEAGUE, et al., Plaintiffs,	)	
VS.	)	**NO. C 20-05799 LHK**
WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, et al., Defendants.	)	

San Jose, California
Tuesday, September 8, 2020

TRANSCRIPT OF ZOOM VIDEOCONFERENCE PROCEEDINGS

APPEARANCES VIA ZOOM:

For Plaintiffs National Urban League; League of Women Voters; Black Alliance for Just Immigration; Harris County, Texas; King County, Washington; City of San Jose, California; Rodney Ellis; Adrian Garcia; and the National Association for the Advancement of Colored People:

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San Francisco, California 94111
BY: STEVEN M. BAUER, ATTORNEY AT LAW
SADIK HUSENY, ATTORNEY AT LAW

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED REMOTELY BY: ANA M. DUB, CSR NO. 7445
RMR, RDR, CRR, CCRR, CRG, CCG
OFFICIAL UNITED STATES REPORTER

1 **APPEARANCES VIA ZOOM:** (CONTINUED)

2 For Plaintiffs National Urban League; League of Women Voters;
Black Alliance for Just Immigration; Harris County, Texas; King
3 County, Washington; City of San Jose, California; Rodney Ellis,
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BY: EZRA ROSENBERG, ATTORNEY AT LAW
7 **AJAY SAINI, ATTORNEY AT LAW**

8 BRENNAN CENTER FOR JUSTICE
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BY: THOMAS P. WOLF, ATTORNEY AT LAW
10
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BY: MICHAEL J. DUNDAS, ATTORNEY AT LAW
14
For the Plaintiff County of Los Angeles:
15 HOLLAND & KNIGHT LLP
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16 San Francisco, California 94111
BY: DAVID I. HOLTZMAN, ATTORNEY AT LAW
17
For Plaintiff City of Salinas:
18 OFFICE OF THE SALINAS CITY ATTORNEY
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19 Salinas, California 93901
BY: MICHAEL D. MUTALIPASSI, ATTORNEY AT LAW
20

21 For Plaintiff City of Chicago, Illinois:
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22 123 Townsend Street, Suite 100
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23 **BY: LILY E. HOUGH, ATTORNEY AT LAW**

24 **(APPEARANCES CONTINUED ON FOLLOWING PAGE)**

25

1 **APPEARANCES VIA ZOOM:** (CONTINUED)

2 For Plaintiff Gila River Indian Community:
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
3 Robert S. Strauss Tower
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BY: **DONALD R. PONGRACE, ATTORNEY AT LAW**
5

6 For the Defendants:
U.S. Department of Justice
7 Civil Division, Federal Programs Branch
450 Fifth Street, N.W.
8 Washington, D.C. 20530
BY: **ALEXANDER V. SVERDLOV**
9 **BRAD P. ROSENBERG**
SENIOR TRIAL COUNSEL
10

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1 **Tuesday - September 8, 2020** **10:01 a.m.**

2 **P R O C E E D I N G S**

3 **---o0o---**

4 **THE CLERK:** Calling Case 20-5799, National Urban
5 League, et al. versus Ross, et al.
6 Now I'm going to go through the parties in this case and
7 ask for appearances. So I'm going to go through this list, and
8 if you could just unmute yourself and state your names if you
9 represent that party.
10 For plaintiffs National Urban League; League of Women
11 Voters; Black Alliance for Just Immigration; Harris County,
12 Texas; King County, Washington; City of San Jose, California;
13 Rodney Ellis; and Adrian Garcia?
14 **MS. SHERRY:** Melissa Arbus Sherry from Latham &
15 Watkins on behalf of those plaintiffs.
16 **THE CLERK:** Thank you.
17 **MR. BRESS:** Richard Bress, Latham & Watkins, on behalf
18 of those plaintiffs.
19 **MR. HUSENY:** Sadik Huseny of Latham & Watkins on
20 behalf of those plaintiffs.
21 **MR. EZRA ROSENBERG:** Ezra Rosenberg from the Lawyers'
22 Committee for Civil Rights Under Law on behalf of those
23 plaintiffs.
24 **MR. WOLF:** Thomas Wolf from the Brennan Center for
25 Justice on behalf of those plaintiffs.

1 **MR. SAINI:** Ajay Saini from the Lawyers' Committee for
2 Civil Rights Under Law on behalf of those plaintiffs.
3 **MR. BAUER:** Good morning, Your Honor. Steve Bauer
4 from Latham & Watkins on behalf of those plaintiffs as well.
5 Thank you.
6 **THE CLERK:** Anyone else?
7 (No response.)
8 **THE CLERK:** Okay. Plaintiff City of Los Angeles,
9 California?
10 **MR. DUNDAS:** Good morning. Michael Dundas from the
11 Office of the Los Angeles City Attorney on behalf of the
12 City of Los Angeles.
13 **THE CLERK:** Plaintiff City of Salinas?
14 **MR. MUTALIPASSI:** Good morning. Michael Mutalipassi,
15 Office of the City Attorney for the City of Salinas.
16 **THE CLERK:** Thank you.
17 City of Chicago?
18 **MS. HOUGH:** Good morning. Lily Hough from the law
19 firm Edelson PC on behalf of the City of Chicago.
20 **THE CLERK:** Thank you.
21 Gila River Indian Community?
22 I wonder if they must have -- oh, Mr. Pongrace.
23 **MR. PONGRACE:** Sorry, Your Honor. Donald Pongrace,
24 Akin Gump Straus Hauer & Feld, on behalf of Gila River Indian
25 Community.

1 **THE CLERK:** Thank you.
2 And did I lose or miss anything else?
3 (No response.)
4 **THE CLERK:** All right. Thank you.
5 Oh, defendants. Excuse me.
6 **MR. EZRA ROSENBERG:** Your Honor, additional
7 organizational plaintiff NAACP and Navajo Nation which are also
8 represented by all the people who said they were representing
9 that other entire list. So I don't think we have to go through
10 that.
11 **THE COURT:** I was wondering. There were some
12 plaintiffs who were left out. You said NAACP, and who was the
13 other one?
14 **MR. EZRA ROSENBERG:** Navajo Nation.
15 **THE COURT:** Okay. And so those plaintiffs are
16 represented by the attorneys at Latham & Watkins, the Lawyers'
17 Committee for Civil Rights, and the Brennan Center; correct?
18 **MR. EZRA ROSENBERG:** That's correct, Your Honor.
19 **THE COURT:** Okay. Thank you.
20 **MS. SHERRY:** Sorry. If I could just make one
21 correction. Latham does not represent Navajo Nation, but we do
22 represent the NAACP.
23 **THE COURT:** Okay. Who represents the Navajo Nation
24 then? Just the Lawyers' Committee for Civil Rights and the
25 Brennan Center; is that correct?

1 **MR. SAINI:** That's correct, Your Honor.
2 **THE COURT:** Okay. Thank you.
3 And did we get all of the new plaintiffs?
4 **MR. HOLTZMAN:** No, Your Honor. David Holtzman of
5 Holland & Knight appearing on behalf of the County of
6 Los Angeles.
7 **THE COURT:** Okay. Thank you.
8 Any other plaintiffs that we missed?
9 (No response.)
10 **THE COURT:** No?
11 Okay. Thank you.
12 **THE CLERK:** Counsel for defendants, will you please
13 state your appearances. Thank you.
14 **MR. SVERDLOV:** Good morning, Your Honor. Alexander
15 Sverdlov for the defendants.
16 **MR. BRAD ROSENBERG:** Good morning, Your Honor. Brad
17 Rosenberg from the Department of Justice, Civil Division,
18 Federal Programs Branch, for the defendants.
19 **THE COURT:** All right. Good afternoon -- or good
20 morning. Welcome.
21 So has everyone stated their appearance?
22 (No response.)
23 **THE COURT:** Okay. Thank you. All right. Thank you
24 very much and welcome.
25 So let me first begin by asking whether the Government is

1 going to seek appellate review of the Court's temporary
2 restraining order.
3 **MR. SVERDLOV:** Good morning, Your Honor.
4 So I think the answer to that question depends on --
5 depends, perhaps in part, on our discussion today.
6 I have three points that I would like to articulate and
7 fully and completely place on the record; and I think that
8 would perhaps help the Government, certainly, but also
9 the Court and the other parties, determine and understand the
10 scope of the Court's injunction and the next steps forward
11 substantively and procedurally in this case.
12 **THE COURT:** Go ahead, please.
13 **MR. SVERDLOV:** Thank you, Your Honor. So I appreciate
14 the Court's indulgence.
15 As I said, there are three points that I think it is
16 important for us to place on the record at the outset. These
17 concern both the procedural posture of the case and the
18 compliance efforts that defendants are making with respect to
19 the temporary restraining order, the TRO.
20 The first point I would like to make, Your Honor, is that
21 the Court now has a complete factual record upon which to
22 decide the preliminary injunction and it should do so
23 expeditiously. The detailed declaration by Mr. Fontenot
24 explains not only that the timing -- excuse me -- explains not
25 only the timing and the basis for the Replan but also the harms

1 from the Court continuing to wait to issue a ruling.
2 Uncertainty is damaging to census operation, and the Court
3 should resolve the PI as soon as possible or even convert the
4 PI to -- excuse me -- even convert the TRO to a PI if the Court
5 believes that plaintiffs can show entitlement to that remedy.
6 It is important to emphasize, Your Honor, that extending
7 the timeline of the count past September 30th would make it
8 impossible for the Bureau to comply with Section 141's
9 statutory deadline, and that deadline cannot be ignored or
10 disregarded. The citizenship question litigation illustrates
11 the importance of that deadline and so does the procedural
12 history of *Carey v. Klutznick*, which the plaintiffs cite
13 throughout their brief.
14 Point Number 2, Your Honor, is that no further record
15 development is necessary or appropriate to resolve the PI. As
16 a legal matter, plaintiffs' claims fail, and the Court should
17 resolve the case on threshold justiciability and jurisdictional
18 grounds. The Court need not even consider a factual record
19 because plaintiffs' claims are barred by, one, the political
20 question doctrine; two, lack of jurisdiction; three, absence of
21 an enumeration clause standard; four, lack of circumscribed and
22 discrete final agency action; and, five, commitment of the
23 issue to agency discretion.
24 Your Honor, precedent from this court and other courts
25 indicates that threshold questions come first. And we would

1 refer the Court to, among others, the case *Regents v. DHS* at
2 279 F.Supp. 3d at 1028 from the Northern District of California
3 in 2018, where the Court recounted the procedural history in
4 which the Supreme Court directed the lower tribunals to
5 consider the defendant's jurisdictional defenses prior to
6 consideration of any discovery or administrative record
7 matters.
8 If the Court in this case passes by the five
9 jurisdictional bars to consider the substance of the APA claim,
10 and if it finds that the detailed declaration that Mr. Fontenot
11 submitted is insufficient to explain the Replan, then that
12 would merely mean that plaintiffs have satisfied the
13 likelihood-of-success prong for the PI. It would not mean that
14 additional information is necessary.
15 To repeat what we have said before, there is no
16 administrative record here because there's no discrete,
17 circumscribed, and final agency action. And the precedent in
18 the *NAACP* case from the Fourth Circuit confirms as much. That
19 case, at 4- -- excuse me -- at 945 F.3d at 190 to 191, explains
20 how census design choices are all interrelated and lack the
21 necessary discreteness and finality to constitute an APA
22 action.
23 The third point, Your Honor, is that while the Government
24 disagrees that the plaintiffs can prevail on the substance of
25 their claims, it is, of course, fully complying with the terms

