

No. 20-16868

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

***Plaintiffs-Appellees***

**vs.**

WILBUR L. ROSS, JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF  
COMMERCE; U.S. DEPARTMENT OF COMMERCE; STEVEN DILLINGHAM, IN  
HIS OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. CENSUS BUREAU; AND  
U.S. CENSUS BUREAU,

***Defendants-Appellants***

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On Appeal from the United States District Court  
for the Northern District of California, No. 20-cv-5799  
The Hon. Lucy H. Koh, District Judge

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**BRIEF OF THE STATES OF LOUISIANA AND MISSISSIPPI  
AS AMICI CURIAE IN SUPPORT OF DEFENDANTS'  
EMERGENCY MOTION TO STAY**

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## **INTRODUCTION AND INTERESTS OF AMICI**

After five weeks of litigation and intrusive discovery, the district court preliminarily enjoined Secretary of Commerce Wilbur Ross (“the Secretary”), the Department of Commerce, the Census Bureau Director, and the Census Bureau from following a revised plan for the census that was announced on August 3 (the “August Re-Plan”). The progress of the census has been disrupted, and the Secretary has been prevented from adapting to the circumstances of the COVID-19 pandemic while maintaining compliance with clear statutory deadlines.

The effect of the district court’s orders has been to boost enumeration in certain jurisdictions at the expense of jurisdictions—like Amici—with lagging enumeration. And the downstream effect of the district court’s order that the Secretary ignore his statutory deadline is to imperil Amici States’ ability to comply with their own redistricting and reapportionment obligations. Indeed, 24 states have state statutory or constitutional deadlines tied to the census that are imperiled. Yet the district court refused to consider those harms.<sup>1</sup>

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<sup>1</sup> As chief legal officers of their respective States, *amici* may file this brief without the consent of the parties or leave of the Court. See Fed. R. App. P. 29(a)(2).

## **ARGUMENT**

### **I. The District Court’s Injunction Is Inconsistent with the Constitution’s Textual Commitment of the Census to Congress.**

The Constitution gives Congress extremely broad discretion in conducting the decennial census “in such Manner as [it] shall by Law direct.” U.S. Const. art. I, § 2, cl. 3. Congress delegated part of that discretion to the Secretary, directing him to conduct the decennial census “in such form and content as he may determine.” 13 U.S.C. § 141(a). But Congress cabined the Secretary’s discretion by requiring him to report to the President the “tabulation of total population by States . . . within 9 months after the census date,” which is elsewhere defined as April 1 of the census year. 13 U.S.C. § 141(b). So, by statute, the Secretary must provide the final census report to the President by December 31, 2020, with other statutory deadlines following in due course. That simple outline highlights the district court’s erroneous path.

*First*, and most remarkably, a single federal district court decreed not that it can *overlook* the violation of a statutory deadline, but that it can affirmatively *compel* an Executive officer to violate Congress’s unequivocal command based on vague impacts to census accuracy. Of

course, the census has never been perfectly accurate. *See, e.g., Department of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 322 (1999). And accuracy is but one of the competing values the Secretary must juggle.

“[T]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986). Congress made precisely such a choice by setting a statutory deadline, then consciously choosing not to extend that deadline in response to COVID-19-related delays. *See, e.g., H.R. 6800 § 70201*. And because the text of the Constitution expressly commits management of the census to Congress and provides no manageable standards for resolving disputes over how “accurate” a census must be, management of the census is a classic political question. *See Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004); *see also Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Plaintiffs’ challenge should fail on this ground alone.

*Second*, the district court’s preliminary injunction purported to

show deference to the Census Bureau itself in enjoining the August Re-Plan, on the grounds that “the decision to accelerate the census schedule was not made by the Census Bureau.” TAB E at 14. But it is the Secretary — not the Census Bureau — who has statutory authority to manage the census. 13 U.S.C. § 141(a). The Secretary is under no obligation, statutory or otherwise, to defer to the Census Bureau’s staff, particularly when doing so would violate his statutory duties.

*Third*, Plaintiffs have launched no direct attack on 13 U.S.C. § 141 itself, which establishes the deadline for delivering census results to the President. This omission makes sense in light of the broad discretion the Constitution gives to Congress to regulate the census. But it does mean that, even if Plaintiffs could establish some defect in the August Re-Plan, the Census Bureau would still need to comply with the December 31, 2020 deadline. Statutory deadlines are not discretionary and must be followed. *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). Plaintiffs have not disputed that if census data collection is extended beyond September 30, “the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data

prior to April 1, 2021.” TAB A ¶ 100. Plaintiffs also have not put forward an alternative timeline that would satisfy their non-statutory demands and comply with the statutory deadline. The undisputed evidence is that no such timeline exists. Plaintiffs therefore have not established that their alleged injuries are redressable in the federal courts.

*Fourth*, it is also not clear that Plaintiffs’ alleged harms can be traced to the August Re-Plan. What Plaintiffs urge is for the courts to legislate a plan that *departs* from the statutory deadlines set by Congress, rather than bringing a typical APA challenge that aims to force an agency to *obey* a statutory mandate. This makes it clear that any harm they face is the result of the deadlines imposed by Congress, not the specifics of the August Re-Plan put forward by Defendants. To the extent Plaintiffs are harmed by something the agency did, it was the unchallenged delays in response to the COVID-19 pandemic. The district court erred in – effectively – forcing the Secretary to proceed with an April COVID-19 Plan that was expressly made contingent on relief that Congress subsequently declined to provide.

*Finally*, Plaintiffs’ Enumeration Clause arguments fare no better.

The Enumeration Clause requires an actual count of the U.S. population, rather than an estimation, but it does not set forth any particular standards for accuracy. Census data “are inherently less than absolutely accurate.” *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). A Census plan cannot be struck down simply because it will fall short of perfect accuracy. Plaintiffs fail to establish any binding metric of accuracy that the August Re-Plan fails to meet. The Secretary’s decisions on how to conduct the census “need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census.” *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). While accuracy is certainly a goal of the census, so is timeliness, and the August Re-Plan reflects a reasonable balance of these two goals that will indeed further the constitutional purpose of the census.

## **II. AMICI STATES WILL SUFFER IRREPARABLE HARM THAT THE DISTRICT COURT AFFIRMATIVELY REFUSED TO CONSIDER.**

Last minute interference in complex processes tends to itself cause harm. For that reason, the Supreme Court has repeatedly made clear that last-minute judicial disruption of government operations is improper, especially on a Preliminary Injunction or Temporary

Restraining Order record, even when fundamental rights are affected. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). The COVID-19 pandemic has not changed that rule. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S.Ct. 1205 (2020).

