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

19 NATIONAL URBAN LEAGUE; LEAGUE OF
WOMEN VOTERS; BLACK ALLIANCE FOR
20 JUST IMMIGRATION; HARRIS COUNTY,
TEXAS; KING COUNTY, WASHINGTON;
21 CITY OF LOS ANGELES, CALIFORNIA;
CITY OF SALINAS, CALIFORNIA; CITY OF
22 SAN JOSE, CALIFORNIA; RODNEY ELLIS;
and ADRIAN GARCIA,

23 Plaintiffs,

24 v.

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

28 Defendants.

CASE NO. 5:20-cv-05799-LHK

**MOTION FOR STAY AND
PRELIMINARY INJUNCTION**

Date: September 17, 2020
Time: 1:30 p.m.
Place: Courtroom 8, 4th Floor, San Jose
Judge: Hon. Lucy H. Koh

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that 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 San Jose, California, Rodney Ellis, and Adrian Garcia (“Plaintiffs”) respectfully move the Court for a stay of agency action under 5 U.S.C. § 705, and a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure and Civil L.R. 7-2 of the Civil Local Rules of the U.S. District Court for the Northern District of California. In light of the circumstances and timing issues addressed herein, and pursuant to stipulation by the parties, Plaintiffs respectfully request that the Court set the motion for hearing on Thursday, September 17, 2020, or as soon thereafter as may be reasonably heard by the Court, based on an agreed expedited briefing schedule whereby Defendants will file their opposition papers by September 4, 2020 and Plaintiffs will file their reply papers by September 10, 2020. Plaintiffs have requested expedited resolution of this motion because Defendants have indicated that, under the plan that is the subject of Plaintiffs’ challenge, Defendants will discontinue data collection after September 30, 2020.

RELIEF SOUGHT

For the reasons discussed below, Plaintiffs respectfully request that the Court grant their motion and order relief as follows:

- A stay of the U.S. Census Bureau’s August 3, 2020 plan and shortened timeline for accomplishing the 2020 United States Census (“Rush Plan”); and
- A preliminary injunction prohibiting Defendants Secretary of Commerce Wilber J. Ross (“Secretary Ross”), U.S. Department of Commerce, Director of the Census Bureau Steven Dillingham (“Director Dillingham”), and U.S. Census Bureau (collectively, “Defendants”) from implementing the Rush Plan or otherwise shortening the preexisting timeline for conducting the 2020 Census under the April 13, 2020 Plan (“COVID-19 Plan”).

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1 **I. INTRODUCTION**

2 Conducting the United States decennial census is a massive undertaking, with weighty
3 constitutional implications and substantial effects on the lives of hundreds of millions of
4 Americans. It forms the basis for the distribution of political power at the federal, state, and
5 local levels, dictates the distribution of \$1.5 trillion in federal funding, and is relied on by a host
6 of businesses, governments, and non-profits for critical operations. Given these stakes, the
7 census takes time to do right: time to plan, time to implement, time to gather information from
8 over a hundred million households, and time to turn that raw data into reliable results. The
9 Census Bureau spent more than a decade creating a detailed plan (the “2018 Operational Plan”)
10 to conduct each and every step of this crucial and complicated endeavor. That plan reflected the
11 Bureau’s considered conclusions as to how long each of the various 2020 Census processes
12 would take, with appropriate timelines set out for completion.

13 Then the COVID-19 pandemic threw all of this careful planning into disarray. With the
14 pandemic halting critical census operations, the Bureau recognized that it had no choice but to
15 adjust the timelines to ensure a full and fair Census. In April of this year, the Bureau issued a
16 revised plan (the “COVID-19 Plan”) which extended the overall timeline for accomplishing the
17 2020 Census but largely preserved the same amount of time for accomplishing each step in the
18 census process. This COVID-19 Plan, the Bureau explained, was intended to “[e]nsure a
19 complete and accurate count of all communities.” Ex. 3 at 1 (Rush Plan Operational
20 Adjustments Timeline). The Bureau immediately proceeded to implement the COVID-19 Plan
21 through the spring and summer. And as late as July, officials reaffirmed that the ongoing
22 COVID-19 pandemic and its resulting disruptions had made it impossible to complete an
23 accurate count on the earlier 2018 Operational Plan’s schedule.

24 On August 3, Defendants reversed course and issued a new plan (the “Rush Plan”).
25 Although the COVID-19 pandemic had only worsened in the interim, the Rush Plan shortens the
26 timelines and severely curtails the time devoted to the most important census operations. In
27 announcing this new plan, Defendants made no effort to justify their abrupt change of position.
28 They did not say that the Bureau was wrong about the timing assessments underlying the

1 COVID-19 Plan. They did not explain why Defendants now believed the Bureau could
2 accomplish an accurate count in half the time (compressing eight and a half months of work into
3 four months), even as the pandemic continued to surge. And they failed to examine many of the
4 key aspects of the problem before them—most obviously, the devastating impact a shortened
5 count would have on the accuracy and reliability of the resulting data.

6 Indeed, the Rush Plan does not explain the reason for the about-face *at all*. And although
7 it references the December 31, 2020 statutory deadline for providing apportionment counts to the
8 President, that deadline can neither explain nor excuse the Bureau’s change of position.
9 Defendants did not rely on that deadline to justify their decision then and cannot, under
10 established principles of administrative law, do so now. In any event, the Bureau had been
11 implementing the COVID-19 Plan for months despite that statutory deadline, and just prior to
12 announcement of the Rush Plan, officials confirmed that it is now impossible to meet that
13 statutory deadline in any event because of delays caused by the pandemic—a tacit
14 acknowledgment that any pre-pandemic statutory timeline must necessarily bow to the
15 constitutional duty to conduct an accurate census.

16 In fact, the Rush Plan’s true motivation has nothing to do with Congress. Just two weeks
17 before the Bureau’s August 3 reversal, the President issued a “Memorandum on Excluding
18 Illegal Aliens From the Apportionment Base Following the 2020 Census” (the “Apportionment
19 Exclusion Order”), intended to remove undocumented immigrants from the apportionment
20 counts. The Rush Plan is meant to ensure that President Trump retains control over the final
21 apportionment figures—regardless of the impact on the accuracy of the 2020 Census. The
22 statutory deadline is (at best) pretext.

23 Defendants’ promulgation of the Rush Plan violates the minimum standards of reasoned
24 decisionmaking required by the Administrative Procedure Act (“APA”). And it continues the
25 administration’s pattern of acting first (in furtherance of political ends) and explaining later (in
26 furtherance of a post-hoc justification that might hold up in court). *See Dep’t of Commerce v.*
27 *New York*, 139 S. Ct. 2551, 2575-76 (2019) (holding that Secretary Ross’s stated rationale for
28 adding citizenship question to 2020 Census was pretextual and violated APA); *Dep’t of*

1 *Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (holding that agency
 2 failed to adequately address the consequences of its rescission of Deferred Action for Childhood
 3 Arrivals (“DACA”), in violation of the APA).

4 Defendants’ actions also violate the Constitution. The Enumeration Clause requires that
 5 decisions about how to conduct the census bear a “reasonable relationship to the accomplishment
 6 of an actual enumeration of the population, keeping in mind the constitutional purpose of the
 7 census.” *Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996). But the decision to cut short the 2020
 8 Census is directly adverse to the core constitutional goal of producing an accurate count, with
 9 particularly pronounced effects among communities of color and other harder-to-count groups.
 10 While the Bureau has considerable latitude in determining how to conduct the census, that
 11 discretion does not extend to taking actions directly contrary to an accurate count—and contrary
 12 to its own admissions of what is required for that accurate count.

13 Preliminary relief is necessary to prevent irreparable harm caused by the Rush Plan.
 14 Absent a stay of the Rush Plan, and an injunction preventing Defendants from finding another
 15 way to shorten the preexisting timelines for the 2020 Census under the COVID-19 Plan,
 16 Plaintiffs will suffer constitutional harm—by definition irreparable—due to the loss of political
 17 representation. They will lose out on federal funding tied to census data. They will be forced to
 18 expend additional, unrecoverable resources trying to ensure that their residents and members are
 19 counted. And Plaintiffs’ core activities and programs—many of which depend on accurate
 20 census data to be successful—will be harmed for the next decade.

21 **II. BACKGROUND**

22 **A. After Years of Analysis, the Census Bureau Promulgated the 2018** 23 **Operational Plan**

24 The Constitution imposes “the responsibility to conduct an ‘actual Enumeration’ of the
 25 American public every 10 years, with the primary purpose of providing a basis for apportioning
 26 political representation among the States.” *Wisconsin*, 517 U.S. at 24. The census’s principal
 27 constitutional purpose is political apportionment, but its importance extends far beyond that use.
 28 Census data is the “linchpin of the federal statistical system.” *Dep’t of Commerce v. U.S. House*

1 *of Reps.*, 525 U.S. 316, 341 (1999) (citation omitted). It is key to the redistricting process at the
 2 state and local level, to allocating trillions of dollars in federal grants and programs that provide
 3 basic support to communities nationwide, and to the decision-making of local governments,
 4 businesses, and non-profit organizations that rely on accurate census data to conduct their
 5 activities. *See, e.g.*, Ex. 5 at 5 (2018 Operational Plan, Version 4.0); Thompson Decl. ¶ 4.¹

6 Congress has delegated its constitutional responsibility to conduct an “actual
 7 enumeration” to the Secretary of Commerce, who in turn oversees the Census Bureau in
 8 conducting the decennial census. 13 U.S.C. §§ 2, 4, 21, 141(a). The Bureau has stated that its
 9 goal for the 2020 Census is to “count everyone once, only once, and in the right place.” Ex. 5 at
 10 5. Accomplishing that enormous task for a population exceeding 300 million requires years of
 11 careful planning, followed by many months of sustained work. To this end, the Bureau spent
 12 most of a decade creating an operational plan to guide the 2020 Census. The Bureau’s subject-
 13 matter experts—including survey methodologists, statisticians, demographers, and
 14 mathematicians—consulted with outside experts, members of the Census Scientific Advisory
 15 Committee and the National Advisory Committee, and a range of stakeholders in formulating its
 16 2020 plans. Ex. 5 at 204. The Bureau also conducted at least fifteen tests between 2012 and
 17 2018, which it used to further refine its processes. *Id.* at 31-55.