1 of the TRO. As detailed in our filing this morning,
2 the Government took immediate steps to come into compliance
3 with the TRO when it received it on Saturday night. We have
4 provided the instructions -- we have provided to the Court the
5 instructions that the Bureau has transmitted to its staff
6 regarding the steps that are necessary to effectuate that TRO.
7 The overarching point is that we understand the TRO to not
8 frustrate the goal of conducting an enumeration. That includes
9 preserving the Bureau's flexibility to reallocate staff from
10 areas where enumeration has been completed to areas where more
11 staff is needed. In other words, we do not understand the TRO
12 to require the Bureau to keep personnel idle.
13 We also understand the TRO to only extend until
14 September 17th, meaning that the Bureau is still intending to
15 take all possible steps to comply with the statutory deadline
16 of December 31st, 2020.
17 Put another way, while the Bureau will spend money to take
18 all the steps we detailed in our Notice of Compliance, we don't
19 interpret the TRO as preventing the defendants from finishing
20 field operations by September 30th. An order that would affect
21 the Bureau's ability to complete its field operations by
22 September 30th and extend past September 17th would, in our
23 view, constitute a preliminary injunction. And if the Court
24 intends to preclude us from finishing by September 30th, we
25 will interpret that as a PI and seek a stay.

1 **THE COURT:** I am going to have to apologize. I have
2 not seen your filing. What time was that filed?
3 **MR. SVERDLOV:** Your Honor, I filed it between 9:00 and
4 10:00 in the morning of -- Eastern time. I can --
5 **THE COURT:** We'll have to take a recess. I apologize.
6 I have not seen that document. Excuse me.
7 (Recess taken at 10:12 a.m.)
8 (Proceedings resumed at 10:16 a.m.)
9 **THE COURT:** All right. I, again, apologize. I had
10 not seen this document. Let me ask you some questions about
11 it.
12 So it looks like, from the first bullet, the Bureau is
13 going to continue to release enumerators and only keep them if
14 the area is in Phase 2 or closeout. Is that correct?
15 Otherwise, you're going to be continuing to terminate
16 enumerators? That's how I read this.
17 (Reading):
18 "Refrain from releasing data collection staff
19 (enumerators and CFSs) . . . ."
20 What does "CFS" stand for?
21 **MR. SVERDLOV:** I apologize. I have -- I have an index
22 that decodes these acronyms, Your Honor. If I could beg
23 the Court's indulgence, I can look it up.
24 But I think that --
25 **THE COURT:** Go ahead and consult that.

1 Let me just read the rest of the sentence.
2 (Reading):
3 ". . . in Area Census Offices where operational
4 progress indicates the area is in Phase 2 or the
5 Closeout phase of the non-response follow-up unit
6 operation."
7 So that means you are continuing to just go ahead and
8 release data collection staff.
9 Now, how do you define --
10 **MR. SVERDLOV:** Your Honor -- I apologize, Your Honor.
11 I just want to make a clear record here. It means the
12 opposite. We are refraining from releasing them, which is to
13 say we are retaining them. We are ensuring --
14 **THE COURT:** But only if --
15 **MR. SVERDLOV:** -- that they stay on staff.
16 **THE COURT:** But only if they're in Phase 2 or
17 closeout. That doesn't say you're refraining to release any
18 other data collection staff, even though that might be contrary
19 to the COVID-19 Plan.
20 **MR. SVERDLOV:** So, Your Honor, what I will say is that
21 the further bullet points elucidate the ways in which the
22 Census Bureau is managing its offices and its staff.
23 And the overarching point is that once an area is --
24 **THE COURT:** I'm sorry to interrupt. We're going to go
25 through every bullet, and we'll go through every sentence. So

1 let's just -- if you could just stick with me here for a
2 minute.
3 You would agree with me that your first sentence of your
4 first bullet says that only data collection staff in Phase 2 or
5 the closeout phase of the non-response follow-up unit operation
6 are being refrained from being released, but you are going
7 ahead and releasing data collection staff in other Area Census
8 Offices that are not in Phase 2 or are not in closeout. Is
9 that correct?
10 **MR. SVERDLOV:** That is -- that is not correct,
11 Your Honor. The Census Bureau is redeploying staff. It is not
12 releasing -- sorry. I apologize. Allow me to back up.
13 **THE COURT:** Why is it qualified? Why doesn't it just
14 say: Refrain from releasing data collection staff unless
15 there's a performance issue, quality concern, or conduct, as
16 was appropriate for the Replan.
17 **MR. SVERDLOV:** Your Honor, may I put it -- may I
18 explain?
19 These steps are the action items that the Census Bureau
20 identified was necessary to take to revert back, essentially,
21 to the pre-Replan phase. Absent -- putting aside the category
22 of performance issues -- right? -- personnel are not released
23 or not planned to be released under any plan until an area gets
24 to Phase 2 or closeout.
25 Now, what these bullets are saying is that now, even when

1 an area gets to Phase 2 or closeout, those personnel will still
2 not be released; and they will, in fact -- once an enumeration
3 is complete in an office, then staff will be redeployed to
4 other areas that remain to be counted.
5 But it is not a correct reading, Your Honor --
6 **THE COURT:** If they're willing to be deployed;
7 correct? If they're willing to be deployed?
8 **MR. SVERDLOV:** That's correct, Your Honor.
9 **THE COURT:** "CFS" stands for what, please? How do you
10 define "Phase 2"? And how do you define "closeout phase,"
11 please?
12 **MR. SVERDLOV:** So those are -- Your Honor, those are
13 terms that are defined in the 2018 Operational Plan, in the
14 appendix of the 2018 Operational Plan. If the Court would
15 like, I can submit specific citations and page numbers after
16 this hearing. I do not have them in front of me right now.
17 **THE COURT:** Well, can you just tell me what they mean?
18 **MR. SVERDLOV:** So, Your Honor, "CFS" stands for the
19 "commodity flow survey." That's -- that is on the Bureau
20 website.
21 No. I'm sorry, Your Honor. I -- I -- I'm not certain
22 that that is the meaning of "CFS" in this context. It's -- I
23 can provide that information to the Court, Your Honor. I will
24 need a couple minutes.
25 But to the Court's question about Phase 2 or closeout,

1 those, as we explained at the hearing on Friday, are specific,
2 essentially, metrics of -- of an office's operations which are
3 triggered when a certain percentage of the cases that the area
4 office is required to handle have been completed.
5 Now, I will refer the Court to Mr. Fontenot's declaration
6 at paragraphs 82 to 100 which discusses the various metrics and
7 what a closeout -- when a closeout phase is triggered, and
8 specifically paragraph 95 of Mr. Fontenot's declaration.
9 **THE COURT:** We're going to get to his declaration.
10 Okay. So when a -- Friday, you were talking about tracks.
11 Now this is talking about CFSs, which you haven't defined for
12 me yet. But when a CFS area --
13 Now, what I wasn't clear on, with the enumeration of
14 85 percent of housing units, does that mean there's no
15 relationship to whether the non-response follow-up unit work is
16 completed? As long as you reach 85 percent of housing units,
17 however that's defined, you stop? Or is there any, also,
18 criteria that a certain amount of the non-response follow-up
19 unit work has to be completed?
20 **MR. SVERDLOV:** So, Your Honor, the non-response
21 follow-up work feeds into the completion rate. And what -- as
22 I endeavored to explain on Friday, what a "closeout phase"
23 means is that there is a concentrated effort to redirect the
24 non-response follow-up to the remaining 15 percent to ensure
25 that those remaining 15 percent are counted.

1 I apologize for not having the definition for "CFS"
2 previously. It stands for "census field supervisor areas."
3 The basic idea here, Your Honor, is that a census office,
4 a census area keeps track of how many housing units have been
5 enumerated, whether through self-response, whether through
6 non-response follow-up operations. And when a certain
7 percentage is triggered, as Mr. Fontenot explained on Friday,
8 at paragraph 95 of his declaration, he said that it is
9 85 percent. The changed metric reflected in the notice that we
10 filed indicates -- indicates a 90 percent completion rate.
11 What that means is that the office moves into basically
12 redirecting all the efforts it has to counting those last
13 10 percent.
14 That's why I worked so hard to explain on Friday that it
15 doesn't mean that an office is shutting down when it enters the
16 closeout phase. It just means that it is in a different status
17 of operations.
18 **THE COURT:** Okay. Let me repeat my question.
19 My question is: Does the 85 percent housing unit
20 completion threshold at all consider the amount of
21 non-responsive follow-up work that is outstanding? I assume
22 the answer is "no." It's going to happen regardless, as long
23 as that 85 percent number is met. Is that correct?
24 **MR. SVERDLOV:** If I understand the Court's question,
25 the non-response follow-up -- there's no separate metric for

1 what the non-response follow-up work has to be at. What
2 matters is how many housing units, whether through
3 self-response or through the census non-response follow-up
4 operations, have been enumerated.
5 And perhaps on this point it would be beneficial to
6 consider Mr. Fontenot's explanation in his declaration from
7 paragraphs 84 to -- excuse me -- 81 to 86, where he explains
8 how non-response follow-up operations work and, essentially,
9 the kinds of metrics that they follow.
10 It is possible, Your Honor, to construct a -- or to
11 identify a separate metric for how many cases the non-response
12 follow-up -- how much of the non-response follow-up work has
13 been done. That is not the 95 percent number. The 95 percent
14 number speaks to -- or, excuse me. The 90 percent number
15 speaks to total completion of enumeration in an area -- of
16 housing units in an area.
17 **THE COURT:** Okay. So I understand your answer to be
18 "no."
19 So let's go to my next question. Where did the 85 percent
20 benchmark come from? That is not at all explained in Associate
21 Director Fontenot's declaration.
22 **MR. SVERDLOV:** Your Honor --
23 **THE COURT:** Where does that --
24 **MR. SVERDLOV:** Yes. Your Honor, the
25 2018 Operational Plan includes those benchmarks. I do not know

1 off the top of my head whether the 2018 Operational Plan
2 included an 85 percent benchmark or some other kind of
3 benchmark that was altered by the COVID-19 Plan and the Replan.
4 But what the Court has in front of it in the guidance that
5 was transmitted in response to the Court's TRO is the current
6 standard, which is 90 percent.
7 So at this point, no office is going to enter
8 non-response -- I'm sorry -- is going to enter Phase 2 until it
9 reaches 85 percent completion of enumeration and, the closeout
10 phase, until it reaches 90 percent of enumeration.
11 **THE COURT:** I'm sorry to interrupt you.
12 I was confused because on Friday you said: Nope, there's
13 no closeout until it's 85 or 90 percent; but then the
14 declaration of -- let me get his title correct. I apologize.
15 Is it associate director or assistant director? Associate
16 director.
17 **MR. SVERDLOV:** Associate director.
18 **THE COURT:** -- doesn't mention the 90 at all; it just
19 says the 85.
20 So why did you mention 90 at the hearing on the TRO on
21 Friday but Associate Director Fontenot's declaration does not?
22 **MR. SVERDLOV:** So, Your Honor, when we held the
23 hearing, we were several hours from finalizing our briefs and
24 our declaration, and there were some numbers that needed to be
25 confirmed by Mr. Fontenot and his staff. So I understood that