Here, the status quo would have been an orderly wind-down of census operations in jurisdictions with acceptable enumeration, with Census Bureau resources re-directed to jurisdictions — like Louisiana and Mississippi — that have lagging enumeration rates, followed by cessation of data collection on September 30 so as to facilitate post-processing of the collected data by the statutory deadline. Tab A ¶¶ 66-67, 95-97. That status quo was upended by the district court’s TRO. *See id.* ¶¶ 93-97. The day after the district court extended its TRO, Louisiana filed a Notice of Intent to Intervene (“Notice”) explaining that the relief demanded by the Plaintiffs (and granted by the TRO) largely served to deplete Census Bureau resources that could otherwise be expended finalizing the census in Louisiana, and that continued judicial micromanagement and delay was harming Louisiana. TAB B. When the Defendants pointed to the harms set forth in Louisiana’s Notice at a

hearing later that day, the district court blithely remarked that Louisiana had not filed a motion to intervene.<sup>2</sup>

Louisiana, joined by Mississippi, moved to intervene on September 23, and further moved for expedited consideration of their intervention. TABS C, D. Tracking Louisiana's Notice, Louisiana and Mississippi explained that they were being irreparably harmed by the TRO and the court-ordered delay in shifting Census Bureau resources to their jurisdictions. The effect of the TRO was to run up the census tally in Plaintiffs' jurisdictions at the expense of lagging jurisdictions like Louisiana and Mississippi, which raised Equal Protection concerns. *Id.* at 10 (citing *Bush v. Gore*, 531 U.S. 98, 105 (2000)). Louisiana and Mississippi noted that even if this Court ultimately reversed the district court on the merits, the harm they were suffering would be irreparable if Census Bureau resources were expended elsewhere (contrary to the Census Bureau's own plan and wishes) in the meantime. *Id.* On the other hand, Louisiana and Mississippi also pointed to the disruption of

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<sup>2</sup> Louisiana recognized that it would require several days to prepare a proposed answer to Plaintiffs' 370 paragraph Amended Complaint, as required by Federal Rule of Civil Procedure 24. It attempted to protect its interests in the interim by filing the Notice and seeking to participate in the district court proceedings.



redistricting and reapportionment in 24 states that have constitutional or statutory deadlines if Plaintiffs succeeded in delaying the census tabulation, including a morass of litigation. *Id.* at 9-10; *see also id.* at ECF 204-7 and 204-8 (listing states and statutes).

The district court's preliminary injunction order contained no discussion of any of these harms to Louisiana and Mississippi, which now proceed as Amici in support of Defendants' Emergency Motion to Stay. The district court briefly discussed possible harm to the Census Bureau itself if it failed to meet a statutory deadline. TAB E at 75. But it did not discuss the diversion of Census Bureau resources away from Amici States while the August Re-Plan is blocked. There was no apparent analysis of the impact on non-parties, including the vast financial impact of special legislative sessions and litigation resulting from delayed census reporting and corresponding delays in reapportionment and redistricting. The district court's only comment on Amici States was an acknowledgement that bad weather, especially hurricanes, could disrupt census efforts along the Gulf Coast. *See* TAB E at 51–52. The failure to discuss harms to Amici States was particularly striking given that Louisiana filed its Notice of Intent to

Intervene one week before the Preliminary Injunction Order was issued (less than 24 hours after learning of this litigation), and also filed a full answer and motion to Intervene before the Preliminary Injunction Order issued, in each case detailing the serious harms to which Amici States were being subjected.

This Court should not leave those harms unaccounted for. In ruling on the Defendants' Emergency Motion, this Court must consider, *inter alia*, where injury from the district court's preliminary injunction will fall and "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Thus, this Court should consider the harms to Amici States — not only to the Plaintiffs — in determining whether the district court's injunction against the August Re-Plan should be stayed. Those considerations weigh heavily in favor of a stay.

### **CONCLUSION**

Although the COVID-19 pandemic is unprecedented, controversy over census matters is not. *See Franklin v. Massachusetts*, 505 U.S. 788, 790 (1992) ("As one season follows another, the decennial census has again generated a number of ... controversies"). Americans have argued over the best methods for conducting a Census for decades. Rather than

allowing the judgment of a single court to upend the plan of the Secretary, this Court should issue a stay such that no census-related action will be disrupted until a final judgment has been reached that such action was unlawful. Amici States are confident that the result in this case will vindicate, rather than condemn, the Defendants' decisions.

Respectfully submitted,

/s/ Elizabeth B. Murrill

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**CERTIFICATE OF COMPLIANCE**

This document complies with the word limit of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,053 words.

This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-pt Century Schoolbook.

Dated: September 28, 2020.

/s/ Elizabeth B. Murrill

TAB A

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

NATIONAL URBAN LEAGUE, *et al.*,

Plaintiff,

v.

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

Defendants.

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

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

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

4 **I. Executive Summary**

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

- 7 • Explain the magnitude, complexity, and planning involved in the 2020 decennial census,  
8 including the tightly integrated nature of census operations and processing;
- 9 • Detail the changes made to the original design in light of the COVID-19 pandemic; and
- 10 • Discuss the impacts of extending field operations past their current end date of September  
11 30, 2020.

12 **II. Qualifications**

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

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

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

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

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

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

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

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



### III. A Complex Design and Budget for the 2020 Census

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. The first operational step in conducting the 2020 Census was to create a Master Address File (MAF) that represents the universe of addresses and locations to be counted in the

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<sup>1</sup> This is known as the 2020 Census Life Cycle Cost Estimate (LCCE) Version 2.0. An executive summary of that estimate is publicly available at [https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/life-cycle-cost-estimate\\_v2.pdf](https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/life-cycle-cost-estimate_v2.pdf).

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

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

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

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

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

3       23. For the third decade, as mandated by the Census Address List Improvement Act of  
4 1994, the Census Bureau implemented the Local Update of Census Addresses (LUCA) Program  
5 to provide tribal, state, and local governments an opportunity to review and update the Census  
6 Bureau's address list for their respective jurisdictions. In 2018, participants from over 8,300  
7 entities provided 22 million addresses, of which 17.8 million (81 percent) matched to addresses  
8 already in the MAF. The Census Bureau added 3.4 million new addresses to the MAF, nationwide,  
9 as a result of LUCA.