18 On December 31, 2018, the Bureau promulgated the final version of its operational plan,
 19 which the Bureau called “Version 4.0” Ex. 5. The 2018 Operational Plan—together with a
 20 series of “detailed operational plans”—comprises the 2020 Census, determining both what needs
 21 to be done and how long the Bureau needs to do it. *See, e.g.*, Ex. 5 at 51-53 (charts of dates for
 22 various census operations). Most important, the Plan included detailed provisions governing

23
 24 ¹ Plaintiffs’ motion is supported by a trio of experts with the knowledge and experience to
 25 analyze the Rush Plan’s impact on the 2020 Census. Mr. John Thompson, a former Director of
 26 the Census Bureau who previously oversaw all phases of the 2000 Census, concludes that the
 27 Rush Plan will have grave consequences because it sets unreasonable deadlines and will not
 28 allow the Bureau to deliver high-quality and accurate results. Dr. Sunshine Hillygus, who has
 published extensively on census participation, surveys, and data quality, concludes the Rush Plan
 will likely exacerbate differential undercounts of hard-to-count populations and lead to
 inaccuracies in enumeration. And Dr. Thomas Louis, a former Associate Director for Research
 and Methodology and Chief Scientist at the Bureau, who is intimately familiar with the statistical
 processes needed for generating high-quality census data, concludes that the Rush Plan will force
 the Bureau to cut corners in processing, leading to inaccurate and unreliable census data.

1 how the Bureau would go about counting individuals and obtaining the necessary information
2 about their characteristics (data collection), and how it would transform that raw data into usable,
3 reliable information (data processing).

4 **1. Data collection**

5 The 2018 Operational Plan specified how the Bureau would engage in data collection.
6 The Bureau deploys many methods for data collection, but two are crucial here. The “self-
7 response” method is the primary methodology for the 2020 Census. Heads of households
8 provide their 2020 Census responses directly to the Bureau by mailing back a paper form, filling
9 out an online form, or calling into Bureau telephone hotlines. Ex. 5 at 208. Such responses
10 generate the highest quality data. But self-response has never, by itself, sufficed to count
11 everyone, because many households fail to return mailed forms or to complete online forms.
12 That problem is particularly pronounced in historically hard-to-count populations, including
13 communities of color, young children, non-English speakers, low-income persons, persons
14 experiencing homelessness, undocumented immigrants, and persons with mental and physical
15 disabilities. *Id.* at 202.

16 According to the 2018 Operational Plan, for the tens of millions of households that do not
17 respond on their own, the Bureau must engage in “non-response follow up” or “NRFU.” During
18 this phase, the Bureau sends its employee enumerators directly to housing units so they can
19 attempt to speak with an occupant and obtain information. *See* Ex. 5 at 12; *see also State of N.Y.*
20 *v. U.S. Dep’t of Commerce*, 315 F. Supp. 3d 766, 784 (S.D.N.Y. 2018) (noting Bureau’s
21 argument that “the non-response followup could cure any diminished self-response”). As the
22 Bureau has explained, the “NRFU Operation is entirely about hard-to-count populations,”
23 including people of color, non-English speakers and individuals experiencing homelessness—the
24 same populations that have disproportionately low self-response rates. Ex. 5 at 212; Hillygus
25 Decl. ¶ 19. Under the 2018 Operational Plan, enumerators would generally conduct up to six
26 visits to a household in an attempt to obtain the necessary data—and “cases in hard-to-count
27 areas [could] receive more than six attempts to achieve a consistent response rate for all
28 geographic areas.” Ex. 5 at 212.

1 If, after several attempts to contact the household, enumerators had not yet succeeded,
2 they could seek to obtain information from a “proxy,” such as a neighbor or landlord, able to
3 report on the status of the household and its members. *State of N.Y. v. U.S. Dep’t of Commerce*,
4 351 F. Supp. 3d 502, 521 (S.D.N.Y. 2019), *aff’d in part, rev’d in part by* 139 S. Ct. 2551 (2019);
5 Ex. 5 at 129. Similarly, if the Bureau had high-quality administrative records for a housing unit,
6 enumerators could—after an initial contact attempt—use those records to fill in responses for
7 that unit. Ex. 5 at 129. But use of proxies and many administrative records are less accurate
8 than direct contact between enumerators and households. Hillygus Decl. ¶¶ 21-29. And both
9 tend to increase disparities in the count—*e.g.*, undocumented immigrants and persons of color
10 are significantly less likely to have accurate administrative records. Hillygus Decl. ¶¶ 22-23.

11 If enumerators were unable to obtain the necessary information during their (at least) six
12 visits, and high-quality administrative records and proxies were not available, the 2018
13 Operational Plan stated that the Bureau would resort to “imputation”: essentially, assuming that a
14 household’s characteristics are the same as those of nearby households. Thompson Decl. ¶ 20d;
15 *State of N.Y.*, 351 F. Supp. 3d at 521 (“In other words, the Census Bureau will use a formula to
16 extrapolate what it does not know about the population from what it already knows.”).
17 Imputation is less accurate than other methods, since it depends on making assumptions—and
18 becomes even less so the more widely it is used, since the “average” data used to fill in blanks
19 will be based on a diminishing sample size. Louis Decl. ¶ 22 (“[T]he less data the Bureau has
20 about housing units in a given geography, the more difficult it becomes for the Bureau to
21 correctly impute households.”); Hillygus Decl. ¶¶ 34-37. Thus, the 2018 Operational Plan called
22 for using these alternative methods, including imputation, selectively and only after direct
23 contact has failed.

24 During the non-response follow up period, the Bureau also engages in other vital
25 operations, such as following up with self-responders who failed to enter certain information and
26 correcting information that was reported erroneously. Ex. 5 at 123. And the Bureau engages in
27 “Self-Response Quality Assurance” by re-collecting some census responses to ensure that the
28 original submissions were accurate (thus protecting against enumerators falsifying information).

1 *Id.* In all, the 2018 Operational Plan specified that the Bureau would require eleven and a half
 2 weeks for the various aspects of non-response follow up. Ex. 15 at 43-44 (2020 Detailed
 3 Operational Plan For Nonresponse Followup, Version 2.0).

4 **2. Data processing**

5 The 2018 Operational Plan also detailed how the Bureau would engage in data
 6 processing. Once the raw data is collected, it must be processed in order to be usable. *See* Louis
 7 Decl. ¶¶ 15, 25-28. Experts at the Bureau must perform a wide variety of operations designed to
 8 transform written responses into computer-readable code, weed out redundant data, detect and
 9 fix over- or under-counts among groups, and generally identify errors, check for accuracy, and
 10 ensure that the data collected rises to the quality level of useful information that can reliably
 11 form the basis of apportionment, redistricting, and a host of federal, state, municipal, and private
 12 activities. *Id.* As just one example, once outlier data is identified, Bureau staff must devote time
 13 and resources to determining whether it is idiosyncratic or a marker for a more general problem,
 14 decide if it can be fixed or the data adjusted, and then revisit the resulting data looking for new
 15 and additional issues. *Id.* ¶ 28. The 2018 Operational Plan afforded the Bureau five months to
 16 process data for congressional reapportionment, and an additional three months to process census
 17 data for redistricting. And, in accordance with statutory deadlines set out in the Census Act, the
 18 Bureau planned to report apportionment data to the President by December 31, 2020, and
 19 redistricting data to the states by April 1, 2021. Ex. 5 at 9; *see* 13 U.S.C. § 141 (designating
 20 December 31, 2020, nine months after “the census day” of April 1, 2020, as the date to report
 21 apportionment data to the President, and April 31, 2021, as the date to report redistricting data).

22 **B. In Response to the Pandemic, the Bureau Issued the COVID-19 Plan**

23 On March 10, 2020, in accordance with the 2018 Operational Plan, the Bureau began to
 24 accept self-responses on its website. *See* Mike Schneider, *Census Bureau Site Goes Live As*
 25 *Counting Begins in Earnest* (Mar. 10, 2020).² Then, the COVID-19 pandemic surged and
 26 lockdowns became nearly universal. The Bureau was forced to confront the fact that the 2020
 27 Census could not proceed as usual. On March 18, the Bureau announced it would suspend all

28 ² <https://apnews.com/3fc59096ab138fdd4795386a2987c573>.

1 field operations for two weeks to “protect the health and safety of the American public.” Press
 2 Release, U.S. Census Bureau Director Steven Dillingham on Operational Updates, Release No.
 3 CB20-RTQ.08 (Mar. 18, 2020).³ That suspension was extended for an additional two weeks.
 4 Press Release, Census Bureau Update on 2020 Field Operations, Release No. CB20-RTQ.14
 5 (Mar. 28, 2020).⁴ During these suspensions, the Bureau halted all training and hiring of the
 6 hundreds of thousands of enumerators it needed to conduct non-response follow up, froze all
 7 background checks and fingerprinting required for hiring, and decreased office staff at regional
 8 centers responsible for processing mail-in self-response forms and the Bureau’s call centers. *See*
 9 Michael Wines, *It’s the Official Start to the 2020 Census. But No One Counted on a Pandemic*,
 10 N.Y. Times (Apr. 3, 2020).⁵ The Bureau was also unable to conduct other crucial operations
 11 such as counting individuals experiencing homelessness, and delivering self-response forms to
 12 remote communities. *See* Ex. 12 at 2 (August 17 Review of Operational Plan).

13 On April 13, 2020, Director Dillingham and Secretary Ross amended the 2018
 14 Operational Plan to “[e]nsure a complete and accurate count of all communities,” “[p]rotect the
 15 health and safety of the American public and Census Bureau employees,” and “[i]mplement
 16 guidance from federal, state, and local authorities regarding COVID-19.” Ex. 3 at 1 (April 13
 17 COVID-19 Plan Statement); Ex. 4 at 1 (COVID-19 Plan Operational Adjustments Timeline).
 18 The amended plan shifted the timeline for data-collection and data-processing operations, to
 19 account for the delays caused by the pandemic. Under that COVID-19 Plan, the Bureau did not
 20 shorten any of those operations; it merely moved the timeline for their accomplishment deeper
 21 into the year in light of the pandemic.

22 For instance, the deadline for self-response, which was originally set to close July 31,
 23 2020, was changed to allow private households to submit data until October 31. Ex. 4 at 1.
 24 Non-response follow up—originally set to begin May 13, 2020 and conclude July 31—was

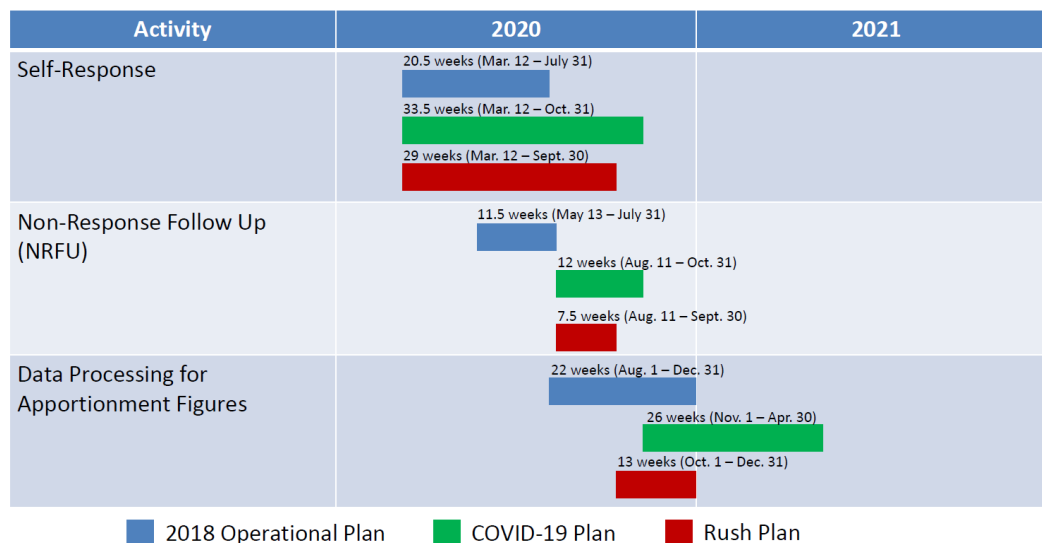
25 _____
 26 ³ <https://www.census.gov/newsroom/press-releases/2020/operational-update.html>.