1 there was a range between the numbers that needed to be
2 confirmed. And that was a number that Mr. Fontenot verified on
3 Friday prior to signing his declaration.
4 **THE COURT:** So that number is not in any Replan? I
5 mean, I thought, based on his declaration, he's the one that
6 worked on coming up with the Replan. And so there's no -- he
7 didn't know what the number was?
8 **MR. SVERDLOV:** He didn't -- at the time we were
9 compiling this, Your Honor, and the time that we were reviewing
10 it for accuracy, we did not have the final number.
11 **THE COURT:** I see.
12 **MR. SVERDLOV:** The number derives from the Replan,
13 Your Honor. That's where the number comes from. That's part
14 of the Replan or the special --
15 **THE COURT:** Okay. So is the Replan a written
16 document? Because I've only seen a press release. You're
17 saying that the number derives from the Replan. Is the Replan
18 an actual document?
19 **MR. SVERDLOV:** No, Your Honor, I do not believe it is
20 one single document. It is --
21 **THE COURT:** Okay.
22 **MR. SVERDLOV:** -- a set of interrelated decisions and
23 criteria that the Census Bureau has identified; that is -- or
24 has developed. I'm sorry.
25 **THE COURT:** It's not written down anywhere? Like,

1 where did he check to find out if the number was 85 or
2 90 percent? Did he have to check with a person? Did he have
3 to check with all the district directors who have the
4 discretion to close out? Or who did he have to check with?
5 Who is the master of that information?
6 **MR. SVERDLOV:** Your Honor, this is -- my understanding
7 is that this information is indeed codified. What I'm trying
8 to make clear is that it is not necessarily -- the full set of
9 different thresholds and plans is not necessarily codified in
10 one particular document.
11 So there are rules for what thresholds are required to
12 achieve closeout, but they are developed -- they were developed
13 as part of the Replan, which I will note Mr. Fontenot explains
14 how the Replan came to be.
15 **THE COURT:** It's codified where? Are there lots of
16 loose documents and so there's no one -- I'm just trying to
17 understand. I apologize, because I now understand that the TRO
18 will be litigated itself as to whether there's compliance or
19 not.
20 So where is it codified? Are there multiple documents
21 that memorialize different pieces or parts of the Replan?
22 Or -- just help me understand. I apologize. I don't mean to
23 be dim-witted here, but when you say it's "codified," can you
24 explain further, please?
25 **MR. SVERDLOV:** Your Honor, I do not have the answer to

1 that off the top of my head. I can -- I can verify that and
2 submit something to the Court shortly. I can perhaps endeavor
3 to verify that while we are on this hearing. But I do not
4 know.
5 Part of the reason that I do not know is because, for all
6 the reasons that we have endeavored to explain, there is --
7 this isn't a final agency action where a rule is reduced in
8 writing in one place. This is ongoing and dynamic operations
9 of an agency.
10 And I am happy to provide the specific information to
11 the Court. I do not have it in front of me right now.
12 **THE COURT:** Okay. All right. But Mr. Fontenot, who
13 is the associate director of the Census Bureau, he didn't know
14 what the percentage was until -- we had that hearing at --
15 what? -- 6:30 p.m. Washington, D.C., time. So sometime between
16 6:30 and you all filed about -- what? -- 10:20 p.m., he got the
17 number from somewhere.
18 **MR. SVERDLOV:** Well, Your Honor, I don't think it's
19 exactly fair to say that he didn't know. He needed to verify.
20 He understood that the number was between 85 and 90 percent.
21 That's -- that was instruction that was transmitted to the
22 field.
23 But, again, in an operation for a $15.6 billion census,
24 the fact that the associate director who is in charge of
25 running the field operations did not have one particular metric

1 off the top of his head and needed to verify it I don't think
2 is at all unusual.
3 **THE COURT:** So the field instructions were what? Were
4 they 85 percent completion or 90 percent completion or
5 something in between?
6 **MR. SVERDLOV:** Your Honor, Mr. Fontenot's declaration
7 at paragraph 95 identifies it as 85 percent.
8 **THE COURT:** Okay. But I thought a moment ago you said
9 that field instructions were 85 to 90 percent.
10 So you don't know where the 85 percent number came from
11 specifically. Do you know where the 90 percent number came
12 from?
13 **MR. SVERDLOV:** Your Honor, the 90 percent number comes
14 from the document that we submitted to the Court this morning.
15 That is -- that provides -- codifies the instructions in Bullet
16 Number 2, below the bullet that the Court has just read.
17 **THE COURT:** Okay. Is that a new number, or were field
18 offices previously told not to implement closeout until
19 90 percent of housing units had been enumerated? Is that a new
20 instruction?
21 **MR. SVERDLOV:** The instruction that we submitted this
22 morning is new in that it was transmitted on the night of
23 September 6th.
24 **THE COURT:** Okay. So the 90 percent is new. Where
25 did that number come from? I mean, were there any -- when I

1 mean "come from," were there any experts or surveys?
2 As you keep saying, it's a $15.6 billion operation, which
3 I understand is a gargantuan operation. Of all the things that
4 had been done to prepare for the 2020 Census, was there any --
5 I don't know -- specialist, expert, survey, anything that sort
6 of led to either 85 or 90 as the right number?
7 **MR. SVERDLOV:** So, Your Honor, the instructions that I
8 reference, which were transmitted on the night of
9 September 6th, reflect the Bureau's understanding of the kinds
10 of steps that are necessary to revert to the pre-Replan
11 Operational Plan and to fully comply with the Court's
12 injunction.
13 So the Bureau -- this number doesn't come out of thin air.
14 This comes out of the Bureau's interpretation and understanding
15 of what ceasing to implement the Replan requires. That is what
16 this document codifies. So the 90 percent number comes from
17 the Census Bureau's understanding of what the threshold was
18 prior to the Replan.
19 Now, I will note --
20 **THE COURT:** I'm sorry. I'm sorry. So then the
21 COVID Plan's threshold for closeout was 90 percent, but the
22 Replan threshold for closeout is 85 percent. That's what I'm
23 hearing from you.
24 **MR. SVERDLOV:** Your Honor, I would caveat it as
25 saying, I think the 90 percent number might have derived from

1 the 2018 Operational Plan rather than the COVID Plan.
2 **THE COURT:** Okay. So the 2018 Operational Plan said
3 the benchmark for closeout is 90 percent enumeration of housing
4 units? Is that the exact wording they used or not?
5 I apologize. I left my copy of the 2018 Operational Plan
6 at home. My mistake. I did not bring it with me to the
7 courthouse. So, I apologize. I don't have it.
8 The 2018 Operational Plan, did they say that the closeout
9 threshold is 90 percent of enumeration of housing units within
10 what? What was the geographic area, or what language did they
11 use?
12 **MR. SVERDLOV:** So, Your Honor, I can look up the
13 2018 Operational Plan and find that language.
14 As Mr. Fontenot explains in his declaration, again, at
15 paragraph -- paragraph 95, the percentages refer to housing
16 units within -- that are assigned to a particular office to
17 handle or to enumerate.
18 If the Court would like me to identify the specific
19 page and language on the Operational Plan, I would ask for
20 the Court's indulgence to find that information.
21 **THE COURT:** I'm going to get to the declaration. So
22 let me -- I'm sorry. This might be somewhat disjointed.
23 Okay. So were any experts or specialists consulted in
24 setting the 85 percent number?
25 **MR. SVERDLOV:** Your Honor, I believe that the question

1 is answered by Mr. Fontenot's declaration where he explains how
2 the Replan was developed. And, yes, experts were consulted,
3 the same people who developed the plan.
4 **THE COURT:** It doesn't say that as to 85 percent. And
5 you're just telling me he didn't even know the answer until he
6 had to check with other people on Friday night before signing
7 his declaration. So he doesn't say that. I know you keep
8 referring to paragraphs 81 through 86, and I keep looking
9 through them, but I don't see where he says where that number
10 came from.
11 Paragraph 95 just says (reading):
12 "CFS areas are eligible for closeout procedures
13 when they cross the 85 percent completion mark."
14 And that doesn't even say completion of what.
15 But anyway, okay.
16 **MR. SVERDLOV:** Your Honor, may I -- may I --
17 **THE COURT:** Let me keep going with my other questions.
18 Okay. So do you know if any of this criteria, either the
19 85 percent or the 90 percent -- and I assume it's going to be
20 housing units within a census field supervisor area and not a
21 tract. Is that right? Or when you used the word "tract" on
22 Friday, were you using another word for "census field
23 supervisor area"?
24 **MR. SVERDLOV:** I was, Your Honor. And I apologize. I
25 didn't have the precise terminology at the time. Again, as I

1 said, we were in the process of finalizing the declaration and,
2 as the Court can appreciate, I'm sure, there are a lot of
3 details and moving parts and components here.
4 And so I think my point, the point that I was trying to
5 get across is --
6 **THE COURT:** Yes.
7 **MR. SVERDLOV:** -- that in a particular area, whatever
8 that geographic area is that an office looks to and is
9 responsible for, there are certain thresholds; and those
10 thresholds are the ones that have been -- that have been
11 identified and have been discussed.
12 And I would like to clear up one thing, Your Honor, if I
13 may.
14 **THE COURT:** Okay.
15 **MR. SVERDLOV:** The Court suggested -- or I understood
16 the Court to suggest that the threshold numbers were developed
17 somehow different from -- or not explained in their
18 development.
19 The threshold numbers are part of the Replan. And so the
20 explanation that Mr. Fontenot provides for how the Replan was
21 developed and the timing for how it was developed and the
22 consideration that was given to those issues incorporates those
23 thresholds. And --
24 **THE COURT:** But you're saying the Replan is not a
25 document. You think it's codified, but you don't know where.

1 So I'm just trying to understand what's going on so that I can
2 understand all these issues.
3 Anyway, let's keep going. So if some districts -- or if
4 you want to call them census field supervisor areas or
5 tracks -- don't reach 85 percent enumeration of housing units
6 by September 30th, does that still mean the Census Bureau is
7 just going to stop data collection and stop non-response
8 follow-up?
9 **MR. SVERDLOV:** So there's several components to that
10 question, Your Honor.
11 **THE COURT:** Yes.
12 **MR. SVERDLOV:** The September 30th date is the date for
13 field operations. As Mr. Fontenot details in his declaration,
14 after field operations, there are a variety of steps that are
15 taken in order to check the quality of the data and to complete
16 the quality of the data.
17 So the Census Bureau prefers to get self-responses. It
18 prefers to do -- it prefers to enumerate using either
19 self-response or non-response follow-up operations because it
20 views those as most accurate. However, there are additional
21 steps and additional procedures that the Census Bureau does
22 separate from field operations.
23 And I will direct the Court to the Supreme Court's
24 decision in *Utah v. Evans* where the court analyzed one such
25 method, which is hot-deck imputation.