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

21       25. During the in-office review, clerical staff had access to publicly available street-  
22 level images through Google Street View and Bing StreetSide, which provided the ability to see  
23 the fronts of structures, as if standing on the sidewalk. The technicians categorized blocks as  
24 passive, active, or on-hold. Passive blocks represented stability, meaning the technician verified  
25 the currency and accuracy of housing data in the office. Active blocks represented evidence of  
26 change and/or coverage issues in the MAF. On-hold blocks represented a lack of clear imagery.  
27 In these latter two instances, In-Field Address Canvassing was required. At the end of the initial  
28

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

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

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

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

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

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

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

**A. Advertising and Media**

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

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

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



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

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

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

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



38. The push to have a greater digital presence allowed the Census Bureau to reach a mobile audience, tailor messages, micro-target, and shift campaign ads and messages as needed. Online media, particularly search engines and social networking sites, made up a significant portion of digital connections. Nearly every person living in the United States was reached an average of 40 times throughout the campaign, from television, radio, newspaper and online ads, as well as outdoor locations such as billboards and bus stops.

39. The Census Bureau adapted its outreach strategies in response to delayed census operations due to COVID-19, increasing advertising and outreach to specific areas of the country with lower response rates. We quickly adjusted our messaging, pivoting from our original campaign to encourage people to respond online from the safety of their own homes. The use of micro-targeting allowed the Census Bureau to tailor its messaging, including directing appropriate messages to hard-to-reach communities and those who distrust government, both of which have been traditionally undercounted. This targeting continues through NRFU as we encourage the public to cooperate with enumerators. This targeting has allowed us to make each dollar spent on the advertising campaign more effective than in any previous census.

#### **B. Partnerships with Community Organizations**

40. The second major element of the Integrated Communications Program is partnerships. There are two prongs to the Partnership Program, the National Partnership Program that works from Census Bureau headquarters mobilizing national organizations, and the Community Partnership and Engagement Program, that works through the regions at the local level to reach organizations that directly touch their communities. The National Partnership Program and Community Partnership and Engagement Program are more integrated than ever before, and numbers involved for both programs significantly exceed the totals reached in prior censuses.

41. Census partners include national organizations like the National Urban League, the Mexican American Legal Defense Fund, the National Association of Latino Elected Officials (NALEO), the National Association for the Advancement of Colored People (NAACP), and the U.S. Chambers of Commerce. Major corporations also become census partners. At the local level,

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

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

## **VI. Census Step 3: Self-Response**

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

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

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

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

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

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

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

## 18 **VII. Census Step 4: Nonresponse Followup (NRFU)**

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

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

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

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

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

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

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

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

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

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

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

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

## 23        **VIII. Census Step 5: Quality Control**

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

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

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

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

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

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

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

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

#### **IX. Census Step 6: Post-data Collection Processing**

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

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

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



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

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

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

Original Dates: February 10 – August 10, 2020

Replan Dates: February 6– September 24, 2020

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

B. Produce the Final Collection Geography MAF/TIGER Benchmark

Original Dates: August 14 – September 1, 2020

Replan Dates: September 5 – 25, 2020

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

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

Original Dates: September 2 – 14, 2020

Replan Dates: September 26 – Oct 14, 2020



Once the benchmark has been created, the final collection geographic data files are produced and verified.

D. Produce and review the Decennial Response File 1 (DRF1)

Original Dates: September 15 – October 14, 2020

Replan Dates: October 14– November 8, 2020

The verified final collection geography data are integrated with the response data. Integration of these data is also verified to ensure accuracy. The next set of activities involves the standardization of the collected information.

- First we determine the final classification of each address as either a housing units or a group quarters facility. Addresses can change from a housing unit to group quarters and vice versa. Initial status is set at the start of the data collection operations as either a housing unit or group quarters. During the enumeration operations, we collect information that informs us on the classification. For a small number of addresses the classification may change, for example a housing unit may have been turned into a small group home. Based on the information collected we determine the status of every address as either a housing unit of group quarters.
- Next, we identify each unique person on the housing unit returns.
- As part of NRFU operation, we conduct a reinterview of a sample of cases to ensure quality. We incorporate the results of the reinterview.
- As part of the Internet self-response option and telephone operation, respondents can provide their data without their Census Identification Number (ID). These cases are assigned an ID which associates them to the final collection geography.
- Some group quarters will provide the information electronically. These files can contain duplicate records, so we need to remove the duplicates.
- We also determine the population count for all group quarters.

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

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

Original Dates: October 14 – November 4, 2020

Replan Dates: November 9 – 30, 2020

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

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

Original Dates: November 4 – 30, 2020

Replan Dates: December 1 – 14, 2020

Once the previous step has been verified, we incorporate administrative records data as the response data for housing units where we do not have an enumeration and have high quality administrative records data. Next we determine the status

for every housing unit as occupied, vacant or non-existent. Non-existent units are removed from future processing. For every occupied housing unit, the population count is determined. For each person with write-in responses to the race and Hispanic origin questions, we merge in the information from automated and clerical coding operations. The coding operations assign a numerical value to the write-in responses. At this point in the post-data collection activities, for every housing unit and group quarter their location (state, county, tract, block group and block) is assigned, their status (occupied, vacant or non-existent) is determined, and in occupied addresses the number of persons is known. In addition, at the person level the demographic information (relationship, age, date of birth, sex, race and Hispanic origin along with write-in code values) and at the housing unit level housing information (tenure) is determined. For the majority of these items, the respondent provided the information. However, for a small number of people and addresses the information may be missing or inconsistent with other provided information, for example the Person 1's spouse is five years old. The result of these processes is a file that contains records for every housing unit and group quarters along with person records for the people associated with the addresses. Note that some of the demographic information and response to the tenure question may be missing.

G. Produce, review and release the Apportionment Counts

Original Dates: December 1 – 28, 2020

Replan Dates: Dec 15- 31, 2020

Once the CUF has been verified, the process goes down two paths. The first path is to determine the apportionment counts. Since every housing unit and group quarters has a population count and linked to a state, we can tabulation the state level population counts. In addition, we merge in the count of the Federally Affiliated Overseas population and the results of the Enumeration of Transitory Locations for each state. To ensure accuracy in the apportionment numbers, the

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

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

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

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

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

Key objectives of the 2013 Census Test included:

- i. Evaluate the use of administrative records and third-party data to identify vacant housing units and remove them from the NRFU workload;
- ii. Evaluate the use of administrative records and third-party data to enumerate nonresponding occupied housing units to reduce the NRFU workload;
- iii. Test an adaptive design approach for cases not enumerated with administrative records and third-party data; and
- iv. Test methods for reducing the number of enumeration contact attempts as compared with the 2010 Census.