27 ⁴ <https://www.census.gov/newsroom/press-releases/2020/update-on-2020-census-field-operations.html>.

28 ⁵ <https://www.nytimes.com/article/census-2020.html>.

1 shifted to begin on August 11 and conclude October 31. Ex. 4 at 2. This change preserved the
 2 same total time for the crucial non-response follow up process. Ex. 7 at 2-6 (June 2020 GAO
 3 Census Report) (detailing changes).

4 In fact, the timelines in the COVID-19 Plan differed from those in the 2018 Operational
 5 Plan in only one material respect: The Bureau granted itself an additional month to process data
 6 for apportionment (six months rather than five), recognizing the difficulties that the pandemic
 7 had introduced. Ex. 4 at 3; Hillygus Decl. ¶¶ 16-17 (detailing difficulties introduced by COVID-
 8 19). To that end, the COVID-19 Plan gave the Bureau until April 2021 to report state-
 9 populations to the President. See Ex. 4 at 2 (stating that under “New Schedule” the Bureau will
 10 deliver apportionment counts to the President “by April 30, 2021”). The following chart
 11 summarizes the timeline shifts in the COVID-19 Plan:



21 Because this new timeline necessarily extended into 2021, Secretary Ross and Director
 22 Dillingham requested that Congress formally extend the December 31, 2020 statutory deadline
 23 for reporting the state-populations to the President, and the March 30, 2021 statutory deadline for
 24 delivering redistricting data to the states. The President publicly took the position that an
 25 extension of the statutory deadlines was appropriate, but not necessary, for the Bureau to shift its
 26 operational and data-delivery timelines. See Hansi Lo Wang, *Trump Officials Ask To Delay*

1 *Census Data For Voting Districts, House Seats*, NPR (Apr. 13, 2020).⁶ In the President’s words:
2 “I don’t know that you even have to ask them [Congress]. This is called an act of God. . . . They
3 have to give it. I think 120 days isn’t nearly enough.” *Id.*

4 Without awaiting any action from Congress, the Bureau immediately began
5 implementing the COVID-19 Plan, and continued to do so through the end of July. For instance,
6 the Bureau did not undertake any non-response follow-up in most of the country between May
7 13 and July 31, the original timeframe in the 2018 Operational Plan. Ex. 4 at 3. Instead, the
8 Bureau “soft-launched” door-knocking in a few regions in mid-July, and did not even plan to
9 begin door-knocking across most of the country until August 9, 2020. Press Release, U.S.
10 Census Bureau, *Door-to-Door Visits Begin Nationwide for 2020 Census* (Aug. 11, 2020).⁷ The
11 Bureau continually communicated to the public and local partners that self-responses would be
12 accepted until October 31, and non-response follow up would continue until at least that date.
13 Ex. 3 at 2; Ex. 4 at 1-2.

14 Meanwhile, top Bureau officials repeatedly recognized that meeting the original
15 deadlines set out in the 2018 Operational Plan—including the December 31 statutory deadline—
16 would be impossible. In late May, Tim Olson, head of field operations for the 2020 Census,
17 stated “[w]e have passed the point where we could even meet the current legislative requirement
18 of December 31. We can’t do that anymore.” Nat’l Conf. of Am. Indians, 2020 Census
19 Webinar: American Indian/Alaska Native, YouTube (May 26, 2020).⁸ Similarly, on July 8, Al
20 Fontenot, Jr., another top Bureau official, affirmed that the Bureau is “past the window of being
21 able to get” accurate counts to the President by December 31, 2020. U.S. Census Bureau,
22 Operational Press Briefing – 2020 Census Update at 21 (July 8, 2020).⁹ Relying on these

23 _____
24 ⁶ <https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats>.

25 ⁷ <https://www.census.gov/newsroom/press-releases/2020/door-to-door-visits-begin-nationwide.html>.

26 ⁸ <https://www.youtube.com/watch?v=F6IyJMtDDgY>.

27 ⁹ <https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf>.

1 statements—and the Bureau’s actions—Plaintiffs publicized the changes to the plan deadlines,
 2 letting constituents and members know that households had until October 31, 2020 to self-
 3 respond. *See, e.g.*, Gyamfi Decl. ¶¶ 12-13; Green Decl. ¶ 14; Briggs Decl. ¶¶ 12-14; Stewart
 4 Decl. ¶ 11; M. Garcia Decl. ¶ 14.

5 **C. Defendants Blindside Everyone with the Rush Plan**

6 On July 21, while the Bureau was well into the implementation of its COVID-19 Plan,
 7 President Trump issued a Presidential Memorandum, declaring that it was the administration’s
 8 policy to remove undocumented persons from the apportionment count, and ordering Secretary
 9 Ross to estimate the number of undocumented persons in the United States when reporting total
 10 population counts to the President for purposes of apportionment. Memorandum on Excluding
 11 Illegal Aliens From the Apportionment Base Following the 2020 Census, (the “Apportionment
 12 Exclusion Order”).

13 The first suggestion that Defendants would depart from the COVID-19 Plan came just
 14 nine days later, when the Bureau removed notifications on its website that non-responsive
 15 households would have until October 31 to respond, and that it would engage in non-response
 16 follow up until that date. *Cf.* Ex. 8 (July 30 Operational Adjustments Timeline), *with* Ex. 9 (July
 17 31 Operational Adjustments Timeline).

18 The following Monday, on August 3, 2020, Defendants abandoned the COVID-19 Plan
 19 and announced the Rush Plan, with dramatically shortened timelines for multiple operations. *See*
 20 Ex. 1 (August 3 Rush Plan Statement). The Rush Plan took the form of a statement from
 21 Director Dillingham, and called for the Bureau to complete eight and a half months of data
 22 collection and data processing in half the time. The Rush Plan shortens the time under which
 23 households are entitled to self-respond by a full month, providing that mail-in responses
 24 postmarked after September 30—which previously would have been timely until the October 31
 25 deadline—will no longer be counted. *Id.* The Rush Plan similarly shortens the period for non-
 26 response follow up from October 31 to September 30, despite the fact that enumerators did not
 27 begin knocking on doors in most communities until early August. Ex. 2 at 3 (Rush Plan
 28 Operational Timeline). And the Rush Plan shortens the data-processing time to three months—

1 two months less than the Bureau deemed necessary under the COVID-19 Plan and a month less
2 than the Bureau had deemed necessary even under the 2018 Operational Plan. *Id.*; *supra* at 8-9.
3 In its later elaborations on the Rush Plan, the Bureau has appeared to entirely omit several data-
4 processing operations that it had previously determined were necessary to ensure an accurate
5 census. Louis Decl. ¶¶ 30-34. The Rush Plan ultimately calls for the Bureau to complete data
6 collection and data processing by December 31, 2020—four months earlier than the COVID-19
7 Plan, and in time to guarantee President Trump receives the reapportionment data. Ex. 1.

8 Director Dillingham’s three-page statement did not explain why Defendants decided to
9 suddenly abandon the COVID-19 Plan; why the Bureau no longer believed the timelines set out
10 in the COVID-19 Plan (which preserved, for each operation, at least the amount of time called
11 for in the 2018 Operational Plan) were necessary to ensure an accurate count; or how, if at all,
12 the Bureau intends to communicate those shortened deadlines to private households. And
13 although the Rush Plan alluded to the December 31 statutory deadline for delivering
14 apportionment counts to the President, Director Dillingham’s statement did not explain why the
15 Bureau now believed that an accurate count could be accomplished by that date—or why the
16 previous statements by officials throughout the summer saying the exact opposite were wrong.
17 *Id.*

18 The sudden decision to scrap the COVID-19 Plan and issue the Rush Plan surprised Bureau
19 officials as well as the public. An official at the Government Accountability Office (GAO)
20 confirmed that Bureau officials were given “hours rather than days or weeks” to adjust their plans
21 and prepare to finish data-collection by September. Hansi Lo Wang, *‘Not Enough Time’: Census*
22 *Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020).¹⁰ Four former Census
23 Bureau Directors—who had publicly endorsed the COVID-19 Plan—issued a statement saying
24 that failing to extend census operations through April 30, 2021 “will result in seriously incomplete
25 enumerations in many areas across our country.” Press Release, Former Census Bureau Directors,

26 _____
27 ¹⁰ [https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-](https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results)
28 [count-could-botch-results.](https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results)

1 *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and*
 2 *Accurate Enumeration of the United States* (Aug. 4, 2020).¹¹ These former Directors further
 3 asserted that the end result of the shortening “will be under-representation of those persons that
 4 NRFU was expected to reach, and at even greater rates for traditionally hard-to-count populations
 5 and over-representation of all other populations with potentially extreme differential undercounts.”
 6 *Id.* Even the Bureau’s own field workers confirmed the Rush Plan’s disastrous nature, with one
 7 current census supervisor stating “[t]here’s just not enough time to do all the work that needs to be
 8 done,” while another asked, ““Are we working on the same team?”” because “[i]t does not feel like
 9 we have the same mission in mind. We’re trying to get a complete count. I’m not sure everyone
 10 on the team has the same mission.” Hansi Lo Wang, *‘Not Enough Time’: Census Workers Fear*
 11 *Rushing Count Could Botch Results*, NPR (Aug. 11, 2020).¹²

12 The Bureau’s decision shocked Congress as well, which opened multiple investigations
 13 into Defendants’ decision and referred the matter to the Department of Commerce’s Inspector
 14 General. *See* Ex. 11 (August 10 Referral to Office of Inspector General). The President of the
 15 American Statistical Association, a coalition of prominent businesses, a group of 450 nonpartisan
 16 philanthropic organizations, and prominent civil-rights groups similarly condemned the plan.¹³

17 **III. LEGAL STANDARD**

18 Plaintiffs seeking a preliminary injunction must establish that (1) they are likely to
 19 succeed on the merits, (2) they are likely to suffer irreparable harm absent preliminary relief, (3)
 20 the balance of equities tips in their favor, and (4) an injunction would be in the public interest.