1 So the post-processing that Mr. Fontenot describes and
2 that is so -- one of the reasons that the Census Bureau must
3 complete its field operations by September 30th takes place
4 afterwards, and it represents the Census Bureau's best efforts
5 to fill in whatever missing gaps are there.
6 And I will also note, Your Honor, that plaintiffs'
7 experts --
8 **THE COURT:** I'm sorry.
9 **MR. SVERDLOV:** -- acknowledge --
10 **THE COURT:** I'm sorry. Let me just stop you there.
11 And I apologize for interrupting.
12 Okay. So you are saying that October 1, data processing
13 begins. And you're saying at that point the Census Bureau is
14 going to start doing imputation to fill in the gaps if a
15 certain census field supervisor area has not reached 85 percent
16 enumeration of housing units in that area?
17 **MR. SVERDLOV:** Your Honor, I don't think it's
18 triggered by a particular level of census enumeration or not.
19 I think after the Census Bureau is out of the field, it
20 endeavors to use whatever tools are available to it and
21 described in the Operational Plan to try to fill in whatever
22 gaps remain.
23 **THE COURT:** Okay. So you will be doing further data
24 collection as of October 1. So what is the point? What's your
25 harm in continuing the field operations if you're still going

1 to be enumerating people in October?
2 **MR. SVERDLOV:** Your Honor, Mr. Fontenot explains in
3 detail why these steps have to be sequential. The post-data
4 processing cannot take place -- Mr. Fontenot explains that the
5 post-data processing cannot take place --
6 **THE COURT:** Give me the paragraph. You're saying it
7 has to be sequential.
8 **MR. SVERDLOV:** It does, Your Honor.
9 **THE COURT:** If it has to be sequential, then how are
10 they doing imputation as of October 1 simultaneous with the
11 data processing? You just said they're going to be filling in
12 holes after field operations end.
13 **MR. SVERDLOV:** Your Honor, that's part of the data
14 processing. The imputation is part of the data processing.
15 That's part of it. I --
16 **THE COURT:** But you're saying no imputation is going
17 on now to get to the 85 percent enumeration of housing units.
18 Is that what you're saying?
19 **MR. SVERDLOV:** That is my understanding, Your Honor.
20 **THE COURT:** No imputation is going on now?
21 **MR. SVERDLOV:** That is correct, Your Honor.
22 **THE COURT:** All of that will be saved until October?
23 **MR. SVERDLOV:** That is my understanding, Your Honor.
24 So in terms of the paragraph -- Your Honor asked for the
25 paragraph where that is explained. I will refer the Court to

1 paragraph 100 of Mr. Fontenot's declaration and prior to that,
2 where Mr. Fontenot describes in detail the design of the
3 2020 Census, from paragraph 19 to paragraph 65, and also
4 paragraph 66 to paragraph 69 where he discusses the
5 post-processing operations. I think all the details are
6 contained there.
7 **THE COURT:** All right. Let's read paragraph 100.
8 (Reading):
9 "Finally, we wish to be crystal clear that if
10 the Court were to extend the data collection period
11 past September 30, 2020, the Census Bureau would be
12 unable to meet its statutory deadlines to produce
13 apportionment counts prior to December 31, 2020 and
14 redistricting data prior to April 1, 2021. The post
15 processing deadlines for the Replan Schedule are
16 tight, and extending the data collection deadline
17 would, of necessity, cause the Census Bureau to fail
18 to be able to process the response data in time to
19 meet its statutory obligations. We have already
20 compressed the post processing schedule from 5 months
21 to only 3 months. We previously planned and tested
22 our post processing systems assuming that we would
23 follow a traditional, sequential processing sequence,
24 and the 3-month schedule necessary for the Replan
25 Schedule has already increased risk. We simply

1 cannot shorten post processing beyond the already
2 shortened 3-month period."
3 I read that. I did not understand that to say that there
4 would be no imputation going on before October 1st and it would
5 all take place after October 1st. I did not understand that.
6 But let's just --
7 **MR. SVERDLOV:** Your Honor, may I -- I apologize, but
8 this is -- I think it's important to create a clear record
9 here.
10 **THE COURT:** Yes.
11 **MR. SVERDLOV:** Paragraph 66 through 69 of
12 Mr. Fontenot's declaration, which starts as section heading IX,
13 "Census Step 6: Post-data Collection Processing," explains
14 what steps the Bureau takes in its post-data collection
15 efforts.
16 Paragraph 100 that I cited to the Court goes to the
17 question of harm that the Court posed. I understood the Court
18 to ask what harm the Bureau would suffer from extending field
19 operations past September 30th, and that is the paragraph that
20 addresses that point most clearly, Your Honor.
21 **THE CLERK:** Your Honor, you're muted.
22 **THE COURT:** Thank you.
23 I could read 66 through 69 into the record, but I am not
24 going to take everyone's time. I don't think it says what you
25 said. But let's move on.

1 So were the 85 or 90 percent thresholds used in any other
2 census prior to this one?
3 **MR. SVERDLOV:** I do not know whether those exact
4 thresholds were used, Your Honor. But as I explained on Friday
5 and as I believe Mr. Fontenot's declaration details, the
6 general idea of having a -- having phases for field operations
7 is something that has been around for a long time and has, in
8 fact, been used in prior censuses. Whether the 2010 Census had
9 an 85 percent threshold for entering the closeout phase or
10 90 percent or something else, I do not know.
11 (Pause in proceedings.)
12 **MR. SVERDLOV:** Your Honor, paragraph 96 addresses this
13 point of prior censuses and the relationship of these -- of
14 these operations. It states (reading):
15 "It is a normal and planned part of the NRFU
16 operation for an ACO to move into the closeout phase
17 and complete operations. We used closeout procedures
18 in NRFU in the 2010 Census and always planned to do
19 the same for the 2020 Census. If we have not wound
20 down in some areas, it is because we are still
21 counting. Some ACOs have greater initial workload,
22 and some started earlier than others - therefore,
23 moving to completion varies by ACO and is a
24 reflection of workload and local conditions and
25 results in the allocation of enumerator resources

1 from areas that are complete to areas that require
2 more work."
3 **THE COURT:** So where in that paragraph does it talk
4 about the thresholds for closeout?
5 **MR. SVERDLOV:** It does not identify thresholds, but
6 I believe that's consistent with what I -- with my response to
7 Your Honor's question, which is that the general outline and
8 the general scope of these procedures are the same. The
9 specific operational details, the specific operational
10 thresholds may vary from plan to plan and census to census.
11 And I think this actually illustrates something very
12 important, Your Honor, which is that a census has a myriad,
13 thousands of various thresholds, various rules, various
14 procedures, various requirements. And that is, in fact, the
15 essential problem with the kind of -- with plaintiffs' efforts
16 to shoehorn a challenge to general operations to -- into the
17 framework of --
18 **THE COURT:** All right. Thank you.
19 Okay. Let's go to the next bullet.
20 So under the Replan, there's only one attempt, a contact
21 attempt, being made at a -- I don't know. I guess it just says
22 housing units, I assume -- who did not presumably respond to
23 the census questionnaire.
24 Is that one contact currently, is that by phone? Is that
25 by Internet? How is that defined?

1 **MR. SVERDLOV:** Your Honor, I believe non-response
2 follow-up operations are done in person. I believe
3 Mr. Fontenot addresses that in his declaration.
4 So to be clear, that is the procedures under the Replan.
5 And as we have indicated now in the notice that we submitted
6 this morning, that has been -- that has been altered.
7 **THE COURT:** Okay. So let me ask you. The
8 2018 Operational Plan, that had six contact attempts; is that
9 correct?
10 **MR. SVERDLOV:** That is correct. And that is what
11 the Bureau has now reverted to, Your Honor, as indicated in our
12 notice.
13 **THE COURT:** And the COVID-19 Plan had six contact
14 attempts?
15 **MR. SVERDLOV:** I believe so, Your Honor.
16 **THE COURT:** Okay. But the Replan had just one?
17 **MR. SVERDLOV:** I believe that is correct, Your Honor.
18 **THE COURT:** Okay. And where is that? Is that in a
19 document somewhere, that the Replan will involve only one
20 contact attempt instead of six?
21 **MR. SVERDLOV:** I do not know the answer to that,
22 Your Honor.
23 **THE COURT:** Okay. Okay. So let me ask. If, under
24 the Replan, there's been only one contact attempt, was there
25 any either survey, test, specialist, expert consulted to

1 determine that one contact would be sufficient? What was that
2 number based on?
3 **MR. SVERDLOV:** So as explained in Mr. Fontenot's
4 declaration, Your Honor, it was the determination of the
5 experts and staff at the Census Bureau who were asked to
6 present that Replan to the Secretary and did so on August 3rd.
7 I would posit, Your Honor, that all the people involved in that
8 are experts.
9 **THE COURT:** Excuse me. His declaration doesn't even
10 say that they've reduced from six contacts to one, does he?
11 **MR. SVERDLOV:** I don't believe it addresses that
12 specifically, Your Honor.
13 **THE COURT:** Okay. That was never disclosed anywhere
14 in anything that the Census Bureau has --
15 **MR. SVERDLOV:** I do not know that I would agree with
16 that, Your Honor.
17 **THE COURT:** Okay. So where was it? It's not in the
18 August 3rd press release; correct? I don't see it in there.
19 **MR. SVERDLOV:** That is correct, Your Honor. I
20 simply -- I do not know. So I would -- I do not want to
21 foreclose the possibility that it was made public. And it
22 certainly would have been made -- that is information that
23 would have been communicated to the offices that were
24 conducting, the local offices.
25 **THE COURT:** But it was never disclosed to your

1 stakeholders and your partners and the public?
2 **MR. SVERDLOV:** I do not know the answer to that,
3 Your Honor.
4 **THE COURT:** Okay. All right. Thank you.
5 So what other changes were made in the Replan other than
6 reducing the number of contacts from six to one? Are you using
7 more of the proxy response methods of contacting Postal Service
8 workers and landlords and neighbors? Is there more
9 administrative records check- -- you're saying no imputation is
10 going on currently in September. Is that correct? Zero?
11 **MR. SVERDLOV:** That is my understanding, Your Honor.
12 **THE COURT:** Okay. So then are proxy responses or
13 administrative record checks then being used? If the number of
14 contacts has gone down from six to one, what is making up the
15 difference? Telephone follow-up, or proxy, or administrative
16 record?
17 **MR. SVERDLOV:** So, Your Honor, I will -- I think I
18 should make something clear. To clarify what I said before,
19 NRFU -- non-response follow-up operations can indeed, and
20 sometimes are, done by telephone, not just in person.
21 Mr. Fontenot's declaration explains the changes under the
22 Replan and the way that the schedule was adjusted.
23 And to Your Honor's specific question, proxy responses are
24 part of field operations.
25 **THE COURT:** But where does the Fontenot declaration