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

- 5           i. Testing various self-response modes, including the Internet,  
6           telephone, and paper, and response without a preassigned census  
7           identifier;
- 8           ii. Testing the use of mobile devices for NRFU enumeration in the field;
- 9           iii. Continuing to evaluate the use of administrative records and third-  
10          party data to remove cases (vacant and nonresponding occupied  
11          housing units) from the NRFU workload;
- 12          iv. Testing the effectiveness of applying adaptive design methodologies  
13          in managing the way field enumerators are assigned their work; and
- 14          v. Examining reactions to the alternate contacts, response options,  
15          administrative record use, and privacy or confidentiality concerns  
16          (including how the Census Bureau might address these concerns  
17          through micro- or macro-messaging) through focus groups.

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

- 20          i. Determination that the field management structure could be  
21          streamlined and the supervisor-to-enumerator ratios increased;
- 22          ii. Messaging and alerts within the operational control system provided  
23          real-time and consistent communication; and
- 24          iii. Smartphones were usable by all people—even those with little  
25          technology experience were able to adjust and adapt.

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

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

- ii. Offering an opportunity to respond without a Census ID (Non-ID Processing) and determine operational feasibility and potential workloads around real-time Non-ID Processing; and
- iii. Determining self-response and Internet response rates.

E. **2015 Census Test.** The 2015 Census Test explored reengineering of the roles, responsibilities, and infrastructure for conducting field data collection. IT also tested the feasibility of fully utilizing the advantages of planned automation and available real-time data to transform the efficiency and effectiveness of data collection operations. The test continued to explore the use of administrative records and third-party data to reduce the NRFU workload. Key objectives included:

- i. Continue testing of fully utilized field operations management system that leverages planned automation and available real-time data, as well as data households have already provided to the government, to transform the efficiency and effectiveness of data collection operations;
- ii. Begin examining how regional offices can remotely manage local office operations in an automated environment, the extent to which enumerator and manager interactions can occur without daily face-to-face meetings, and revised field staffing ratios;
- iii. Reduce NRFU workload and increase productivity with the use of administrative records and third-party data, field reengineering, and adaptive design; and
- iv. Explore reactions to the NRFU contact methods, administrative records and third-party data use, and privacy or confidentiality concerns.

F. **2016 Census Test.** The 2016 Census Test tested different supervisor-to-enumerator staffing ratios and incremental improvements and updates to the

field data collection software that guided an enumerator through interviews. The 2016 Census Test also allowed the continued evaluation of the use of administrative records to reduce the NRFU workload. Key NRFU objectives included:

- i. Refining the reengineered field operations;
- ii. Refining the field management staffing structure;
- iii. Testing enhancements to the Operational Control System and field data collection application; and
- iv. Testing scalability of Internet and Non-ID Processing during self-response using enterprise solutions.

Objectives related to self-response included:

- i. Testing provision of language support to Limited English Proficient populations through partnerships and bilingual questionnaires;
- ii. Testing the ability to reach demographically diverse populations;
- iii. Testing deployment of non-English data collection instruments and contact strategies; and
- iv. Refining Real-Time Non-ID processing methods, including respondent validation.

**G. 2018 End-to-End Census Test.** The 2018 End-to-End Census Test focused on the system and operational integration needed to support the NRFU operation. Nearly all 2020 system solutions supporting the NRFU operation were deployed. The test also allowed continued evaluation of the NRFU contact strategy. The objectives of this test included:

- i. Testing and validating 2020 Census operations, procedures, systems, and field infrastructure together to ensure proper integration and conformance with functional and nonfunctional requirements.

**H. Address Canvassing Test (conducted in the fall of 2016).** The Address Canvassing Test examined the effectiveness of the In-Office Address

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

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

#### **XI. Current Status of 2020 Census Operations**

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

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

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

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



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

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

## 5 **XII. Replanning the Census – Multiple Times**

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

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

15 79. At that time the career professional staff at the Census Bureau undertook the project  
16 of replanning each of the field operations based on our best predictions of when we could safely  
17 begin sending staff into the field to interact with the public. On April 13, 2020 staff finalized the  
18 plan to adjust field operations, and I presented the plan to the Secretary of Commerce and  
19 Department of Commerce management. The plan involved delaying our key high personal contact  
20 operations by 90 days. Update Leave, which had started on March 15 and been stopped because  
21 of COVID-19 on March 17, would resume pursuant to a new schedule beginning on June 13 and  
22 concluding on July 9. In-person Group Quarters operations which had been scheduled from April  
23 2 – June 5 would be rescheduled from July 1 – September 3, and our largest field operation, NRFU,  
24 which was scheduled from May 13- July 31, would be moved to August 11- October 31. We  
25 rescheduled self-response to conclude with the end of Field Operations so instead of ending on  
26 July 31 as indicated in the original plan, it was extended to October 31. This schedule required  
27 Congress to provide legislative relief from the statutory deadlines of December 31, 2020, for the  
28 submission of the Apportionment counts to the President, and March 31, 2021, for the delivery of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Previous procedures delivered data to the next step only when the entire country had been reviewed by multiple teams).

- We optimized employee assignments to ensure maximum staff resource usage during this shortened production period – i.e., implemented a seven-day/week production schedule.
- We compressed the time allotted for subject matter expert review and software error remediation, cutting 21 days from the schedule.

90. These changes increase the risk the Census Bureau will not identify errors during post processing in time to fix them.

91. Nevertheless, the Census Bureau is confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline following the Replan Schedule. The 2020 Census operational design is tailored to enumerate all persons, including hard-to-count populations.

92. The Census Bureau has kept the Office of Management and Budget informed about schedule developments for both the COVID Schedule and the Replan Schedule, and has filed nonsubstantive changes that have been published in the Federal Register. OMB was not required to approve the changes to the operational plan, nor did it. As with the 2018 Operational Plan, we did not ask other agencies to review or approve either the COVID Schedule or Replan Schedule.

### **XIII. Impacts of Granting a Preliminary Injunction**

93. If the Court grants an injunction, the Census Bureau will need to replan the remaining census operations again. We cannot speculate at this point exactly how we will replan the remainder of the census, as the specific actions we take will depend on when the Court rules and the specifics of the ordered actions.

94. The timing of any Court order changing the schedule is particularly important, as stated in our filing on Wednesday, September 2, 2020, where we explained that the Census Bureau has already taken steps to conclude field operations. As I will explain further, the fact that we are concluding field operations in ACOs that have completed their workload is a normal part of the NRFU operation, and is not specific to the Replan Schedule.



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

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

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

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

8           99.       Were the Court to enjoin us, we would evaluate all of the changes we made for the  
9 Replan Schedule and determine which to reverse or modify. For example, we notified participants  
10 of the cancellation of the Count Review 2 operation, originally scheduled for September 15. If our  
11 schedule were extended, we would evaluate whether to re-schedule this operation. We would go  
12 through each and every aspect of remaining operations and determine how best to use the  
13 remaining time to maximize the accuracy and completeness of the census results.