21 _____
 22 ¹¹ <https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html>.

23 ¹² <https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results>.

24 ¹³ *See* Hansi Lo Wang (@hansilowang), Twitter (Aug. 5, 2020),
 25 <https://twitter.com/hansilowang/status/1291198017882796034> (“There is no scientific rationale
 26 to curtail the data-collection period for this constitutionally mandated activity, and the premature
 27 cessation of census enumeration will produce flawed counts.”); Letter from U.S. Philanthropy
 28 Leaders to Sec’y Ross & Dir. Dillingham (Aug. 5, 2020), <https://funderscommittee.org/wp-content/uploads/2020/08/Letter-Philanthropic-Leaders-on-Census-Being-Cut-Short-8-5.pdf>;
 Press Release, Leadership Conf. on Civ. & Human Rights, Trump Plans to Sabotage 2020
 Census by Cutting Short Operations (July 31, 2020), <https://civilrights.org/2020/07/31/trump-plans-to-sabotage-2020-census-by-cutting-short-operations/>.

1 *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Am. Trucking Ass’n, Inc. v.*
2 *City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. 2009). The Ninth Circuit uses a “sliding scale”
3 approach, under which “a stronger showing of one element may offset a weaker showing of
4 another.” *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (citation omitted). Thus, if
5 Plaintiffs establish irreparable harm and the “balance of hardships tips *sharply* in [their] favor,”
6 they need “only show that there are ‘serious questions going to the merits.’” *Shell Offshore, Inc.*
7 *v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (citation omitted); *see also All. for Wild*
8 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (“a stronger showing of irreparable
9 harm to plaintiff might offset a lesser showing of likelihood of success on the merits”). The
10 “factors considered” when determining whether to issue a stay of agency action under the APA
11 “substantially overlap with the *Winter* factors for a preliminary injunction.” *City of S.F. v. U.S.*
12 *Citizenship & Immigration Servs.*, 408 F. Supp. 3d 1057, 1078 (N.D. Cal. 2019); *see* 5 U.S.C.
13 § 705.

14 **IV. DISCUSSION**

15 **A. Plaintiffs are Likely to Succeed on the Merits**

16 **1. The Rush Plan is a final agency action that violates the APA**

17 The Administrative Procedure Act requires courts to set aside final agency action that is
18 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.
19 § 706(2)(A). Under that standard, an agency must “examine the relevant data and articulate a
20 satisfactory explanation for its action including a rational connection between the facts found and
21 the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463
22 U.S. 29, 43 (1983) (citation omitted). And in evaluating an agency’s rationale for its actions,
23 courts will “[c]onsider[] only contemporaneous explanations.” *Dep’t of Homeland Sec. v.*
24 *Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). An agency’s change in policy may be
25 “arbitrary and capricious” when it “rests upon factual findings that contradict those which
26 underlay its prior policy; or when its prior policy has engendered serious reliance interests that
27 must be taken into account.” *See Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 106 (2015).
28 Relatedly, agency action is necessarily arbitrary and capricious if the agency “entirely failed to

1 consider an important aspect of the problem.” *Id.* And, in order to permit effective judicial
2 review, an agency “must ‘disclose the basis’ of its action.” *Dep’t of Commerce*, 139 S. Ct. at
3 2573. When an agency offers an explanation that is “contrived” or pretextual, that explanation
4 cannot justify the agency’s action. *Id.* at 2575.

5 The Rush Plan violates the APA in all of these respects. Defendants failed to provide any
6 contemporaneous explanation why this shortened timeline was necessary, or how the new
7 timeline could possibly produce an accurate count—particularly given the Bureau’s previous
8 findings that more time was required due to the (still surging) pandemic. Defendants failed to
9 consider key aspects of the problem, including how the revised timeline could feasibly produce
10 anything close to an accurate count given current conditions as well as the public’s reliance on
11 the previously announced deadlines. And any post-hoc attempt to use the statutory deadline as a
12 cover for these patent failures would be pretextual and unjustified in its own right. There is
13 every reason to think that the Rush Plan was designed to ensure that apportionment data is
14 presented to the President Trump while he remains in office, so that *this* administration—not a
15 potential successor—can carry out the Apportionment Exclusion Order. The Rush Plan’s many
16 failures fall far short of what the APA demands.

17 **a. The Rush Plan is final agency action**

18 For an agency action to be “final” under the APA, it must mark the “consummation of the
19 agency’s decisionmaking process” and be one “by which rights or obligations have been
20 determined or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 178
21 (1997). The Rush Plan satisfies both requirements. *See New York*, 351 F. Supp. 3d at 645
22 (noting government’s concession that adding citizenship question to census was final agency
23 action).

24 The Rush Plan had every indicia of finality. It made clear that the dates outlined in the
25 COVID-19 Plan would no longer be followed; that it was “announcing updates to our plan”; and
26 that the “Census Bureau’s new plan” would now govern. Ex. 1 at 1; *see Or. Nat. Desert Ass’n v.*
27 *U.S. Forest Serv.*, 465 F.3d 977, 985 (9th Cir. 2006) (“It is the effect of the action and not its
28 label that must be considered,” and finality must thus “be interpreted ‘in a pragmatic way.’”

1 (citations omitted)). The Rush Plan also directly affected rights and obligations. It changed the
 2 deadline for self-responses, such that persons who previously had until October 31, 2020 to
 3 submit their responses would now have only until September 30, 2020. *See id.* at 987 (it is
 4 enough that agency action “fix *some* legal relationship as a consummation of the administrative
 5 process” (citation omitted)). And the legal consequences of a truncated census count (as detailed
 6 throughout this motion) are hard to overstate: the census results will affect apportionment,
 7 funding, and myriad other critical decisions for the next decade. *See supra* at 3-4.

8 **b. Defendants failed to adequately explain why the census**
 9 **should be shortened**

10 Neither the Rush Plan nor any other contemporaneous document explains why the
 11 Bureau suddenly saw fit to cut the count short. The Court can search the Rush Plan, and the
 12 Director’s contemporaneous statement, in vain for an explanation—there is none. In short,
 13 Defendants completely failed to articulate “a rational connection between the facts found and the
 14 choice made.” *Dep’t of Commerce*, 139 S. Ct. at 2569 (quoting *Motor Vehicle Mfrs.*, 463 U.S. at
 15 43); *see also Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1037 (9th Cir.
 16 2010) (holding that agency action approving building of water structures violated APA, where
 17 “the key question—whether water structures were necessary at all—remains entirely unanswered
 18 and unexplained by the record”).

19 These explanatory failures are particularly egregious because of what came before.
 20 Agencies may change their policy positions, but they must give a reasoned explanation for doing
 21 so, and that means the agency must “‘display awareness that it is changing position’ . . . and
 22 ‘show that there are good reasons for the new policy.’” *Encino Motorcars, LLC v. Navarro*, 136
 23 S. Ct. 2117, 2125-26 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515
 24 (2009)); *see also Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 968 (9th Cir.
 25 2015) (vacating agency action that “rest[ed] upon factual findings that contradict those which
 26 underlay its prior policy,” and where agency failed to “provide a ‘reasoned explanation for
 27 disregarding’ the ‘facts and circumstances’ that underlay its previous decision” (ellipsis omitted)
 28 (quoting *FCC*, 556 U.S. at 516). As the Supreme Court and the Ninth Circuit have repeatedly

1 held, failure to do so renders the agency action arbitrary and capricious. *See Encino Motorcars*,
 2 136 S. Ct. at 2127 (agency action was arbitrary and capricious for failure to explain change of
 3 position); *Motor Vehicle Mfrs.*, 463 U.S. at 42-43 (same); *Organized Vill. of Kake*, 795 F.3d at
 4 968 (same). In *Humane Society v. Locke*, for example, an agency had previously found that a
 5 plan permitting fisheries to take certain fish species would have “minimal adverse effects” on the
 6 listed species, while later finding that sea lions responsible for comparable mortality would have
 7 a “significant negative impact.” 626 F.3d 1040, 1049-50 (9th Cir. 2010). Because the agency
 8 had not “offered a rationale to explain the disparate findings,” the Ninth Circuit held the agency
 9 action must be vacated. *Id.* at 1050; *see also, e.g., Organized Vill. of Kake*, 795 F.3d at 968
 10 (vacating agency action).

11 Here, the Bureau failed to even acknowledge that the Rush Plan contradicts the prior
 12 findings and conclusions reached in the COVID-19 Plan—and in the 2018 Operational Plan.
 13 Just four months earlier, the Bureau had found that a significant delay (and corresponding
 14 extension) in census operations was necessary to “[e]nsure a complete and accurate count of all
 15 communities.” Ex. 3 at 1. That decision was based on nearly a decade of analysis, testing, and
 16 data that went into the 2018 Operational Plan’s findings about how long each census operation
 17 would need to produce an accurate count. The Rush Plan ignores all of that. It fails to explain
 18 how multiple operations of the 2020 Census can now be accomplished in significantly less time
 19 than called for in both the COVID-19 Plan *and* the 2018 Operational Plan—despite additional
 20 complications caused by the pandemic. Specifically, it does not explain how a non-response
 21 follow up operation that the Bureau previously determined would require three months can now
 22 be accomplished in two; or why complex data processing that the Bureau previously found
 23 would require six months can now be completed in only three.¹⁴ And it does not explain how a

24 _____
 25 ¹⁴ Court filings, too, emphasize the change in the government’s position. In cases earlier this
 26 year, the Department of Justice extolled the Bureau’s plan to “send an enumerator to [a non-
 27 responsive] housing unit again up to six times”; its intention to deploy “somewhere between
 28 320,000 and 500,000 enumerators” to conduct such visits; and its “ability to be flexible and
 devote resources where needed” in response to “unforeseen disruptions.” Bureau’s Opp. to Pls.’
 Prelim.-Inj. Mot. at 4-6, *NAACP v. Bureau of the Census*, No. 8:18-cv-00891 (D. Md. Feb. 11,
 2020), ECF No. 170. Indeed, it promised that the Bureau’s count would be accurate precisely

1 timeline that census officials, employees, nonpartisan experts, former Census Directors, and even
2 the President deemed impossible just weeks prior suddenly became possible. *See supra* at 10-11.