1 say what's being done? You just said it didn't say that the
2 six contacts has been reduced to one. It doesn't say -- I
3 don't see any detail here.
4 **MR. SVERDLOV:** May I walk the Court through the
5 relevant paragraphs, Your Honor?
6 **THE COURT:** Sure.
7 **MR. SVERDLOV:** So at paragraph 81, Mr. Fontenot
8 addresses the timing and the development of the plan.
9 **THE COURT:** Okay. Let's get to that.
10 **MR. SVERDLOV:** Paragraph --
11 **THE COURT:** Wait. Let me stop you. It says
12 (reading):
13 "Once it became apparent that Congress was not
14 likely to grant the requested statutory relief, in
15 late July the career professional staff of the
16 Census Bureau began to replan the Census operations
17 to enable Census to deliver the apportionment counts
18 by the Statutory deadline of December 31, 2020."
19 So what was the date in late July?
20 **MR. SVERDLOV:** Your Honor, I think the -- I'm not sure
21 I understand the question. I apologize.
22 **THE COURT:** What is the date? In that same paragraph,
23 he tells me what time meetings happened: 8:00 a.m. on
24 Thursday, July 30th. So what time in late July did the Census
25 Bureau begin to replan the census operations to meet the

1 statutory deadline? I mean, if you have times of meetings in
2 here, certainly there should at least be a date of when did the
3 Census Bureau begin to replan the census operations.
4 I found "in late July" to be very vague. And at the CMC
5 that I had with your colleague, Mr. Rosenberg, and the other
6 counsel, I said I really want to know when the Census Bureau
7 began developing the Replan. And "late July" is very vague.
8 **MR. SVERDLOV:** So, Your Honor, I don't want to speak
9 for Mr. Fontenot because this is his declaration. I suspect,
10 however, that a lack of precise timing reflects, among other
11 things, the fact that there was not necessarily a single point
12 at which Bureau staff began to recognize that the COVID-19 Plan
13 may not be practical or possible because Congress is not -- did
14 not appear willing and does not appear willing to extend the
15 statutory deadline.
16 And if I may complete my answer to the prior question,
17 Your Honor. Paragraphs 82 on discuss the specific details of
18 the Replan; namely, the changes that were made and the factors
19 that were considered in making those changes.
20 **THE COURT:** It doesn't go into the level -- it never
21 says how many visits there are or how the visits will be
22 conducted.
23 But since you brought up 81, let's stick with 81. So
24 there was no one at the director level or deputy -- this is
25 also very vague; right? Who told anyone that Congress was not

1 going to grant the requested statutory relief and planning to
2 revise the operations needed to begin? Who made that decision
3 at the Census Bureau, and when was that decision made?
4 **MR. SVERDLOV:** So, Your Honor, I do not have the
5 answers to those questions right now.
6 But perhaps what I may suggest, if I may, Your Honor, I
7 would suggest that to the extent the Court wishes to have an
8 evidentiary hearing and hear from Mr. Fontenot on some of these
9 questions, we are happy to make him available as part of an
10 accelerated schedule for resolving the preliminary injunction.
11 It seems -- I worry that I am unable today to provide the Court
12 with answers to the specific questions that the Court is
13 seeking, and it seems that perhaps providing Mr. Fontenot would
14 be a better course.
15 **THE COURT:** Well, let me see what questions you are
16 able to answer, and then I think we can discuss whether an
17 evidentiary hearing would be appropriate.
18 So you, as counsel for the Census Bureau, do not know who
19 made the decision to begin replanning and when that decision
20 was made; correct?
21 **MR. SVERDLOV:** Your Honor, I disagree with --
22 respectfully, I disagree with that characterization.
23 **THE COURT:** Okay. So then who did, and when did they?
24 **MR. SVERDLOV:** Your Honor, I think the point is that
25 there was no single decision. I think that's the central --

1 that's not only a legal point, Your Honor, that we're making
2 but it is a practical point as well. Just as a factual matter,
3 this reflects an evolving -- an evolving process.
4 There was a particular point at which the Secretary of
5 Commerce directed that a plan be presented to him. That is an
6 identifiable point.
7 But otherwise, this is -- the reasons that we raised the
8 threshold legal arguments that we raise, Your Honor -- not to
9 belabor them again -- but the reason we raised them is because
10 that reflects the reality on the ground; that reflects the fact
11 that a census operational plan is not a discrete agency action,
12 even in the way that the decision to place a citizenship
13 question on the census --
14 **THE COURT:** I understand. Let me ask. So this was
15 organic? Multiple people spontaneously came to the same
16 conclusion that replanning was necessary? Is that what the
17 Census Bureau's position is?
18 **MR. SVERDLOV:** I -- I don't agree with the
19 characterization that it was spontaneous, Your Honor. I think
20 that the determination, such as it was, arose from a continual
21 back-and-forth between the experts in the Census Bureau who are
22 charged with running the census.
23 **THE COURT:** Okay. So let me go back to your filing
24 from this morning.
25 So if the number of contacts, whether by phone or in

1 person, has been reduced from six to one, then what is the
2 Census Bureau doing for non-response follow-up?
3 **MR. SVERDLOV:** Your Honor, respectfully, in our filing
4 this morning, we indicate that the Census Bureau has reverted
5 back to the six contacts. That's the central point.
6 **THE COURT:** I understand. But from whenever you
7 began -- I guess August 9th is now the date that everyone is
8 settling on. From August 9th, what was the Census Bureau
9 doing?
10 I guess I'm even not clear on how many are already -- how
11 many of these areas are already in closeout. That's not in
12 the -- how many are already in closeout?
13 **MR. SVERDLOV:** So, Your Honor, if I may refer
14 the Court to paragraph 95 of Mr. Fontenot's declaration, that
15 information is provided.
16 ". . . approximately [sic] 11 percent of CFS
17 areas nationwide are eligible for what we call 'the
18 closeout phase' . . . ."
19 That is in paragraph 95, Your Honor.
20 **THE COURT:** And did they reach the 90 percent
21 threshold or just the 85 percent?
22 **MR. SVERDLOV:** They reached the applicable threshold,
23 Your Honor. As Mr. Fontenot states in the declaration, that
24 was -- his understanding is that that was 85 percent.
25 **THE COURT:** And when were the field operations started

1 in those areas? Were those started August 9th?
2 **MR. SVERDLOV:** I do not know how the August 9th date
3 matches up with the areas that are in -- the 11 percent that
4 are in closeout. Mr. Fontenot discusses how some areas began
5 NRFU operations early. Some began August 9th. Some began
6 August 11th. I don't -- I don't know how the 11 percent
7 measures out between them.
8 But I will say that at paragraphs 84 to 87 of the
9 declaration, Mr. Fontenot discusses the beginning of the NRFU
10 operations and how they observed higher productivity in those
11 areas than what they had expected.
12 So, for example, the Court can look to paragraph 85 of the
13 Fontenot declaration.
14 **THE COURT:** What is the plaintiffs' response to
15 the Government's filing as of this morning?
16 **MS. SHERRY:** I think our primary response is we really
17 need the administrative record. And so that might not be
18 directly responsive to what's detailed on there, but I think
19 Your Honor's questions, in terms of the lack of clarity as to
20 what they were doing then compared to what they're doing now,
21 just highlights the fact that, you know, they're essentially
22 asking the Court to decide the PI without the administrative
23 record.
24 And so, you know, we've talked about this before, and the
25 defendants' position has shifted a bit. They went from saying

1 that there is no such record, to saying that there is
2 deliberative process privilege over whatever might be in that
3 record, to saying: Well, we're not saying there's no
4 administrative record; just, technically, there's no record
5 because we think there's no final agency action.
6 And then they filed their opposition brief to the PI where
7 they said essentially that and included the Fontenot
8 declaration, essentially to supplant or replace the
9 administrative record.
10 And so our view is, and has always been, that we are
11 entitled to the administrative record; that at this point
12 the Government should be argu- -- ordered, rather, to produce
13 the administrative record.
14 I mean, it's an APA claim. It's pretty much black letter
15 law that an APA claim should be decided on the administrative
16 record and not on *post hoc* litigation declarations. Now, those
17 declarations can serve some purpose in terms of background, but
18 they can't supplant the administrative record. And this one
19 can't be looked at as actually explaining the agency's
20 reasoning in the record because, again, there is no record.
21 And we know -- I mean, there are documents out there, as
22 Your Honor's questions reveal. They talk about the
23 "Rush Plan." And, actually, in their opposition, they give us
24 a hard time for conflating the actual plan with the
25 two-page statement from the director when the plan was

1 released; but, you know, that's because we haven't seen the
2 Replan. Whether it's one document or several, there are
3 documents in the administrative record that should be produced
4 for purposes of deciding the preliminary injunction. That's
5 one thought we have.
6 The second thought is, they allude to this in the filing
7 and they brought it up again this morning, but the suggestion
8 that Your Honor should essentially rush the PI hearing or
9 decision because they think the record is complete.
10 For the reasons I just said, the record is by no means
11 complete. We still need the administrative record. And our
12 reply is due on Thursday, and we, you know, need an opportunity
13 to respond.
14 I understand that they think they have strong
15 justiciability or jurisdictional arguments. I'm happy to
16 explain now or later why that's not, in fact, the case. But
17 they absolutely should be ordered to produce the administrative
18 record immediately, and the Court should have that record
19 before ruling on the PI motion.
20 **THE COURT:** Okay. I would assume the Government's
21 position would be then the Court would have to rule on the
22 justiciability issues first before ordering an administrative
23 record. Is that correct?
24 **MR. SVERDLOV:** Yes, Your Honor.
25 And may I make two points? May I be heard on two points?

1 **THE COURT:** Before you do, let me just ask.
2 Do the plaintiffs agree with that, that the Court would
3 have to rule on, effectively, standing, whether there was final
4 agency action?
5 **MS. SHERRY:** I mean, the first thing I would say is,
6 if their position is jurisdictional issues need to be decided
7 first, I think they've only raised two issues that can
8 correctly be characterized as jurisdictional, which would be
9 the political question doctrine that literally every court to
10 have considered the issue has rejected in the census context,
11 and then the second one is their standing, Article III standing
12 argument.
13 I don't think the Court has to resolve those issues before
14 requiring them to produce the administrative records. I think
15 they have recognized that normally, what would happen is they
16 would produce the administrative record along with their
17 answer -- or along with their motion to dismiss, and that
18 motion to dismiss would have made the same arguments that
19 they're making now. I haven't heard them argue that they would
20 be somehow excused from producing the record alongside an
21 answer -- or, rather, alongside a motion to dismiss raising
22 those jurisdictional issues.
23 I know they cited a case this morning, and I'd want to
24 look at that. But I don't think there's any absolute
25 prohibition on the Court ordering production of the

1 administrative record. I think that is what commonly happens
2 when the Government files a motion to dismiss in district
3 court.
4 **THE COURT:** Well, I think they were raising the --
5 they were raising the DACA case. And I actually think the DACA
6 case is distinguishable for a number of reasons. I mean, the
7 DACA case did not involve preliminary injunction, was not under
8 this kind of a time constraint. In this case, the Government
9 has not asserted a privilege. I mean, a preliminary injunction
10 is effectively a mini-trial.
11 Anyway, go ahead.
12 **MR. SVERDLOV:** Your Honor, if I could clarify the
13 record. I think it's important to discuss the DACA case
14 because there was a preliminary injunction there, and it is
15 distinguishable only insofar as in that case --
16 **THE COURT:** Excuse me. That was after the discovery
17 dispute. The preliminary injunction -- the discovery dispute
18 went to the Supreme Court before the preliminary injunction.
19 Go ahead.
20 **MR. SVERDLOV:** Your Honor, if I may read the -- what
21 I think is the relevant portion of that decision, *Regents v.*
22 *DHS*, 279 F.Supp. 3d --
23 **THE COURT:** Okay. I'm sorry. Excuse me. I'm going
24 to have to go -- it's in my chambers. I have it, but I have a
25 very small space here for these videoconferences. Excuse me.