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

24          101.      As I have tried to make clear in this Declaration, the decennial census is a massive,  
25 complex, and interrelated endeavor. Particularly troubling is the prospect of continual, conflicting,  
26 and evolving court orders from this this and other courts, including appellate courts. While Census  
27 Bureau staff have demonstrated considerable resilience and flexibility during this difficult year,  
28



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

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

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

<https://2020census.gov/en/response-rates/self-response.html>

<https://2020census.gov/en/response-rates/nrfu-completion.html>

<https://2020census.gov/en/response-rates/nrfu.html>

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

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

I have read the foregoing and it is all true and correct.

DATED this \_\_\_\_ day of September, 2020

**Albert E  
Fontenot**

Digitally signed by Albert E  
Fontenot  
Date: 2020.09.05 00:14:42 -04'00'

Albert E. Fontenot, Jr.

Associate Director for Decennial Census Programs

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

United States Bureau of the Census

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

**TAB B**

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*Counsel for the State of Louisiana*

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

NATIONAL URBAN LEAGUE

Plaintiffs,

v.

WILBUR L. ROSS,

Defendants.

No. 5:20-cv-05799-LHK

**NOTICE OF INTENT TO INTERVENE  
AND REQUEST TO PARTICIPATE IN  
STATUS CONFERENCE**

Hr'g Date: Sept. 18, 2020  
Hr'g Time: 10:00 a.m.  
Judge: Hon. Lucy H. Koh  
Action Filed: Aug. 18, 2020

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that the State of Louisiana (“Louisiana”) has received notice of and intends to promptly file a motion to intervene in the above-captioned action pursuant to Federal Rule of Civil Procedure 24. In the interim, until a ruling on that motion, and particularly in light of the nature of the action, Louisiana requests permission to participate in the Status Conference set for September 18, 2020, and any subsequent hearings or conferences. In support thereof, Louisiana states as follows:

1. This action was filed one month ago, on August 18, 2020.

2. Louisiana is a sovereign State that has significant protectable interests in connection with the census, including the size of Louisiana’s Congressional delegation and Louisiana’s proportionate allocation of limited federal resources, *see* Compl. ¶¶ 300-318. Not surprisingly, federal Courts have repeatedly permitted States to intervene in disputes over the census. *See, e.g., Utah v. Evans*, 536 U.S. 452, 459 (2002).

3. According to the Census Bureau, Louisiana’s self-response rate as of September 16, 2020, is only 59.2% (placing Louisiana 46th of the 50 States) and Louisiana’s overall enumeration rate is only 86.9% (tied for 48th place). The Census Bureau estimates that Louisiana’s population is 32.8% African American, with 19.0% of Louisiana’s population living in poverty and 35% of its population living in hard-to-count neighborhoods.<sup>1</sup> Plaintiffs allege those populations are underrepresented in administrative records, such that using administrative data to fill in missing information for non-responsive households will produce a less accurate census. *See* Compl. ¶ 106. Further, Plaintiffs argue that jurisdictions — like Louisiana — with high numbers of hard-to-count citizens suffer disproportionately when compared to areas with low numbers of these same groups. Reply (ECF 130) at ECF p.11.

4. On September 5, 2020, the Court granted Plaintiffs’ motion for a TRO until a September 17, 2020, hearing on Plaintiffs’ motion for a PI. Order (ECF 84). That TRO enjoined the federal defendants from implementing their current plan for the census. *Id.* at 6-7.

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<sup>1</sup> <https://www.census.gov/quickfacts/LA>

1           5.       The status quo would have been an orderly wind-down of census operations in many  
 2 jurisdictions, with Census Bureau resources re-directed to jurisdictions — like Louisiana — that have  
 3 lagging enumeration rates, followed by cessation of data collection so as to facilitate post-processing  
 4 of the collected data. Fontenot Decl. (ECF 81-1) ¶¶ 66-67, 95-97. That status quo has been upended.  
 5 *See id.* at ¶¶ 93-97. Time has marched toward the Census Bureau’s statutory deadlines, and Census  
 6 Bureau resources have been expended in jurisdictions that have acceptable enumeration rates rather  
 7 than redirected to Louisiana.

8           6.       Last-minute interference with large government undertakings creates disruption and  
 9 harm. Not surprisingly, the Supreme Court has repeatedly rejected last-minute judicial disruption,  
 10 especially on a PI or TRO record, even when fundamental rights are affected. *See, e.g., Purcell v.*  
 11 *Gonzalez*, 549 U.S. 1, 4-5 (2006); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). The COVID-19  
 12 pandemic has not changed that rule. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct.  
 13 1205 (2020). And the census is a vastly larger and more complex operation than the elections where  
 14 the rule is most commonly applied. *See* Fontenot Decl. (ECF 81-1) ¶ 66-67, 101. Indeed, Louisiana  
 15 respectfully submits that the relief demanded by the Plaintiffs (and to an extent granted by the TRO)  
 16 will largely serve to deplete Census Bureau resources that could otherwise be expended finalizing the  
 17 census in Louisiana, and that continued micromanagement and delay harm Louisiana.

18           7.       Plaintiffs demanding court-enforced allocation of Census Bureau resources and  
 19 changes to complex census-taking logistics plainly do not represent Louisiana’s interests. Neither do  
 20 the federal Defendants, whose powers may be affected by the outcome of this litigation, but who —  
 21 unlike Louisiana — suffer no risk of losing representation or federal resource allocations.

22           8.       Louisiana could partially protect its interests by filing a separate action to compel  
 23 compliance with the statutory deadline for completing the census and the existing enumeration plan.  
 24 *See Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 599-600 (2020) (Gorsuch, J., concurring)  
 25 (reviewing multiple district court litigations and noting that “[u]niversal injunctions have little basis in  
 26 traditional equitable practice”). But such relief would inherently be partial given the effect of the  
 27 TRO on other localities, which necessarily depletes Census Bureau resources. Additionally, the delay  
 28

1 inherent in pursuing a separate action would adversely affect Louisiana's interests while census  
2 resources continue to be reallocated or depleted.

3 9. A September 30, 2020, census Re-plan deadline is approaching. If data collection is  
4 extended beyond September 30, "the Census Bureau would be unable to meet its statutory deadlines  
5 to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1,  
6 2021." (ECF 81-1) at ¶ 100. Nevertheless, on September 17, this Court continued the PI hearing to  
7 September 22, 2020, and extended its TRO until "until the Court issues its decision on the  
8 preliminary injunction motion or through September 24, 2020, whichever is sooner." Order (ECF  
9 142) at 3. In doing so, the Court noted "the complexity of the issues and the fact that 1,800  
10 documents may be produced three days before the hearing," at least some of which may require  
11 resolution of privilege disputes. *Id.* at 2-3, 14-15.