3 Since then, Defendants have attempted to backfill these critical missing pieces of the
4 administrative record. On August 17, 2020, the Bureau released a 19-slide Powerpoint
5 purporting to provide more detail on its plans. Ex. 12. But that post-hoc explanation *cannot* cure
6 the Rush Plan’s failures. *See Dep’t of Homeland Sec.*, 140 S. Ct. at 1909 (explanation must be
7 contemporaneous). Nor does it. The slideshow still fails to explain why Defendants changed
8 their position, to address prior contrary findings, or to even offer non-fanciful proposals as to
9 how the count could be accurately completed on the Rush Plan’s timelines.

10 In the end, Defendants have failed to offer any adequate explanation for changing their as
11 to how long each operation of the 2020 Census would take and whether delay due to the current
12 health crisis is necessary. That alone renders the Rush Plan unlawful.

13 **c. Defendants failed to consider important aspects of the**
14 **problem**

15 Relatedly, Defendants also failed to consider important aspects of the problem.
16 Specifically, the agency failed to consider two key issues: (1) how, exactly, it plans to
17 accomplish an accurate count on such an abbreviated timeline, and (2) the public’s reliance
18 interests.

19 *First*, the Bureau wholly failed to consider the Rush Plan’s feasibility in light of the
20 exceptional circumstances at hand.

21 Let’s start with staffing. More staff will certainly be required to complete the non-
22 response follow up process in the shortened time period. Thompson Decl. ¶ 19. When non-
23 response follow up began across the country on August 9, nearly 37% of households had not yet
24 responded and thus needed to be contacted by enumerators. Ex. 2 at 2; U.S. Census Bureau,

25 *because* it “plans to deploy the number of enumerators needed to complete the NRFU
26 workload.” *Id.* at 13. Yet the Rush Plan dramatically shortened the timeline for that admittedly
27 crucial operation, even while the Bureau lacked anywhere near the number of enumerators it
28 previously promised to employ. *Compare* Ex. 5 at 25 (hiring 516,000 enumerations under 2018
Operational Plan), *with* Ex. 13 at 2 (August 18 Letter from Office of Inspector General) (220,000
enumerators trained and ready to start working).

1 *Response Rates* (select August 9, 2020).¹⁵ The 2018 Operational Plan had called for the Bureau
 2 to spend eleven and a half weeks canvassing a non-response follow-up universe comprised of as
 3 much as 39.5% of all households nationally—timelines preserved in the COVID-19 Plan. Ex. 5
 4 at 132. The Rush Plan thus requires completing nearly the same amount of work in just 65% of
 5 the scheduled time.

6 Yet the Rush Plan calls for the Bureau to maintain staffing at levels determined before
 7 the pandemic—and staffing at the time the Rush Plan was promulgated (and now) remains well
 8 below even those levels. *Id.*; Thompson Decl. ¶ 20. As of the week of August 18, the Bureau
 9 was 80,000 enumerators below its target, with only 73% of needed staff. *See* Gregory Wallace,
 10 *Watchdog Warns of Census Worker Shortage As Deadline Approaches*, CNN (Aug. 21, 2020)¹⁶;
 11 Ex. 13 (as of August 18, 2020 Bureau has only 73% of needed field staff). That is unsurprising
 12 since, as one official explained, “[a]bout a third of our [enumerator] applicants are older persons
 13 considered at high risk of the virus.”¹⁷ Director Dillingham himself admitted just days before
 14 instituting the Rush Plan that “the pandemic is estimated to increase the number of no shows to
 15 training sessions, as well as the number of employees who complete training but decline to show
 16 up for work.” *Id.*

17 And while the Rush Plan states that the Bureau will “conduct additional training sessions
 18 and provide awards to enumerators” for working extra hours, Ex. 1 at 1, it gives no hint as to
 19 how offering “awards” will allow a huge influx of enumerators to be hired, undergo background
 20 checks, receive government-issued iPhones, complete training, and accomplish their work—all

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 22 ¹⁵ <https://2020census.gov/en/response-rates.html> (last visited Aug. 24, 2020).

23 ¹⁶ <https://www.cnn.com/2020/08/21/politics/census-worker-shortage/index.html> (80,000
 24 enumerators short on August 21).

25 ¹⁷ *See* Census Bureau, Operational Press Briefing – 2020 Census Update at 13 (July 8, 2020),
 26 [https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-
 27 transcript-july8.pdf](https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf); *see also* Mike Schneider, *Census Bureau Drop-Outs Complicate Door-
 28 Knocking Efforts*, Associated Press (Aug. 8, 2020), [https://www.usnews.com/news/us/articles/
 2020-08-08/census-bureau-drop-outs-complicate-door-knocking-efforts](https://www.usnews.com/news/us/articles/2020-08-08/census-bureau-drop-outs-complicate-door-knocking-efforts) (Bureau’s Assistant
 Director for Decennial Programs confirming, in early August, that potential enumerators were “a
 little hesitant because of the COVID environment.”).

1 before September 30, 2020. *See* Thompson Decl. ¶ 20; Hillygus Decl. ¶ 16 (at 12).¹⁸ This
 2 failure “to consider an important aspect of the problem”—for one of the very few specific
 3 initiatives offered as to how the Bureau will meet its shortened timelines—is just one example of
 4 why the Plan is unlawful. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

5 But this is not the Rush Plan’s only failing. The reduced staff combined with the
 6 shortened schedule will result in a higher level of proxy enumerations, increased reliance on
 7 administrative records, and an increased use of imputation—all of which are less reliable than in-
 8 person enumerations. Thompson Decl. ¶¶ 19, 21. This, in turn, leads to problems with data
 9 processing, which will be exacerbated by the shortened processing timeline. Under ordinary
 10 circumstances, a massive expenditure of time and effort is required to render the raw data fit for
 11 use. Louis Decl. ¶¶ 13-16. But incomplete or substandard data *collection* increases the need to
 12 impute missing values in the data, and check for and correct errors—thus requiring more time,
 13 not to mention staffing—for data *processing*. Louis Decl. ¶¶ 25-29. The Rush Plan does the
 14 opposite, cutting the time for data processing nearly in half. All of these issues are likely to
 15 result in reduced quality in the census data and less accurate results. Louis Decl. ¶¶ 1, 3. And,
 16 again, Defendants have utterly failed to consider these critical aspects of the new policy
 17 articulated in the Rush Plan, to address the impact of shortened data collection on the necessary
 18 time required for data processing, or to articulate how the Rush Plan compensates for these
 19 issues.

20 These flaws likely stem from other inadequacies in the truncated decisionmaking process.
 21 As GAO recently noted, Bureau officials had been “given ‘hours rather than days or weeks’ to
 22 revise their plans to finish counting by the end of September.” Hansi Lo Wang, *‘Not Enough*
 23 *Time’: Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020) (Chris
 24 Mihm, managing director of strategic issues at GAO). But making a decision first, and
 25 considering its impact and how to implement it only later, is the antithesis of “[r]easoned

26 _____
 27 ¹⁸ Difficulties in training new hires are also more than theoretical. One census field supervisor
 28 working in the mid-Atlantic told NPR that, given the new rushed timeline and lack of sufficient
 staff, “[w]e’re just sending bodies out regardless of whether they’re ready or not.” Hansi Lo
 Wang, *‘Not Enough Time’: Census Workers Fear Rushing Count Could Botch Results*, NPR
 (Aug. 11, 2020).

1 decisionmaking under the Administrative Procedure Act.” *Dep’t of Commerce*, 139 S. Ct. at
 2 2576; see *Int’l Snowmobile Mfrs. Ass’n v. Norton*, 304 F. Supp. 2d 1278, 1292 (D. Wyo. 2004)
 3 (“The rushed nature of the [agency’s] actions indicates both a violation of the NEPA process and
 4 an arbitrary and capricious, predetermined decision on the part of the [agency] . . .”).

5 *Second*, the Rush Plan fails to acknowledge or take into account the public’s reliance on
 6 the timeline set out in the COVID-19 Plan. When an agency’s prior policy has engendered
 7 “serious reliance interests,” an agency would be “arbitrary or capricious to ignore such matters”
 8 and must “provide a more detailed justification than what would suffice for a new policy created
 9 on a blank slate.” *FCC*, 556 U.S. at 515-16. Here, the Bureau had publicized for months that
 10 non-response follow up and the self-response period would continue until October 31, 2020—
 11 promises that remained on the Bureau’s website as late as July 30, 2020. Households across the
 12 United States had been told that they could return their census responses throughout October.
 13 And Plaintiffs too—along with many other local governments and non-profit organizations—
 14 relied on the COVID-19 Plan’s timeline in structuring their efforts to increase response rates, to
 15 inform their members and residents of key dates, and to ensure that all individuals were counted.
 16 See *infra* at 31. Yet the Rush Plan nowhere mentions, much less “provides a . . . detailed
 17 justification” for contravening, these “serious reliance interests.” *Id.*

18 Just this year, in ruling on the administration’s rescission of DACA, the Supreme Court
 19 emphasized that an agency’s failure to “assess whether there were reliance interests, determine
 20 whether they were significant, and weigh any such interests against competing policy concerns”
 21 justified vacatur of the agency decision. *Dep’t of Homeland Sec.*, 140 S. Ct. at 1915. So too
 22 here: If Defendants had weighed reliance interests against competing policy concerns, they
 23 might have altered their decision to cut short the COVID-19 Plan in whole or in part.

24 **d. The December 31, 2020 deadline does not justify the**
 25 **Rush Plan, and any reliance on that deadline is**
 26 **pretextual**

26 As explained, Defendants failed to provide any contemporaneous explanation as to why
 27 they departed from the COVID-19 Plan or otherwise decided to cut short the 2020 Census. The
 28 Rush Plan does, however, briefly mention the Census Act’s statutory deadline of December 31,

1 2020 to deliver apportionment counts to the President. To the extent Defendants seek to justify
2 their actions based on that deadline, that attempt must fail for multiple reasons.

3 *First*, Defendants did not justify their decision on the basis of the December 31 deadline.
4 That by itself should end the matter: “It is a ‘foundational principle of administrative law’ that
5 judicial review of agency action is limited to the ‘the grounds that the agency invoked when it
6 took the action.’” *Dep’t of Homeland Sec.*, 140 S. Ct. at 1907 (quoting *Michigan v. EPA*, 576
7 U.S. 743, 758 (2015)).

8 *Second*, even if Defendants *had* articulated the December 31 deadline as a reason for
9 changing course, that explanation would not withstand scrutiny. Defendants were fully aware of
10 the statutory deadline when they adopted the COVID-19 Plan on April 13, 2020—yet that plan
11 expressly called for data collection to continue through October 31, 2020, and data processing to
12 continue through April 2021. To be sure, Defendants also requested that Congress extend the
13 statutory deadline. *See Ex. 3 at 2*. But the COVID-19 Plan nowhere stated that its revised
14 timelines would apply only if that extension were granted. The President himself took the
15 position that such a request was unnecessary. *Supra* at 10. And Defendants immediately
16 proceeded to implement the COVID-19 Plan, and continued to do so for nearly four months,
17 from April 13 to August 3, 2020. In short, the statutory deadline did not stop the Bureau in
18 April, May, June, or July—and it cannot justify Defendants’ sudden change of position in
19 August.