1 Let's take a ten-minute break, please. Thank you.
2 **THE CLERK:** We're in recess.
3 (Recess taken at 11:12 a.m.)
4 (Proceedings resumed at 11:28 a.m.)
5 **THE COURT:** All right. Welcome back. Thank you for
6 your patience.
7 Okay. So let's do some scheduling.
8 Okay. So let me ask. So you want the administrative
9 record. Are you ready to file a motion requesting the
10 administrative record? I think some briefing would be helpful.
11 I do think that the case -- so I was looking at the
12 Supreme Court case. Government counsel was looking at the
13 District Court case that references the Supreme Court case. I
14 do think that case is distinguishable, but also I think some
15 briefing may be helpful as to what issues need to be decided in
16 light of that case, if anything, although I do think it can be
17 distinguished.
18 Do you want to be heard?
19 **MS. SHERRY:** Sure. I think on the -- and we're happy
20 to brief it. I mean, looking at the Supreme Court case,
21 I think the case is very clear that, number one, in that case
22 the Government actually did produce an administrative record
23 and what was at issue was the motion to supplement that
24 administrative record. And what the Court essentially said is
25 that that request was overly broad, and it block quoted what

1 was, you know, additional asks in terms of supplementing the
2 record. And it also was clear that on the specific facts here,
3 it would make sense for the threshold questions to be decided
4 first. And so I agree. I think it's entirely distinguishable
5 from this case.
6 I could also point Your Honor to another case in the
7 Ninth Circuit in the District of Oregon. It's another -- it's
8 a *Doe v. Trump* case -- it's 423 F.Supp. 3d 1040 -- that I think
9 is very similar to the facts here, where the District Court
10 there did require the Government to produce the administrative
11 record for a PI, despite the argument that they didn't have to
12 produce it because there had not been final agency action.
13 And I'd also just note that Your Honor, in deciding the
14 TRO, has at least found serious questions on the final agency
15 action issue and other issues. Again, I'm happy to sort of
16 dive in deeper to the substance of those arguments.
17 But I think the important thing is that an administrative
18 record is needed for the Court to decide the PI and, honestly,
19 also relevant to looking to see -- you know, the Government
20 keeps saying that there's no final agency action because this
21 is not discrete and it's very diffuse, and the record would be
22 helpful to see whether it supports any of the arguments that
23 they are making.
24 I think it's problematic for them to rely solely on the
25 Fontenot declaration to replace the administrative record. I'm

1 not sure they've cited any support for their ability to do
2 that.
3 And so we'd be happy to put it in briefing, but that's
4 what our position is on the administrative record.
5 **THE COURT:** I wish you had moved sooner. Your reply
6 is due in two days. I've always been asking, all along: What
7 do you need? Do we need discovery?
8 And asking now, it's -- well, I will say I agree that
9 I think the DACA case is distinguishable because the Government
10 did produce an administrative record there, did not claim
11 deliberative process privilege.
12 And I'm just going to quote what the District Court's
13 order was. It was very broad.
14 (Reading):
15 "All DACA-related materials considered by
16 persons anywhere in the Government who thereafter
17 provided the Secretary with verbal input on DACA."
18 So, I mean, I think it's distinguishable. We have no
19 record here at all. The Government is insisting there is no
20 administrative record. The Government has not asserted the
21 deliberative process privilege. They did on Friday, and then
22 they took it back. And certainly, I'm not going to issue, if I
23 were to do it, something as broad as that language.
24 Let me hear from the -- okay. So from your perspective,
25 the plaintiffs' perspective, you think before the record could

1 be ordered, the Court would have to decide Article III
2 standing, political question doctrine, and what else?
3 **MS. SHERRY:** Oh, sorry. To be clear, I don't think
4 the Court actually has to decide any of that before ordering
5 that the record be produced. I don't think that's what the
6 case they cite stands for at all. I think it's very
7 distinguishable.
8 The Court certainly could have issued a broad ruling,
9 saying those issues must be decided first, but that's not what
10 that decision does.
11 So I think the Court can order the administrative record
12 now before deciding any of those issues.
13 You know, if the defendants have support for the idea that
14 there's some categorical threshold question that needs to be
15 answered first, I mean, I would think that if that was the
16 case, there would be more support for it. I think
17 the Government in many cases argues that the case is not
18 justiciable for a wide variety of reasons. Certainly, in the
19 census area, the political question doctrine is litigated a
20 lot. And I think in these cases, it is commonplace and
21 expected for the Government to produce the administrative
22 record.
23 Now, there might be disputes as to what's in that record
24 or how complete it is and motions to supplement and extra
25 record discovery. But just the barebones record, you know, the

1 fact that we're litigating here about a Replan and there's no
2 documentation that has been produced saying what that Replan is
3 I think is really quite remarkable and distinct from other
4 cases.
5 And, Your Honor, on timing, you know, our apologies on
6 that. We feel like we've been dealing with a little bit of a
7 moving target on this issue. We first raised the need for an
8 administrative record at the August 26th case management
9 conference and was told at that time that there was no record.
10 Wasn't sure what to do with that or entirely what that meant.
11 And when it -- it didn't become clear until the TRO hearing
12 that, in fact, there were certain documents. Whether they
13 were, you know, claiming privilege over it was also a little
14 bit unclear during that hearing.
15 So I think it's been a little more difficult to -- you
16 know, we've asked for it. I think we've been clear that we
17 would like it. But it has been a little bit of a moving target
18 in terms of what actually exists and what the Government's
19 position is with respect to the record.
20 **THE COURT:** So when are you going to file your motion?
21 **MS. SHERRY:** We can file it -- we can try to file it
22 first thing in the morning, if that is okay.
23 You know, we do want to -- our reply is due on Thursday,
24 and we would like --
25 **THE COURT:** I'll move that date. I'll move that date.

1 **MS. SHERRY:** Okay.

2 **THE COURT:** I just think it may be -- I mean, I think
3 that the DACA case -- do you have -- let me ask government
4 counsel.

5 Do you have anything other than the DACA case in
6 opposition to producing an administrative record? Because if I
7 disagree with you that there is final agency action or the
8 Replan constitutes final agency action, then obviously -- I
9 don't know where anyone has been able to -- and maybe you can
10 cite a case -- or someone has produced zero administrative
11 record and is refusing to produce anything other than a
12 litigation declaration.

13 Can you cite me a case? Because if you only can cite the
14 DACA case, then I disagree with you.

15 **MR. SVERDLOV:** We can cite a case, Your Honor.

16 **THE COURT:** Okay.

17 **MR. SVERDLOV:** The *NAACP* case in the Fourth Circuit
18 which rejected the APA claims and dismissed the APA claims,
19 there's no administrative record in that case.

20 And similarly, like that case -- I'm sorry -- this case --

21 **THE COURT:** This is what I'm willing to do. I'm going
22 to order both sides to file by 7:00 p.m. today a very short --
23 you can give me two pages on whether the administrative record
24 needs to be produced or not. 7:00 p.m. California time, that
25 would be 10:00 p.m. your time.

1 I'm assuming you all still need a decision by the hearing
2 date of September 17th; so it has to be resolved pretty
3 quickly.
4 Now, what happens if the Government then seeks a writ?
5 Then they will probably move to stay this litigation.
6 **MR. SVERDLOV:** Your Honor, may I be heard on that
7 point?
8 **THE COURT:** Yes.
9 **MR. SVERDLOV:** So I think it is not uncommon for
10 preliminary injunction motions to be resolved prior to the
11 production of the record.
12 And as I indicated at the start of this hearing, I think
13 if the Court determines that Mr. Fontenot's declaration is
14 inadequate as far as an explanation for the Replan and,
15 obviously, if it even gets to that issue after the five
16 threshold legal hurdles that we identified, then the
17 appropriate determination would be that the plaintiffs have
18 prevailed on their APA challenge and that the Court can
19 consider the other preliminary injunctions after.
20 So, put another way, if the Court determines that an
21 explanation is necessary and Mr. Fontenot's declaration is
22 inadequate, then I suppose the Government loses on that prong.
23 That doesn't speak to the need for an administrative record.
24 And I would like to make one point that I wanted to make
25 earlier, Your Honor.

1 **THE COURT:** I'm sorry. Can you clarify one thing?
2 You're saying that if you agree -- if I find there's final
3 agency action, then the plaintiffs automatically prevail? I'm
4 sorry. I think I may have misunderstood you. Go ahead,
5 please.
6 **MR. SVERDLOV:** Yes, Your Honor. Our position is that
7 if the Court rejects the five threshold arguments that we have
8 made, determines that there was final agency action and
9 determines that an explanation was required under the APA and
10 finds that Mr. Fontenot's declaration does not provide that
11 explanation, then the conclusion would have to be that
12 the Government loses on the likelihood of success on the merits
13 prong of the PI, not that a record is appropriate.
14 So our position would be that if the Court reaches --
15 **THE COURT:** Why is the Government so afraid to just --
16 you say you've relied on all these experts; you've done all
17 this internal investigation for the Replan. Why are you so
18 afraid to produce any of those documents? I don't understand.
19 **MR. SVERDLOV:** Your Honor, respectfully --
20 **THE COURT:** There are a lot of Supreme Court cases
21 that say a litigation-generated declaration is not sufficient,
22 that the contemporaneous justification for the agency action is
23 what is the critical keystone.
24 Anyway, so let's go ahead. And I want simultaneous
25 briefing on the administrative record. I think that would be

1 helpful to do. And let's do it by tonight. I mean, you all
2 are asking for expedited treatment. I am willing and my
3 chambers is willing to put in the time to get this done.
4 So can you file it today by 7:00 p.m., which is 10:00 p.m.
5 D.C. time?
6 **MR. SVERDLOV:** Your Honor, may I have until midnight
7 tonight?
8 **THE COURT:** No. You already came with your DACA case.
9 You've already cited *NAACP*. I'm only going to give you two
10 pages. I need to do a ruling, and I assume you may then seek
11 review of my ruling to order the production of the
12 administrative record. We're running out of time. You're
13 saying that the Bureau will not honor the Court's TRO as of
14 September 18th. So I don't have any choice. So file it by
15 7 p.m. Pacific Time today.
16 Now, I will try to issue a ruling as soon as I can. Then
17 the question is -- so this is my question. I'd like you to
18 address whether I have to decide threshold issues and exactly
19 which ones they are, if at all.
20 I know the plaintiffs want me to just distinguish DACA,
21 which I feel comfortable doing. DACA was different. They did
22 produce an administrative record. The Court's order was overly
23 broad. There was no deliberative process privilege. Here we
24 have zero administrative record. We just have a self-serving
25 declaration created in the context of litigation.