12 10. In view of the above, the disposition of this action is highly likely to impede  
13 Louisiana's ability to protect its interests. And in view of this Court's September 17 Order, the  
14 likelihood of that impediment is becoming increasingly certain. Accordingly, upon learning of this  
15 Court's September 17 Order, Louisiana promptly retained local counsel and appeared. *Cf. United*  
16 *States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1182-83 (3d Cir. 1994). Recognizing the fast pace of this  
17 litigation, Louisiana provides this abbreviated Notice of Intent to Intervene. Louisiana respectfully  
18 requests permission to participate in today's Status Conference and any subsequent conferences or  
19 hearings.

1 Dated: September 18, 2020

Respectfully submitted,

2 **BENBROOK LAW GROUP, P.C.**

3 /s/ Bradley A. Benbrook

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15 

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# TAB C EXCERPTS

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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

NATIONAL URBAN LEAGUE *et al*

Plaintiffs,

v.

WILBUR L. ROSS *et al*,

Defendants.

No. 5:20-cv-05799-LHK

**NOTICE OF MOTION AND MOTION TO  
INTERVENE BY STATES OF  
LOUISIANA AND MISSISSIPPI**

Hr'g Date: TBD

Hr'g Time: TBD

Judge: Hon. Lucy H. Koh

Location: San Jose Courthouse, Courtroom 8

Action Filed: Aug. 18, 2020

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that pursuant to Local Rule 7-1(b), the States of Louisiana and Mississippi (collectively, “State Intervenor”) respectfully move to intervene as Defendants in the above-captioned litigation without oral argument and on an expedited basis. Alternatively, the State Intervenor notice that on October 29, 2020, at 1:30 p.m., before the Hon. Lucy H. Koh, 280 South 1st Street, San Jose, or such other time as the Court may order, the State Intervenor will and do hereby move for the same relief.

This motion is brought pursuant to Federal Rule of Civil Procedure 24. As more fully set forth in the accompanying memorandum, the grounds for the motion are: (a) the motion is timely; (b) the State Intervenor has significant protectable interests; (c) this action has already impeded the State Intervenor’s ability to protect those interests, and the disposition of this action could further impede the State Intervenor’s ability to protect those interests; (d) the current parties do not adequately represent the interests of the State Intervenor; and (e) a separate lawsuit to protect the State Intervenor’s interests would plainly involves common questions of law and fact with this action, and their direct opposition to Plaintiffs’ claims satisfies the “common question” requirement for permissive intervention. Federal Courts have repeatedly permitted States to intervene in disputes over the census, *see, e.g., Utah v. Evans*, 536 U.S. 452, 459 (2002), and this Court should do so here.

This motion is based on this motion and the supporting memorandum below; the accompanying Declaration of Joseph S. St. John; and any further papers filed in support of this motion, the argument of counsel, and all pleadings and records on file in this matter.

**PLEASE TAKE FURTHER NOTICE** that counsel for Louisiana contacted counsel for the parties via email on September 22, 2020. Defendants responded: “Defendants consent, but respectfully urge the Court not to delay resolution of Plaintiffs’ motion for a preliminary injunction.” Plaintiffs responded but did not provide a position. *See* Exh. 16.

**PLEASE TAKE FURTHER NOTICE that State Intervenor urge that this motion not delay the Court’s issuance or denial of a preliminary injunction.**

**PLEASE TAKE FURTHER NOTICE** that State Intervenor’s proposed answer is attached.

## MEMORANDUM IN SUPPORT

### BACKGROUND

#### THE DECENNIAL CENSUS

The Constitution requires the federal government to conduct a census every ten years:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. Const. art. I, § 2.

Consistent with its express constitutional authority to regulate the “manner” of the census, Congress requires that the Secretary of Commerce, with the aid of the Census Bureau, “*shall*, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April.” 13 U.S.C. § 141(a) (emphasis added). The resulting “tabulation of total population by States . . . *shall* be completed within 9 months after the census date and reported by the Secretary to the President of the United States.” *Id.* at § 141(b) (emphasis added). The President must then transmit to Congress the tabulation of total population and the number of representatives to which each State is entitled:

On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President *shall* transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

2 U.S.C. § 2a (emphasis added). Additional apportionment and redistricting-related tabulations “*shall* . . . be completed, reported, and transmitted to each respective State within one year after the decennial census date.” 13 U.S.C. § 141(c) (emphasis added). In short, Congress has imposed a series of clear, mandatory deadlines, starting December 31, 2020, for the Secretary and the President to provide census tabulations to Congress and the States.

## THE 2020 CENSUS

On or about December 31, 2018, the Census Bureau released Version 4.0 of its Operation Plan. Exh. 1. The plan contemplated ceasing census data collection at the end of July 2020, *id.* at 108, 129, followed by post-processing. But the plan also contemplated “late operational design changes,” *i.e.*, “design changes [that] are required following the completion of key planning and development milestones.” *Id.* at 175. The announced mitigation strategies for such late design changes included “[p]repar[ing] for rapid response to address potential changes and make decisions based on the results of the change-control process.” *Id.* at 176. The plan further contemplated impacts from exogenous limitations on staffing and operations, and included mitigation strategies for those limitations, too. *Id.* at 141, 176.

Consistent with its Operation Plan, the Census Bureau began data collection in 2020. But on March 13, the President declared a national emergency based on the outbreak of COVID-19 and the resulting strain on the Nation’s healthcare system. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak*, 85 Fed. Reg. 15337 (Mar. 18, 2020). On March 15, the Census Bureau announced it was “adjusting some operations” to protect “the health and safety of our staff and the public” while fulfilling its “statutory requirement to deliver the 2020 Census counts to the President on schedule.” Exh. 2. The Census Bureau noted the “planned completion date for data collection for the 2020 Census is July 31, 2020,” but “***that date can and will be adjusted if necessary as the situation evolves . . .***” *Id.* (emphasis added).

A few days later, the Census Bureau announced that “2020 Census field operations [would] be suspended” due to the ongoing COVID-19 pandemic. Exh. 3. The Census Bureau explained it was doing so “to protect the health and safety of the American public, Census Bureau employees, and everyone going through the hiring process for temporary census taker positions.” *Id.* Then, on April 13, the Census Bureau announced:

[T]he Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts.