20 *Third*, the constitutional interest in accuracy outweighs any (post-hoc) interest in
21 complying with the statutory deadline. As explained below, *infra* at 25-26, Congress (and, by
22 delegation, Defendants) have a constitutional duty to conduct an accurate enumeration.
23 Congress plainly could not enact a statute giving the Bureau only a single week to conduct the
24 census. In the extraordinary circumstances of the COVID-19 pandemic, enforcing the December
25 31 deadline is similarly unconstitutional and would contravene the “strong constitutional interest
26 in accuracy,” *Utah v. Evans*, 536 U.S. 452, 478 (2002), and the duty to conduct an actual
27 “enumeration[] of the population, keeping in mind the constitutional purpose of the census,”
28 *Wisconsin*, 517 U.S. at 20. That is especially true because the Bureau had already suspended

1 census operations for months under the COVID-19 Plan, and Bureau officials had *already* made
 2 clear that it would be impossible to both conduct an accurate census and meet the December 31
 3 deadline. *See supra* at 10-11. In short, when a statutory deadline conflicts with a constitutional
 4 duty, the Constitution prevails. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 797-98
 5 (1992); *Carey v. Klutznick*, 637 F.2d 834, 837-38 (2d Cir. 1980); *Ga. Coal. for Peoples' Agenda,*
 6 *Inc. v. Deal*, 214 F. Supp. 3d 1344, 1445 (S.D. Ga.) (enjoining voter-registration deadline based
 7 on claims that its application in the midst of hurricane evacuations violated First and Fourteenth
 8 Amendments).

9 Even in less exceptional circumstances, the Second Circuit has upheld a preliminary
 10 injunction that might have caused the Census Bureau to miss the December 31 deadline,
 11 explaining that “[w]e see nothing sacred in the due date of the filing, especially when the work of
 12 the Census Bureau, at least as preliminarily demonstrated below, is incomplete.” *Klutznick*, 637
 13 F.2d at 837-38. The Supreme Court has similarly held that the data presented to the President
 14 remains subject to correction until it is reported to Congress, underscoring the non-finality of the
 15 December 31 deadline. *Franklin*, 505 U.S. at 797-98. Historically, too, the federal government
 16 often took well over a year from Census Day to report apportionment results.¹⁹ This “long and
 17 consistent historical practice” underscores that the accuracy of the enumeration is far more
 18 important than any particular date. *Dep’t of Commerce*, 139 S. Ct. at 2567.

19 *Fourth*, and at bottom, any reliance by Defendants on the December 31 deadline is
 20 pretextual. On July 21, 2020, the President issued the Apportionment Exclusion Order, directing
 21 the administration to exclude undocumented immigrants from the apportionment count. Two

22 _____
 23 ¹⁹ *See, e.g.,* U.S. Census Bureau, Decennial Census Official Publications,
 24 [https://www.census.gov/programs-surveys/decennial-census/decade/decennial-](https://www.census.gov/programs-surveys/decennial-census/decade/decennial-publications.1800.html)
 25 [publications.1800.html](https://www.census.gov/programs-surveys/decennial-census/decade/decennial-publications.1800.html) (last visited Aug. 24, 2020) (establishing enumeration for 1800 Census to
 26 begin on August 4, 1800); Letter from James Madison, U.S. Sec’y of State, to Thomas Jefferson,
 27 President of U.S. (Dec. 8, 1801), [https://founders.archives.gov/?q=%22second%20](https://founders.archives.gov/?q=%22second%20census%22&s=1111311111&sa=&r=10&sr=)
 28 [census%22&s=1111311111 &sa=&r=10&sr=](https://founders.archives.gov/?q=%22second%20census%22&s=1111311111&sa=&r=10&sr=) (reporting totals from 1800 Census on December
 8, 1801); U.S. Census Bureau, Decennial Census Official Publications,
[https://www.census.gov/programs-surveys/decennial-census/decade/decennial-](https://www.census.gov/programs-surveys/decennial-census/decade/decennial-publications.1810.html)
[publications.1810.html](https://www.census.gov/programs-surveys/decennial-census/decade/decennial-publications.1810.html) (last visited Aug. 24, 2020) (establishing enumeration to begin on August
 6, 1810); Letter from James Madison, President of U.S., to U.S. Congress (Nov. 13, 1811),
<https://founders.archives.gov/documents/Madison/03-04-02-0015> (reporting totals from 1810
 Census to Congress based on results received same day from Secretary of State).

1 weeks later (with no previous indication that the Bureau was considering revising the census
2 timelines), Defendants promulgated the Rush Plan. That timing is telling.

3 In recent weeks, “it was widely reported in the press that the Trump Administration was
4 looking to rush the 2020 Decennial Census operations in order to allow the Secretary of
5 Commerce to transmit the apportionment counts to the president by December 31, 2020.”
6 Ex. 11. Shortening the census timeline ensures that, regardless of the outcome of the November
7 election, this President will have the opportunity to implement his Apportionment Exclusion
8 Order. Delaying reporting until spring—as the COVID-19 Plan did—leaves open the possibility
9 that the President will no longer be in office when data is provided, and thus will be unable to
10 effectuate the Apportionment Exclusion Order. But a desire to effectuate the Apportionment
11 Exclusion Order while a particular president remains in office cannot justify the Rush Plan. It
12 bears no reasonable relationship to the achievement of a fair and accurate Census, and will in
13 fact undermine that goal. Indeed, multiple suits challenging that Exclusion Order have explained
14 that excluding undocumented persons from apportionment counts contravenes constitutional text,
15 structure, and history, and would inflict significant damage on the census. *See, e.g.,* Complaint,
16 *San Jose v. Trump*, No. 5:20-cv-05167 (N.D. Cal. July 27, 2020).

17 In short, the factual circumstances surrounding adoption of the Rush Plan does not match
18 any belated reliance on the statutory deadline. And this would not be the first time the
19 administration has used a pretextual rationale to support its decisions about the 2020 Census.
20 *See Dep’t of Commerce*, 139 S. Ct. at 2575. Beginning in 2017, Secretary Ross attempted to add
21 an untested citizenship question to the 2020 Census, claiming that the question was necessary to
22 better enforce the Voting Rights Act. That decision was litigated and enjoined by three district
23 courts. Ultimately, the Supreme Court found that Defendant Ross’s rationale was “contrived”
24 and “incongruent with what the record reveals about the agency’s priorities and decision-making
25 process.” *Id.* at 2575. Because Secretary Ross’s decision “rested on a pretextual basis,” the
26 Supreme Court held that it must be set aside. *Id.* at 2573.

27 Following the Supreme Court’s decision, President Trump confirmed the true
28 motivation—and fully justified the Court’s holding that Secretary Ross’s rationale was

1 pretextual—when he stated that the administration sought a citizenship question, not to enforce
 2 the Voting Rights Act, but “for districting” and “for appropriations.” Remarks by President
 3 Trump Before Marine One Departure (July 5, 2019).²⁰ In an attempt to advance his plan
 4 notwithstanding the Supreme Court’s decision, the President has declared his intention through
 5 the Apportionment Exclusion Order to factor citizenship data into apportionment, and
 6 Defendants adopted the Rush Plan to enable the President to accomplish that goal. And once
 7 again, Defendants have tried to obscure the motivations for their action—this time, by refusing to
 8 concede that the Rush Plan was intended to implement the Apportionment Exclusion Order
 9 before the end of the President’s term in office. That “political chicanery” has no place in the
 10 census. *Utah*, 536 U.S. at 500-01 (Thomas, J., concurring and dissenting in part). And the
 11 Bureau’s pretextual explanation is entitled to no weight under the APA.

12 **2. Defendants’ decision to dramatically shorten Census timelines**
 13 **violates the Constitution’s Enumeration Clause**

14 As the Supreme Court has explained, the Constitution, by requiring an “actual
 15 enumeration,” evinces “a strong constitutional interest in accuracy.” *Utah*, 536 U.S. at 478; *see*
 16 *also Dep’t of Commerce*, 139 S. Ct. at 2584 (Breyer, J., concurring in part and dissenting in part)
 17 (explaining that accuracy of the enumeration is “the sole constitutional function of the census
 18 and a task of great practical importance”). In keeping with that interest, the Enumeration Clause
 19 requires that decisions as to how to conduct the census bear a “reasonable relationship to the
 20 accomplishment of an actual enumeration of the population, keeping in mind the constitutional
 21 purpose of the census,” which is to fairly and accurately “determine the apportionment of the
 22 Representatives among the States.” *Wisconsin*, 517 U.S. at 20; *see also Dep’t of Commerce*, 139
 23 S. Ct. at 2566. That standard vests considerable discretion in the Bureau to make good-faith
 24 decisions as to how to conduct the decennial census. But it does not afford leeway to adopt a
 25 plan that will actively undercut an accurate enumeration, and which does not even purport to
 26 further the ultimate goal of improving the count.

27 _____
 28 ²⁰ <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/>.

1 Public figures and experts have denounced the likely disastrous effects of the Rush Plan.
 2 The same four former Census Bureau Directors who endorsed the COVID-19 Plan issued a
 3 statement saying that “our expert opinion is that failing to extend the deadlines to April 30, 2021
 4 will result in seriously incomplete enumerations in many areas across our country.”²¹ The
 5 venerable American Statistical Association similarly confirmed there is “no scientific rationale to
 6 curtail the data-collection period . . . and the premature cessation of census enumeration will
 7 produced flawed counts.” Ex. 10 at 2 (Letter From American Statistical Association).

8 In addition, testimony in this case, including testimony from a former Bureau Director
 9 and former Bureau Chief Scientist, make clear that enforcing the Rush Plan will “severely
 10 compromise the quality, accuracy, reliability, and indeed the legitimacy of the 2020 Census
 11 numbers.” Louis Decl. ¶ 1; *see* Thompson Decl. ¶¶ 5, 21-27 (noting that “reducing the time for
 12 data collection at this late date will have grave and material consequences for the 2020 Census”);
 13 Hillygus Decl. ¶¶ 5, 39-42 (noting that “a reduction in the duration of the NRFU operation is
 14 almost certain to increase the number of hard-to-count households that will be inaccurately
 15 enumerated”). For example, as of August 21st, the City of Los Angeles’s self-response rate was
 16 13.5 percentage points lower than in 2010. M. Garcia Decl. ¶ 8. Texas, too, enters the non-
 17 response follow up operation with a self-response rate 6.2 percentage points behind 2010.
 18 Hillygus Decl. ¶ 20. The shortened non-response follow up period will fail to cure that disparity,
 19 and in fact will exacerbate it. Hillygus Decl. ¶ 20. The shortened timeline will thus create
 20 severe undercounts compared to previous censuses, as well as an exacerbated overcount of the
 21 White population. *See* Thompson Decl. ¶¶ 20-21; Louis Decl. ¶¶ 13, 39; Hillygus Decl. ¶¶ 12,
 22 20-26, 33-34, 37-39; *see also* M. Garcia Decl. ¶ 8. Moreover, the undercount will
 23 disproportionately impact hard-to-count groups, which typically have lower rates of self-
 24 response and therefore require more non-response follow-ups. Thompson Decl. ¶¶ 20-21;
 25 Hillygus Decl. ¶¶ 12-13, 19-39; Louis Decl. ¶¶ 14, 22-23; *see also* M. Garcia Decl. ¶ 8.