1 And maybe I would be willing to do that, but I think -- I
2 mean, let me hear from you. What do you think would be the
3 more cautious thing to do?
4 **MS. SHERRY:** I would be --
5 **THE COURT:** I think I could issue a ruling on the
6 merits. Obviously, it would not be quite as comprehensive, and
7 it would have to be something that is much more expedited. And
8 I'd prefer not to do that. I'd prefer to hear everything
9 before I have to do that. But let me hear.
10 I guess I could make a tentative ruling just for purposes
11 of getting the administrative record. What's your view on
12 that?
13 **MR. SVERDLOV:** Your Honor --
14 **MS. SHERRY:** Go ahead.
15 **MR. SVERDLOV:** Thank you, Your Honor. If I may be
16 heard.
17 So our view is, I think, as I've articulated. The
18 administrative record -- a resolution of the administrative
19 record issue is entirely unnecessary.
20 If the Court wants to make a ruling based on the absence
21 of an administrative record and then use that as something that
22 goes to the merits of the APA claim, then I think that would be
23 a more appropriate course than --
24 **THE COURT:** No, I am not going to do that. But,
25 thank you. Thank you for raising that.

1 Ms. Sherry, what's your view?

2 **MS. SHERRY:** Our view is that you don't have to decide

3 the threshold issues and that it would be better to let us have

4 a reply brief on those issues before you have to consider them

5 and decide them.

6 Now, you know, to be clear, we think we are right on those

7 issues. We think they're fairly easily disposed of, but

8 I think -- and we'll file this at 7:00 p.m. tonight.

9 Legally, I do not think you need to resolve those

10 threshold issues definitively or even preliminarily before

11 ordering them to file an administrative record.

12 **THE COURT:** All right. Okay. So let's say I do order

13 it. Then I would order it be produced by -- today is -- I

14 would order it to be produced by Thursday, and the reply brief

15 would then be due on Monday.

16 **MR. SVERDLOV:** Your Honor, may I be heard on one

17 additional point that I have been unable to articulate?

18 **THE COURT:** Go ahead, please.

19 **MR. SVERDLOV:** Thank you. I have a point related to

20 the administrative record, and I have a factual clarification

21 regarding NRFU that I would like to make.

22 On the administrative record, Your Honor, acceding to

23 plaintiffs' fiction that there is an administrative record in

24 this case would require the very same people who are running

25 the census to spend time trying to identify what documents

1 would potentially constitute an administrative record in this
2 kind of context where there isn't really a clear scope for it.
3 To the extent that plaintiffs believe that there should be
4 some sort of record and that one needs to be created, at the
5 very least, it seems that the documents at issue should not --
6 should not extend indefinitely in time. They should be limited
7 to the beginning of the Replan planning to when the Replan was
8 approved, which would be late July to August 3rd. That's my
9 administrative record point.
10 On the factual question, we discussed prior to --
11 **THE COURT:** I'm sorry. You said from late July or
12 mid-July?
13 **MR. SVERDLOV:** Mr. Fontenot's declaration indicates
14 that late July was when planning started; so that should be the
15 scope of the -- of any documents, late July until August 3rd.
16 The factual clarification I would like to make is about
17 the NRFU follow-up operations. We had discussed at some length
18 prior to -- prior to the recess the distinction between one
19 follow-up attempt and six follow-up attempts. And I want to
20 make clear that the one follow-up attempt was only -- under the
21 Replan was only for vacant or unoccupied units. Units that
22 were not vacant always had six follow-up attempts and will
23 continue to have six follow-up attempts.
24 What the Court can see in the filing that we submitted
25 this morning is that now the number of follow-up attempts to

1 housing units that the Census Bureau believes are vacant has
2 been reverted back to six follow-up attempts.
3 **THE COURT:** Anyway, let me ask. I wouldn't limit the
4 administrative record to late July because, clearly, there were
5 people in the Census Bureau, according to your own
6 justification, who were following Congress's response and
7 whether Congress would grant an extension of the statutory
8 deadline. So clearly, people are at least following that and
9 then making the call, according to your own theory and
10 justification.
11 What is the time period that the plaintiffs would want for
12 any administrative record? Well, you want the whole record and
13 not some arbitrary limit.
14 **MS. SHERRY:** We would want the whole record and not
15 some arbitrary limit. We do think the period of time sort of
16 both leading up to the COVID-19 Plan and the planning that went
17 into that and then the period of time between the four months
18 or so between the COVID-19 Plan and the Replan should
19 definitely be part of that record. But, yeah, we would want
20 the whole period.
21 **THE COURT:** So do you think the development of the
22 COVID-19 Plan started around mid-March, or at least the
23 thinking around it when sheltering-in-place orders were
24 starting to be imposed on March 17th?
25 **MS. SHERRY:** That's my understanding. I'm not sure

1 exactly when in March, you know, they decided it was time to
2 replan in light of what was going on with coronavirus in this
3 country, but I think somewhere around that timing would be the
4 starting point.
5 **THE COURT:** Do you need more than two pages? I said
6 two pages, but I'm not set. I would just like something as
7 instructive and helpful as possible. So --
8 **MS. SHERRY:** I think I'd like to make it short for
9 Your Honor, but why don't we say three pages just to give us a
10 little more running room in case there is more ground to cover.
11 **THE COURT:** That's fine.
12 Mr. Sverdlov, three pages? I assume there's just a couple
13 of cases that you would want me to look at.
14 Let me ask one other question that I continue to have. If
15 the decision to implement the Replan or to adopt the Replan was
16 made on August 3rd, why did the Bureau take the October 31st
17 date for the conclusion of field operations off its website on
18 July 31st? Why was that done before the decision was made?
19 **MR. SVERDLOV:** Your Honor, may I make two points
20 completely in response to the two questions that the Court has
21 asked?
22 The first point is that the website timing is explicitly
23 addressed in Mr. Fontenot's declaration. He indicates that
24 he -- on paragraph 81, he indicates the timing of the website
25 and that he gave the direction.

1 Number two, Your Honor, just to be clear, we are happy to
2 make a submission on the administrative record, brief this
3 legal question tonight, two, three pages; but it is going to be
4 not possible for the Government to produce an administrative
5 record in this kind of inchoate notion in two days. That is
6 simply impossible. So we'll obviously honor any order that
7 the Court issues, but I want to make clear on the record that
8 as a matter of practicality and as a matter of burden, if
9 nothing else, we object.
10 **THE COURT:** Okay. But you were sued in this case on
11 July 27. It's now September 7th. You're saying during all
12 that time, you never anticipated that in an APA case you would
13 never have to collect the administrative record?
14 **MR. SVERDLOV:** There is -- as we stated from the first
15 status conference, Your Honor, there is no administrative
16 record in this case because there is no APA action. There's no
17 action cognizable under the APA, and we can't make it otherwise
18 just because plaintiffs keep insisting that there is.
19 **THE COURT:** Right. But I may not agree with you.
20 **MR. SVERDLOV:** And the Court will absolutely issue the
21 order that it issues, and we will comply with the orders.
22 But as a practical matter, two days to determine what a
23 record is in the circumstances is not possible for
24 the Government, Your Honor.
25 **THE COURT:** Did you want to respond, Ms. Sherry?

1 **MS. SHERRY:** I was just going to point out, when we
2 had the case management conference on August 26th and
3 the Government said that there was no administrative record
4 and, you know, they didn't have an obligation to produce
5 anything, Your Honor very clearly told them if there's an
6 administrative record, it should be produced. So I don't think
7 there's been any sort of uncertainty in terms of both our
8 position and, honestly, what your court said both at that
9 hearing and at the TRO hearing in terms of the Government's
10 obligation to produce the record.
11 I understand their sort of technical argument that it's
12 not called an administrative record if there's no final agency
13 action. But I think it was pretty clear that everyone was
14 talking about what ultimately becomes the administrative
15 record, the decision-making documents that the agency has in
16 its possession.
17 **THE COURT:** All right. Well, you need to start
18 working on it right now, I mean, the codification that you
19 mentioned earlier, all the instructions. I just find it hard
20 to believe that there's no administrative record here. I do
21 not understand the Government's refusal to be transparent about
22 what they have decided to do.
23 Anyway, but please put it in your filings. I'll make a
24 decision quickly.
25 Let me ask. So one other just factual point I'm curious

1 about is, Associate Director Fontenot's declaration says that
2 all areas are eligible for closeout on September 11th at each
3 regional director's discretion.
4 What are the factors for the exercise of that discretion?
5 And did that discretion exist under the COVID-19 Plan, or is
6 that just part of the Replan, if you know?
7 **MR. SVERDLOV:** So, to be clear, Your Honor, that date
8 is no longer effective for all the reasons that we've indicated
9 in our Notice of Compliance with the TRO.
10 Now, as far as the factors that feed into the discretion,
11 I do not know what all those factors are.
12 **THE COURT:** Okay. Are those factors in the Replan?
13 **MR. SVERDLOV:** They are a component of the Replan in
14 that they are an element of the Replan. I do not know whether
15 they also preceded the Replan, whether they were part of the
16 Operational Plan prior to that.
17 **THE COURT:** Okay. So the Replan would spell those
18 factors out?
19 **MR. SVERDLOV:** Your Honor, I would not speculate. I
20 would say that the discretion that the field offices have is
21 likely exercised pursuant to certain parameters. I don't know
22 how those parameters are codified.
23 **THE COURT:** Okay. And do you know if that regional
24 director discretion existed in past censuses?
25 **MR. SVERDLOV:** I do not know that off the top of my

1 head, Your Honor. I suspect that it did.
2 **THE COURT:** Okay. Let me ask. What is the
3 plaintiffs' view on an evidentiary hearing? Mr. Sverdlov has
4 now offered up Associate Director Fontenot for an evidentiary
5 hearing.
6 **MS. SHERRY:** Our position would be it cannot replace
7 an administrative record. But if, once they file an
8 administrative record, Your Honor wants to have an evidentiary
9 hearing with Mr. Fontenot, we would be fine with and welcome
10 that; but it can't be a replacement of the evidentiary -- of
11 the administrative record, rather. That's just sort of a
12 continuation of the problem with defendants' position here and
13 reliance on extra-record evidence instead of an administrative
14 record for an APA claim.
15 **THE COURT:** Mm-hmm. So the Government is not willing
16 to stipulate to an extension of the Court's TRO? I mean, what
17 you're --
18 **MR. SVERDLOV:** Your Honor, we ask that the Court
19 simply enter the TRO as a preliminary injunction at this point.
20 I think that will serve everybody's interests best. I think it
21 is going to be --
22 **THE COURT:** I understand you will not stipulate; so we
23 have to keep that September 17th date. I was just wondering if
24 there was any flexibility.
25 So if we need an evidentiary hearing, be prepared to have

1 that happen on Tuesday of next week. All right?
2 So you're both going to file by 7:00 p.m. today three
3 pages as to whether administrative record should be ordered to
4 be produced. If I order its production, it will be -- it must
5 be produced by Thursday. The plaintiffs' reply will be due on
6 Monday, an evidentiary hearing would be on Tuesday, and then I
7 would allow oral argument on Thursday as planned.
8 Now, I guess I'm just wondering, perhaps, whether we
9 should just combine -- well, no. I may need to keep the oral
10 argument date because I don't think the Government would agree
11 to having a TRO --
12 Well, what's your thought -- let me hear from the
13 plaintiffs -- about if I just combined the evidentiary hearing
14 and the oral argument on Tuesday. Then the injunction I
15 granted was through the hearing, through September 17th. I
16 just would like some time to incorporate any oral argument into
17 the order. Because this is all happening so quickly,
18 obviously, I would love to spend more time on the order, but I
19 understand time is of the essence and both sides want an answer
20 quickly.
21 So what's your thinking about just advancing -- well, I
22 don't know. I guess that wouldn't give me that much more time.
23 Let's keep the oral argument on Thursday, and I'll just
24 have to do something as quickly as I can after that date.
25 Okay?