Under this plan, the Census Bureau would extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021, and redistricting data to be delivered to the states no later than July 31, 2021.

Exh. 5. Such a delay would cause significant downstream disruption to States vis-à-vis redistricting and upcoming elections, would likely trigger costly special legislative sessions, and would yield a morass of litigation. *See* Exhs. 6, 7, 14, 15, 16. Not surprisingly, although legislation was introduced, *see, e.g.*, H.R. 6800 § 70201, Congress has thus-far declined to provide relief from the statutory deadlines it had previously established.<sup>1</sup> Accordingly, on August 3, the Census Bureau announced a further update to its plan that includes “enumerator awards and the hiring of more employees to accelerate the completion of data collection and apportionment counts by [the] statutory deadline of December 31, 2020 . . . .” Exh. 8. To satisfy they statutory deadline, the Census Bureau announced that it would end field data collection by September 30, 2020. *Id.*

#### PLAINTIFFS SEEK TO PAD THE CENSUS COUNT IN CERTAIN JURISDICTIONS

On August 18, 2020, Plaintiffs — represented by a platoon of attorneys — filed suit seeking to vacate the Census Bureau’s August 3 plan, reinstate the April plan, and enjoin various federal Defendants from implementing the August 3 plan. Compl. (ECF 1). Plaintiffs’ theories are that the August 3 plan violates the Enumeration Clause, Section 2 of the Fourteenth Amendment, and the Administrative Procedure Act. *Id.* ¶¶ 330-354. Plaintiffs proceed under the remarkable theory that a federal district court can command federal officers to violate clear statutory law on a subject that the Constitution expressly assigns to Congressional regulation. *Id.* ¶ 13. In terms of the Administrative Procedure Act, Plaintiffs urge that a federal district court can set aside an agency action that it finds arbitrary and capricious and mandate an agency action that is clearly contrary to law.

On September 5, the Court granted Plaintiffs’ motion for a temporary restraining order until a September 17 hearing on Plaintiffs’ motion for a preliminary injunction. Order (ECF 84) (“TRO”). The TRO enjoined the federal Defendants from implementing their current plan for the census. *Id.* at 6-7. The status quo would have been an orderly wind-down of census operations in jurisdictions with adequate enumeration rates, with Census Bureau resources re-directed to jurisdictions — like Louisiana and Mississippi — that have lagging enumeration rates, followed by cessation of data

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<sup>1</sup> The Census Bureau also sought \$1 billion in additional funding. To the extent the cost census operations exceed the authorized appropriation, the responsible officers or employee of the United States Government may be subject to criminal sanctions. 31 U.S.C. §§ 1341, 1350.

1 collection so as to facilitate post-processing of the collected data. Fontenot Decl. (ECF 81-1) ¶¶ 66-  
2 67, 95-97.

3 That status quo has now been upended. *See id.* at ¶¶ 93-97. The Census Bureau made clear  
4 that if data collection is extended beyond September 30, “the Census Bureau would be unable to  
5 meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and  
6 redistricting data prior to April 1, 2021.” *Id.* ¶ 100. Yet the TRO included no analysis of the impact  
7 on non-parties, including the vast financial impact of special legislative sessions and litigation  
8 resulting from delayed census reporting and corresponding delays in reapportionment and  
9 redistricting. More pointedly, time has marched toward the Secretary’s statutory deadlines, and  
10 Census Bureau resources have been expended in jurisdictions that have acceptable enumeration rates  
11 rather than redirected to Louisiana and Mississippi. The effective result – even if the Court vacates  
12 the TRO or the Court is reversed on appeal – is the picking of jurisdictional winners by inflating the  
13 enumeration in certain jurisdictions while suppressing the enumeration in others by preventing the  
14 planned shift in Census Bureau resources.

15 On September 17, the Court extended the TRO “until the Court issues its decision on the  
16 preliminary injunction motion or through September 24, 2020, whichever is sooner.” Order (ECF  
17 142) (“TRO Extension”). Once again, the Court included no analysis of the impact on non-parties.  
18 *See id.* Louisiana learned of this suit and the TRO Extension that afternoon, retained local counsel,  
19 and appeared the same day. *See* Notice of Appearance (ECF 144). Recognizing the fast pace of this  
20 litigation, Louisiana filed a Notice of Intent to Intervene the next morning. Notice (ECF 146).<sup>2</sup> That  
21 Notice detailed certain of the harms to Louisiana resulting from the Court’s order; generally set forth  
22 grounds for intervention; and directed the Court to analogous cases in which the Supreme Court  
23 made clear that district courts should not disrupt complex government operations with last-minute  
24 injunctions, even when fundamental rights are at stake. *Id.* Given the rapid pace of this litigation,

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25 <sup>2</sup> Rule 24(c) requires that a motion to intervene “be accompanied by a pleading that sets out  
26 the claim or defense for which intervention is sought.” Fed. R. Civ. P. 24; *see also* Fed. R. Civ. P. 24(a)  
27 (listing pleadings). It was impracticable for Louisiana to prepare an answer to Plaintiffs’ 370  
28 paragraph Amended Complaint prior to the September 18 status conference. Louisiana therefore  
filed an abbreviated Notice of Intent to Intervene and asked to participate in order to protect its  
interests.

1 Louisiana also requested permission to participate in a Status Conference and any subsequent  
2 conferences or hearings until it could formally move to intervene. *Id.*

3 At a status conference later that day, the Court implicitly denied Louisiana's request to  
4 participate. *See* St. John Decl. ¶¶ 10-11. When the federal Defendants attempted to raise the harms  
5 apparent from Louisiana's Notice, the Court stated that Louisiana had neither a motion to intervene  
6 nor an amicus brief pending. This motion to intervene follows.

### 7 LEGAL STANDARDS

8 With respect to intervention as of right, "[o]n timely motion, the court must permit anyone to  
9 intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an  
10 interest relating to the property or transaction that is the subject of the action, and is so situated that  
11 disposing of the action may as a practical matter impair or impede the movant's ability to protect its  
12 interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). "An applicant  
13 seeking to intervene as of right under Rule 24 must demonstrate that four requirements are met: (1)  
14 the intervention application is timely; (2) the applicant has a significant protectable interest relating to  
15 the property or transaction that is the subject of the action; (3) the disposition of the action may, as a  
16 practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing  
17 parties may not adequately represent the applicant's interest." *Citizens for Balanced Use v. Montana*  
18 *Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). "[T]he requirements are broadly interpreted in  
19 favor of intervention." *Id.*

20 With respect to permissive intervention, "[o]n timely motion, the court may permit anyone to  
21 intervene who. . . has a claim or defense that shares with the main action a common question of law  
22 or fact." Fed. R. Civ. P. 24(b)(1). Additionally, "the court may permit a federal or state governmental  
23 officer or agency to intervene if a party's claim or defense is based on . . . a statute or executive order  
24 administered by the officer or agency." *Id.* at 24(b)(2). Thus, "permissive intervention requires (1) an  
25 independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact  
26 between the movant's claim or defense and the main action." *Freedom from Religion Found. v. Geithner*,  
27 644 F.3d 836, 843 (9th Cir. 2011).