26
 27 ²¹ Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020*
 28 *Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States*
 (Aug. 4, 2020), <https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html>.

1 Lacking time to count households in person, enumerators will have to try to address non-
2 responses using proxies, administrative records, and imputation. These are not only less accurate
3 methods of enumeration, but are particularly inaccurate for hard-to-count groups—exacerbating
4 undercounts and threatening the basic integrity of the census. Thompson Decl. ¶¶ 20-22;
5 Hillygus Decl. ¶¶ 19-39; Louis Decl. ¶¶ 21-23, 35-39. Moreover, the non-response follow up
6 period is also critical in resolving issues that cannot be resolved as well (or at all), in the data
7 processing phase, for example, correcting inaccurate data or incomplete data and resolving
8 duplicated data. Louis Decl. ¶ 24. These errors will be further compounded by a data-
9 processing period that the Rush Plan cuts in half, thus reducing the time in which census officials
10 will be able to check for and correct errors. Louis Decl. ¶¶ 25-40; *see supra* at 9. Nor do the
11 additional details released by the Bureau in its August 17, 2020 PowerPoint give any cause for
12 comfort: Many of the proposals in that PowerPoint were *already* part of earlier plans (and thus
13 cannot remedy shortening the timelines in those plans), and others—such as hiring more
14 enumerators and offering “awards” for extra hours worked, when the Bureau has been unable to
15 retain even the enumerators it has—are plainly unworkable. Thompson Decl. ¶ 20; *see supra* at
16 19-20. In short, the result of the Rush Plan will be lower-quality data across the board that fails
17 to accurately capture the population of the United States—the entire purpose of census. Louis
18 Decl. ¶¶ 1, 5, 30-40; Thompson Decl. ¶¶ 1, 5, 20-22, 27; Hillygus Decl. ¶¶ 5, 38-42.

19 These errors will not be run-of-the-mill imperfections; they are likely to have “grave and
20 material consequences” that will “undermin[e] the legitimacy of the count.” Thompson Decl.
21 ¶ 5; *see also* Louis Decl. ¶ 3; Hillygus Decl. ¶ 5. By undermining the processes used to assess
22 data quality and ensure reliability, the Rush Plan will also undermine public faith in the
23 legitimacy of the enumeration and resulting political outcomes. Thompson Decl. ¶¶ 5, 23, 25-
24 26; Hillygus Decl. ¶¶ 39-42; Louis Decl. ¶¶ 40-44. What is at stake is not just accuracy for its
25 own sake: the Census underlies our system of political representation. Where integrity is lacking
26 in the enumeration, resulting legislative apportionment and redistricting, which rely on census
27 data, Louis Decl. ¶¶ 41-43; Hillygus Decl. ¶ 40, will also be called into question, further harming
28 the core constitutional interests at stake.

1 A plan that leads to such outcomes simply cannot be reconciled with the requirements of
2 the Enumeration Clause. And the decision to adopt such a plan certainly cannot be justified as
3 bearing a “reasonable relationship to the accomplishment of an actual enumeration of the
4 population.” *Wisconsin*, 517 U.S. at 20. Moreover, Defendants have offered little indication that
5 they have a plan in place to ameliorate these problems, beyond vague blandishments about
6 ensuring an accurate count. That is not enough to satisfy the Constitution, and Plaintiffs will
7 likely prevail on this claim as well.

8 **B. Enforcing the Rush Plan During the Pendency of this Lawsuit Would**
9 **Irreparably Harm Plaintiffs**

10 Preliminary relief is appropriate because irreparable harm to Plaintiffs “is likely in the
11 absence of” a stay of the Rush Plan. *Winter*, 555 U.S. at 22; *All. for Wild Rockies*, 632 F.3d at
12 1131; *City of S.F.*, 408 F. Supp. 3d at 1078 (noting that considerations for stay of agency action
13 under the APA “substantially overlap with the *Winter* factors for a preliminary injunction”).
14 Indeed, although the Ninth Circuit requires a plaintiff seeking preliminary relief to show only a
15 “threat of future harm,” and does not “require that future harm be shown with certainty before an
16 injunction may issue,” *Nat’l Wildlife Fed’n v. Burlington N.R.R., Inc.*, 23 F.3d 1508, 1512 & n.8
17 (9th Cir. 1994), irreparable harm is all but certain in this case absent preliminary relief. Among
18 other harms, the undercounts caused by the Rush Plan will lead to constitutional harms from lack
19 of representation, decreased federal funding benefitting Plaintiffs, the need for Plaintiffs’
20 expend additional resources in an attempt to minimize undercounts, and damage to Plaintiffs’
21 operations that rely on accurate census data. These are precisely the harms that have justified
22 relief in previous census litigation. *See, e.g., New York*, 351 F. Supp. 3d at 675 (enjoining
23 Secretary Ross from adding a citizenship under vacated memorandum, or “any reasoning that is
24 substantially similar to the reasoning contained in that memorandum,” based on “lost political
25 representation, lost federal funding, and the degradation of information that is an important tool
26 of state sovereignty”); *House of Reps.*, 525 U.S. at 328-34 (affirming injunction barring the use
27 of statistical sampling in census, and noting interstate apportionment harms, and intrastate
28 apportionment and redistricting harms).

1 *First*, Plaintiffs will suffer irreparable harm in the absence of preliminary relief because
2 an inaccurate apportionment will violate their constitutional rights to political representation. It
3 is “well established that the deprivation of constitutional rights ‘unquestionably constitutes
4 irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v.*
5 *Burns*, 427 U.S. 347, 373 (1976)); *see also Hernandez v. Cty. of Monterey*, 110 F. Supp. 3d 929,
6 956 (N.D. Cal. 2015). As discussed above, the Rush Plan will not accurately achieve “an actual
7 enumeration of the population,” as required by the Constitution. But the constitutional harm
8 extends further. Because the census is used to apportion congressional representatives to each
9 state, not just accuracy, but distributional accuracy, is needed in the census data to ensure a fair
10 apportionment of representatives. Hillygus Decl. ¶¶ 11-13, 39-40; Louis Decl. ¶¶ 40-44. It is
11 not enough for the total count to be accurate; the proportional distribution of the population by
12 geography and population group must also be accurate. Hillygus Decl. ¶¶ 11-13. If the census
13 undercounts the number of people living in Los Angeles, for example, the census could result in
14 an unfair apportionment of congressional representatives to California—even if the census
15 accurately counts the number of people living in the United States overall. Hillygus Decl. ¶¶ 11-
16 13; Louis Decl. ¶¶ 40-43.

17 Moreover, census data is typically used to redraw district boundaries for federal, state,
18 and even local legislatures. *See* Louis Decl. ¶ 43; Thompson Decl. ¶ 23; *see, e.g.,* Westall Decl.
19 ¶¶ 13-29 (noting use of census data to redraw political boundaries); Dively Decl. ¶ 9 (same);
20 Soto Decl. ¶¶ 4-11. The harm to apportionment and representation caused by an undercount will
21 thus extend well beyond the federal level, even if the total count on a state level does not result in
22 the loss of United States representatives. In short, the Rush Plan will “compromise the success
23 of the apportionment count” and “severely compromise the quality of the redistricting data.”
24 Louis Decl. ¶ 43.

25 The undercount resulting from the Rush Plan will likely result in an unfair apportionment
26 that will cause local government Plaintiffs, individual Plaintiffs, and members of multiple
27 organizational Plaintiffs, to lose their fair share of representation. *See* Westall Decl. ¶¶ 27-29;
28 Dively Decl. ¶ 9; Soto Decl. ¶¶ 8-11; Stewart Decl. ¶¶ 15-16; Gyamfi Decl. ¶¶ 5, 10, 18-19;

1 Green Decl. ¶¶ 21-24; A. Garcia ¶¶ 10-12. For example, based on the 2020 Census response rate
2 in the City of Los Angeles and City of Salinas so far, historically low response rates in Harris
3 County, and the Rush Plan’s curtailment of the activities that might remedy those tendencies, the
4 residents of these Plaintiffs will likely be undercounted. M. Garcia Decl. ¶¶ 8-15; Briggs Decl.
5 ¶¶ 7, 15-17; Gurmilan Decl. ¶¶ 6, 8-14. In addition, because both California and Texas redrew
6 their electoral districts based on the census data, Plaintiffs will not receive proportionate
7 legislative representation in their respective state legislatures either. *See* Cal. Const. art. XXI,
8 §§ 1-2; Tex. Const. art. III, § 28. The same is true of individual Plaintiffs, who reside in these
9 communities and will be deprived of their fair share of representation. *See* Ellis Decl. ¶¶ 12-14;
10 A. Garcia Decl. ¶¶ 10-12. That harm, too, justifies preliminary relief. *See, e.g., Dep’t of*
11 *Commerce*, 139 S. Ct. at 2565; *State of N.Y.*, 315 F. Supp. 3d at 783.

12 *Second*, Plaintiffs will be deprived of vital federal funding. Local government Plaintiffs
13 are direct recipients of multiple sources of funding that turn on census data. *See* Ex. 6 at 3-7;
14 Shah Decl. ¶ 8; Dively Decl. ¶¶ 7-8; Wilden Decl. ¶¶ 4-5; Westall Decl. ¶¶ 34-36. King County,
15 Washington, for example, receives Community Development Block Grants (CDBG), HOME
16 Investment Partnership Program, and Emergency Solutions Grants (ESG) Program funding from
17 the U.S. Department of Housing and Urban Development (HUD), all of which are distributed
18 proportionately based on census counts. Dively Decl. ¶ 7. In 2020, King County received
19 \$9,852,719 for the three HUD programs. *Id.* An undercount of the County’s population in the
20 2020 Census will reduce the amount of federal funding the County receives from these
21 programs. *Id.* The City of Los Angeles likewise receives CDBG and Federal Transit
22 Administration funds based in part on census data, and therefore stands to lose this funding as a
23 result of an undercount. Westall Decl. ¶¶ 34-36. Because both localities have large numbers of
24 hard-to-count individuals, both are likely to suffer undercounts due to the shortened timeline for
25 enumeration, and therefore lose valuable funding. *See* M. Garcia Decl. ¶¶ 7-8; Dively Decl. ¶ 5;
26 Hillygus Decl. ¶¶ 12, 19, 39. Indeed, courts have recognized that even a “remarkably low net
27 undercount” would “prompt the . . . losses of [federal] funding.” *New York*, 351 F. Supp. 3d at
28 610; *see Dep’t of Commerce*, 139 S. Ct. at 2565 (noting that “if noncitizen households are

1 undercounted by as little as 2%,” plaintiffs would “lose out on federal funds”).