1 So that's the time frame. File tonight at 7:00. If I
2 order it produced, it's ordered to be produced by Thursday.
3 The plaintiffs' reply is then due Monday.
4 The evidentiary hearing -- how long do you think that
5 hearing will last? I'll just try to reserve the entire day for
6 it. So that will be Associate Director Fontenot.
7 And then we'll have oral argument as scheduled, and I'll
8 try to issue an order as quickly as I can. All right?
9 Okay. Thank you all very much.
10 Anything further we should discuss today? I appreciate
11 your patience. I'm sorry this was a long status conference.
12 Anything further for today?
13 **MS. SHERRY:** Nothing from plaintiff, Your Honor.
14 Thank you.
15 **MR. SVERDLOV:** Nothing for defendants, Your Honor.
16 **THE COURT:** All right. Thank you all very much.
17 Thank you very much for your patience with all my questions. I
18 appreciate it. I'm just trying to get information so I can
19 understand the facts here.
20 All right. Thank you all. Take care.
21 (Proceedings adjourned at 11:59 a.m.)
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2 **CERTIFICATE OF REPORTER**

3 I certify that the foregoing is a correct transcript
4 from the record of proceedings in the above-entitled matter.
5
6 DATE: Wednesday, September 9, 2020
7
8
9 Ana M. Dub
10 Ana M. Dub, CSR No. 7445, RDR, CRR, CCRR, CRG, CCG
Official Reporter, U.S. District Court
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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 GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER** Re: Dkt. No. 66

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.

Before the Court is Plaintiffs' September 3, 2020 motion for a temporary restraining order

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("TRO motion"), enjoining Defendants from implementing Defendants' August 3, 2020 Replan, which shortens census data collection and processing timelines from the eight months set forth in the Defendants' April 13, 2020 COVID-19 Plan to four months. Plaintiffs claim that the Replan's shortened timelines will unlawfully harm the accuracy of crucial census data. Plaintiffs request that the TRO remain in effect for twelve days, until the September 17, 2020 hearing on Plaintiffs' motion for stay and preliminary injunction ("PI motion").

Temporary restraining orders "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." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 439 (1974); *accord, e.g., E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) ("a TRO 'should be restricted to . . . preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing and no longer") (ellipsis in original).

"'[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction [or TRO], so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction [or TRO] is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *accord Short v. Brown*, 893 F.3d 671,675 (9th Cir. 2018) (holding that these factors are "on a sliding scale"). Thus, "when the balance of hardships tips sharply in the plaintiff's favor, the plaintiff need demonstrate only 'serious questions going to the merits.'" *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019) (quoting *All. for the Wild Rockies*, 632 F.3d at 1135). The issuance of a TRO is at the Court's discretion. *See All. for the Wild Rockies*, 632 F.3d at 1131.

The Court has considered the TRO motion, opposition, and reply; the parties' oral arguments at the September 4, 2020 TRO hearing; the PI motion and opposition; the relevant law; and the record in this case. Below the Court analyzes in turn (1) the presence of serious questions going to the merits; (2) irreparable harm; (3) the balance of hardships; and (4) the public interest. *All. for the Wild Rockies*, 632 F.3d at 1135.

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The Court finds that Plaintiffs have presented serious questions going to the merits at least as to Plaintiffs' claims under the Administrative Procedure Act ("APA"). The Court does not prejudge these claims, but merely recognizes that the Plaintiffs have presented serious questions going to the merits of these claims.

For example, there are serious questions as to whether the Replan is reviewable by this Court. There is a serious question as to whether Plaintiffs have standing to challenge the Replan. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019) (holding that Plaintiffs had standing because an undercount of "as little as 2%" of noncitizen households constituted an injury in fact and was traceable to the Defendants' actions). Additionally, there is a serious question as to whether the Replan constitutes final agency action. Although the United States Supreme Court decided in *Franklin v. Massachusetts* that the Secretary of Commerce's transmission of a final Census report to the President is not final agency action, there is a serious question as to whether *Franklin* governs the facts in the instant case. 505 U.S. 788, 798 (1992) (explaining that the transmission was not final agency action because it "carries no direct consequences for the apportionment"). Finally, there is a serious question as to whether the Replan is committed to agency discretion by law. *See Dep't of Commerce v. New York*, 139 S. Ct. at 2568 (noting that "census-related decisionmaking" is traditionally reviewable under the Administrative Procedure Act).

There are also serious questions as to whether the Replan was arbitrary and capricious in violation of the APA. *See* 5 U.S.C. § 706(2)(A). The APA requires that Defendants consider the "important aspect[s] of the problem" before them. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). Although Defendants justify the Replan based on the statutory deadline, Plaintiffs suggest that Defendants have failed to consider their other statutory obligations, including the statutory 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." *Dep't of Commerce v. New York*, 139 S. Ct. at 2569 (quoting *Franklin*, 505 U.S. at 819–20 (Stevens, J., concurring in part and concurring in the judgment)). Thus, there are

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serious questions going to the merits of the Plaintiffs' APA claims.

As to irreparable harm, Plaintiffs identify and support with affidavits four potential irreparable harms that Plaintiffs will suffer as a result of inaccurate census data. First, Plaintiffs state that an inaccurate apportionment will violate their constitutional rights to political representation. Mot. 29. Second, Plaintiffs risk losing important federal funding from undercounting. Mot. 30. Third, Plaintiffs will need to expend resources to mitigate the undercounting that will result from the Replan. Mot. 31. Lastly, local government Plaintiffs' costs will increase because those Plaintiffs rely on accurate granular census data to deploy services and allocate capital.

These harms are potentially irreparable in two ways. To start, at least part of the harms may be constitutional in nature, and "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Moreover, to the extent the harm involves expending money or resources, "[i]f those expenditures cannot be recouped, the resulting loss may be irreparable." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers). Because the decennial census is at issue here, an inaccurate count would not be remedied for another decade, which would affect the distribution of federal and state funding, the deployment of services, and the allocation of local resources for a decade. Similar harms have thus justified equitable relief in previous census litigation. *See, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 328–34 (1999) (affirming injunction against the planned use of statistical sampling in census and citing apportionment harms, among others); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 675 (S.D.N.Y.) (issuing injunction and finding irreparable "the loss of political representation and the degradation of information"), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551. Plaintiffs attached to their TRO motion an internal Bureau document indicating that the Replan's compressed deadlines increase the risk of inaccuracy in the census count. ECF No. 66-3. Plaintiffs aver that each day that the Census does not conduct its field operations to reach and

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count hard to reach populations increases the inaccuracy of the census count and thus increases their irreparable harm.

By contrast, a temporary restraining order would merely require Defendants to do what Defendants had planned to do and were doing since April 13, 2020, when Defendants adopted the COVID-19 Plan, through August 3, 2020, when Defendants adopted the Replan. Moreover, the sole evidence Defendants submit in opposition to the TRO motion and the PI motion is the declaration of Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the U.S. Census Bureau (hereafter, "Fontenot"). In his September 5, 2020 declaration, Fontenot declares that:

> 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.

Font. Decl. at ¶ 98. Thus, Fontenot's declaration underscores Plaintiffs' claims of irreparable harm because the Bureau is terminating field staff now and will have difficulty rehiring such staff. Moreover, Fontenot's declaration suggests that the burden of an injunction on Defendants is far less now than later in September.

Furthermore, Defendants' stated reason for the August 3, 2020 Replan is to get the Census count to the President by December 31, 2020 instead of April 30, 2021 as scheduled in the Bureau's COVID-19 Plan. Font. Decl. at ¶ 81. However, Defendants' sole declarant, Fontenot, acknowledged publicly less than two months ago that the Bureau is "past the window of being able to get accurate counts to the President by December 31, 2020." *U.S. Census Bureau, Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-programtranscript-july8.pdf. Similarly, on May 27, 2020, Tim Olson, head of field operations for the 2020 Census, stated during a May 26, 2020 webinar organized by the National Congress of

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American Indians that, "we have passed the point where we could even meet the current legislative requirement of December 31st. We can't do that anymore." Nat'l Conf. of Am. Indians, *2020 Census Webinar: American Indian/Alaska Native*, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY&feature=youtu.be&t=4689. These statements support Plaintiffs' claims of irreparable harm arising from an inaccurate census count. On balance, the Court finds that the balance of hardships tips sharply in favor of Plaintiffs.

As to the public interest, when the government is a party, the analysis of the balance of the hardships and the public interest merge. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). As the United States Supreme Court recognized, Congress has codified the public's interest in "a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Dep't of Commerce v. New York*, 139 S. Ct. at 2569 (quoting *Franklin*, 505 U.S. at 819–820 (Stevens, J., concurring in part and concurring in judgment)) (discussing the Census Act, 2 U.S.C. § 2a). Other courts have held that "the public interest . . . requires obedience to the Constitution and to the requirement that Congress be fairly apportioned, based on accurate census figures" and that "it is in the public interest that the federal government distribute its funds . . . on the basis of accurate census data." *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) (per curiam). Thus, the balance of the hardships and public interest tip sharply in Plaintiffs' favor.

Accordingly, having considered the TRO motion, opposition, and reply; the parties' oral arguments at the September 4, 2020 TRO hearing; the PI motion and opposition; the relevant law; and the record in this case, the Court GRANTS Plaintiffs' motion for a temporary restraining order. The Court finds that no security is necessary. *See Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) ("Rule 65(c) invests the district court 'with discretion as to the amount of security required, *if any*.'" (quoting *Barahona–Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999)).

IT IS HEREBY ORDERED THAT, effective as of the date of this Order, 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

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implementing the August 3, 2020 Replan or allowing to be implemented any actions as a result of the shortened timelines in the August 3, 2020 Replan, including but not limited to winding down or altering any Census field operations, until the Court conducts its September 17, 2020 hearing on Plaintiffs' PI motion.

IT IS SO ORDERED.

Dated: September 5, 2020

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

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