2 Other Plaintiffs are similarly situated. Harris County likewise relies on federal funding
3 that is based on census data, and has a large, hard-to-count population with typically low self-
4 response rates, and therefore stands to lose funding as a result of a likely undercount. Wilden
5 Decl. ¶¶ 4-6; Briggs Decl. ¶ 7; Shah Decl. ¶ 8; Hillygus Decl. ¶¶ 12, 19, 39. Individual Plaintiffs
6 in these hard-to-count areas will suffer from decreased funding for local government services on
7 which these Plaintiffs rely, like public schools, and road and highway maintenance. Ellis Decl.
8 ¶¶ 4-11; A. Garcia Decl. ¶¶ 4-9; *see also* Green Decl. ¶¶ 25-26 (noting that members will be
9 harmed by loss of funding). “Los[ing] out on federal funds” constitutes a “concrete and
10 imminent injury.” *Dep’t of Commerce*, 139 S. Ct. at 2565 (affirming standing based on likely
11 loss of funds stemming from lower census response rates). Moreover, there is no realistic
12 prospect for redressing this injury once it has occurred, as it will be an additional ten years before
13 new census data is available to guide the distribution of federal and state funding, and damages
14 are of course not available against the federal government for these harms.

15 *Third*, Plaintiffs will be irreparably injured because they will need to expend additional
16 resources in an attempt to mitigate the undercounting that will result from the Rush Plan. Based
17 on the non-response follow-up timeline outlined in the COVID-19 Plan, local government
18 Plaintiffs and organizational Plaintiffs planned efforts to ensure effective counting of historically
19 undercounted communities. M. Garcia Decl. ¶¶ 9-12, 14; Briggs Decl. ¶¶ 4-9, 13-14; Gyamfi
20 Decl. ¶¶ 12-13, 15-16; Stewart Decl. ¶¶ 6-11; Green Decl. ¶¶ 7-17; Gurmilan Decl. ¶¶ 6-12. For
21 instance, City of Los Angeles planned mobile outreach events each weekend of October—plans
22 that will necessarily be frustrated or rendered ineffective under the Rush Plan. M. Garcia Decl.
23 ¶ 13. Moreover, Los Angeles and its community partners—relying on the Bureau’s COVID-19
24 Plan—have already conducted a public education campaign publicizing the October 31, 2020
25 date for self-response. M. Garcia Decl. ¶ 14. The City—and other Plaintiffs in similar
26 positions—must now expend additional resources to try to undo that campaign and inform
27 residents and members that they must provide self-responses a month earlier—a task that will be
28 harder because of the shortened timeline and the public health emergency. M. Garcia Decl. ¶¶

1 14-15; Gurmilan Decl. ¶¶ 11-14; Briggs Decl. ¶¶ 11-12, 15-17; Stewart Decl. ¶¶ 11-14; *see also*
 2 Gyamfi Decl. ¶¶ 11-17; Green Decl. ¶¶ 15, 19.

3 *Fourth*, Plaintiffs' usual activities will be harmed, and their expenses will increase, due to
 4 the lowered quality of census data that is likely to result from the Rush Plan. Local government
 5 Plaintiffs use granular census data to deploy fire department, emergency management, and
 6 sanitation resources, engage in urban planning, address transportation infrastructure needs, and
 7 direct investment decisions. Westall Decl. ¶¶ 30-33; Dively Decl. ¶¶ 5-6; Gurmilan Decl. ¶ 7.
 8 For example, Public Health Seattle-King County uses census data to identify where public health
 9 clinics should be located and plan the types of services patients are likely to need, and the King
 10 County Department of Local Services relies on census data to provide demographics that inform
 11 neighborhood and transportation planning. Dively Decl. ¶ 6. King County Emergency
 12 Management relies on census data for hazard mitigation and recovery planning. *Id.* Inaccurate
 13 census data will lead to a misallocation of resources needed for these and other urban planning
 14 activities. Westall Decl. ¶¶ 30-33; Dively Decl. ¶¶ 5-6; Gurmilan Decl. ¶ 7.

15 In addition, local governments Plaintiffs use census data to fulfill redistricting
 16 responsibilities under local, state, and federal law and to ensure fair representation in local
 17 government legislative districts, like city councils. Westall Decl. ¶¶ 17-29; Dively Decl. ¶ 9;
 18 Soto Decl. ¶¶ 6-13. An inaccurate census will affect how these boundary lines are drawn.
 19 Dively Decl. ¶ 9; Westall Decl. ¶¶ 24-29; Soto Decl. ¶¶ 8-11. And Harris County uses the
 20 census data to inform public health policies, including responses to the COVID-19 pandemic,
 21 and receives funding for its public health department that is often based on population data.
 22 Shah Decl. ¶¶ 5-8. Without accurate Census data, Harris County will struggle to receive funding
 23 and ensure that public health policies are appropriately tailored to the population. Shah Decl.
 24 ¶ 8.

25 These harms are also irreparable. "Normally the mere payment of money is not
 26 considered irreparable . . . but that is because money can usually be recovered from the person to
 27 whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable."
 28 *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers); *Chevron*

1 *Corp. v. Donziger*, 833 F.3d 74, 142-43 (2d Cir. 2016); *Idaho v. Coeur d’Alene Tribe*, 794 F.3d
 2 1039, 1046 (9th Cir. 2015) (recognizing that harm was irreparable where a tribe’s “sovereign
 3 immunity likely would bar the State from recovering monetary damages incurred during the
 4 course” of litigation due to tribe’s alleged violations of law). Here, of course, Plaintiffs have no
 5 avenue to recoup from the federal government the expenses they will incur in seeking to seeking
 6 to alleviate the undercount that will be caused by the Rush Plan, or to remedy the decreased
 7 effectiveness and increased expense necessary for undertaking core programs and functions.

8 **C. The Remaining Factors Support Relief**

9 The final two factors, the balance of equities and the public interest, also strongly favor
 10 preliminary relief.

11 As discussed, Plaintiffs stand to suffer significant, irreparable harm from the inaccurate
 12 count that will result from the Rush Plan. *See supra* at 28-33. But these harms will not be
 13 limited to the Plaintiffs in this case. Given the importance of the census nationally, the harms
 14 Plaintiffs will suffer from an inaccurate count are likely to play out over and over again across
 15 the country. Hillygus Decl. ¶¶ 38-40; Louis Decl. ¶¶ 37, 40-44; Thompson Decl. ¶¶ 3, 19-23.
 16 Indeed, states, local governments, businesses, and non-profits all depend on accurate census data
 17 to obtain funds and conduct a host of vital operations—and of course, to determine political
 18 representation. *See* U.S. Census Bureau, *Importance of the Data*.²² Courts accordingly
 19 recognize that, with respect to the Census, “the public interest . . . requires obedience to the
 20 Constitution and to the requirement that Congress be fairly apportioned, based on accurate
 21 census figures. Furthermore, it is in the public interest that the federal government distribute its
 22 funds . . . on the basis of accurate census data.” *Carey*, 637 F.2d at 839. There can be little
 23 question that the public has a vital interest in the accuracy of the census, or that this interest has
 24 constitutional significance. *Utah*, 536 U.S. at 478; *see also Dep’t of Commerce*, 139 S. Ct. at
 25 2584 (Breyer, J., concurring and dissenting in part). Thus, not only Plaintiffs’ harms, but the
 26 public interest, weigh strongly in favor of preliminary relief.

27
 28 ²² <https://2020census.gov/en/census-data.html> (last visited Aug. 24, 2020).

1 The harm to the government’s interest, on the other hand, will be minimal. If the Rush
2 Plan is stayed, the government will be able to carry on census operations under its own
3 previously promulgated COVID-19 Plan, which gives the government more time to complete the
4 critical stages of the count. In addition, the government and public interest in having the census
5 conclude by December 31, 2020—rather than a few months later—is marginal at best. There is
6 no constitutional requirement that the census conclude by the end of the year, and any
7 government or public interest in the agency’s compliance with the statutory deadline is
8 outweighed by the constitutional harm that will result from the Rush Plan. *See supra* at 22-28;
9 *see also Klutznick*, 637 F.2d at 837-38 (upholding injunction despite possibility it would cause
10 Bureau to miss deadline); *Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012) (district court
11 did not abuse its discretion in concluding that public interest in upholding constitutional rights
12 outweighed the government’s interest in enforcing the challenged policy); *All. for Wild Rockies*,
13 632 F.3d at 1138-39 (balancing competing public interests and finding that public interest in
14 issuing injunction outweighed public interest in enforcing the challenged policy). This is
15 particularly true given that Bureau officials have already acknowledged that it is too late to meet
16 the statutory deadline. *See supra* at 10-11. Accordingly, equity and the public interest strongly
17 favor preliminary relief. *See, e.g., All. for Wild Rockies*, 632 F.3d at 1139 (granting preliminary
18 injunction where plaintiff demonstrated likelihood of irreparable injury, raised “serious
19 questions” on the merits, and where the balance of hardships and public interest favored
20 plaintiff).

21 A final public interest bears discussion. The absence of granular data due to shortened
22 non-response follow up, the reduced insights into the accuracy of the data caused by curtailed
23 data-processing operations, the elimination of transparency, and the widespread understanding
24 that the 2020 Census is fatally inaccurate will degrade trust in the ultimate results, and thus in the
25 democratic legitimacy of the decisions and political apportionment that flow from them. *See*
26 *Thompson Decl.* ¶¶ 24-26; *Hillygus Decl.* ¶¶ 39-42. Preliminary relief is both necessary and
27 appropriate to prevent the tarnishing of one of the few sources of information on whose
28 legitimacy Americans of all stripes and persuasions can still depend.

1 **V. CONCLUSION**

2 For the forgoing reasons, Plaintiffs respectfully request that this Court grant this Motion,
3 stay the Rush Plan for the 2020 Census, and enjoin Defendants from implementing the Rush Plan
4 or otherwise shortening the timelines set out in the COVID-19 Plan, pending final judgment in
5 this lawsuit.

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Dated: August 25, 2020

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ATTESTATION OF CONCURRENCE IN THE FILING

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: August 25, 2020

LATHAM & WATKINS LLP

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