## INTERESTS AND GROUNDS FOR INTERVENTION

### I. The Court should grant intervention as of right.

#### A. The motion is timely.

Plaintiffs filed their complaint last month. *See Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011) (finding a motion was timely when filed three months after plaintiff’s complaint). The proposed intervention poses no prejudice to the parties, and the State Intervenor has acted promptly after learning of this litigation and the orders imperiling their interests. This motion is therefore timely. *See United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (listing considerations for timeliness and finding district court abused its discretion in denying intervention in fifteen year old litigation where litigant’s actions and court order implicated changed circumstances); *see also United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1182-83 (3d Cir. 1994) (finding intervention in four year old litigation timely where intervention was sought 43 days after intervenor became aware its interests were imperiled).

#### B. The State Intervenor has significant protectable interests.

The State Intervenor has clear and substantial protectable interests at stake in this action. The “property” that is the subject of this action — particularly given Plaintiffs’ request for nationwide relief — includes the size of the State Intervenor’s Congressional delegations, their proportionate allocation of limited federal resources, and the Equal Protection rights of their citizens. *See Am. Compl.* ¶¶ 304-333. In particular, Plaintiffs seek to boost the census enumeration of their own jurisdictions at the expense of jurisdictions — like Louisiana and Mississippi — with lagging enumeration. *Cf. Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (abrogated on other grounds) (“By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.”).

**C. The disposition of this action could impede the State Intervenor’s ability to protect their interests.**

The risk this action poses to the State Intervenor’s interests is readily apparent. According to the Census Bureau, Mississippi’s self-response rate as of September 19 is only 59.6%, and Louisiana’s is only 59.3% (placing Mississippi and Louisiana 44th and 46th of the 50 States, respectively). Exh. 10. Likewise, Mississippi’s overall enumeration rate is only 89.6%, and Louisiana’s overall enumeration rate is only 89.1% (placing them 46th and 48th of the 50 states, respectively). *Id.*

That lagging enumeration is compounded by the Intervenor States’ demographics. Census Bureau estimates that Mississippi’s population is 37.8% African American, with 19.6% of Mississippi’s population living in poverty.<sup>3</sup> Louisiana’s population is similar: 32.8% African American, with 19.0% of Louisiana’s population living in poverty.<sup>4</sup> And 26% of Mississippi’s population and 25.5% of Louisiana’s population did not self-report in the 2010 Census, representing hard to count populations. Exhs. 12, 13. Plaintiffs allege those populations are underrepresented in administrative records, such that using administrative data to fill in missing information for non-responsive households will produce a less accurate census. *See* Compl. ¶ 106. Further, Plaintiffs argue that jurisdictions — like Mississippi and Louisiana — with high numbers of hard-to-count citizens suffer disproportionately when compared to areas with low numbers of these same groups. Reply (ECF 130) at ECF p.11. Under Plaintiffs’ theory, diversion of Census Bureau resources to increase the count in jurisdictions with adequate enumeration directly imperils the interests of the Intervenor States and their residents, who are lagging in enumeration.

As explained in Louisiana’s Notice, last-minute interference with large government undertakings itself creates serious disruption and harm. Not surprisingly, the Supreme Court has repeatedly rejected such last-minute judicial disruption, especially on a PI or TRO record, even when fundamental rights are affected. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). The COVID-19 pandemic has not changed that rule. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020). And the census is a vastly larger and more

<sup>3</sup> <https://www.census.gov/quickfacts/fact/table/MS/BZA210218>

<sup>4</sup> <https://www.census.gov/quickfacts/LA>

complex operation than the elections where the rule is most commonly applied. *See* Fontenot Decl. (ECF 81-1) ¶ 66-67, 101. Indeed, the Intervenor States respectfully submit that the relief demanded by the Plaintiffs (and to an extent granted by the TRO) will largely serve to deplete Census Bureau resources that could otherwise be expended finalizing the census in the Intervenor States, *see id.* ¶ 96, and that continued micromanagement and delay irreparably harm those States. Indeed, this Court's TRO itself implicates serious Equal Protection concerns vis-à-vis the Intervenor States' citizens. *See Bush v. Gore*, 531 U.S. 98, 105 (2000). And even if this Court is reversed on appeal, those harms will have occurred and be irremediable. On the other hand, if Plaintiffs succeed, any significant delay in enumeration will necessarily have major impacts on states like Louisiana that have state constitutional or statutory deadlines for redistricting. Exhs. 6, 7, 11, 14-17; *see also, e.g.*, La. Const. art. I sec. 6. Indeed, massive amounts of litigation — including by Plaintiffs — is likely to follow any such delay.

**D. The parties do not adequately represent the interests of the State Intervenor.**

**1. Neither Plaintiffs nor the federal Government represent the interests of the State Intervenor.**

Unlike Plaintiffs, the State Intervenor believe the December 31, 2020, statutory deadline is clear, mandatory, and constitutional; and that the April COVID Plan was contrary to law to the extent it would necessarily require violation of that deadline. To that end, the State Intervenor believe the August Re-Plan is adequately supported and was effectively required once it became clear that Congress was unlikely to grant relief from the December 31 deadline. Plaintiffs attacking the August Re-Plan clearly do not represent the State Intervenor's interests.

The federal Defendants do not represent the State Intervenor's interests, either. Although the federal Defendants have urged the Court to reject the Am. Complaint, they have made only passing reference to the vast and irreparable harm the TRO and any PI are likely to cause the States vis-à-vis suppressed enumeration and impacts to State deadlines. The federal Defendants also cannot respond to the Plaintiffs' arguments in the same manner the State Intervenor can: as sovereign States in our federal form of government. *See Sagebrush Rebellion*, 713 F.2d at 528 (stating that courts assessing the adequacy of representation consider whether the intervenor offers a necessary element to the proceedings that would be neglected).

“In assessing the adequacy of representation, the focus should be on the ‘subject of the action,’ not just the particular issues before the court at the time of the motion.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). “[T]he burden of showing inadequacy is ‘minimal,’ and the applicant[s] need only show that representation of its interests by existing parties ‘may be’ inadequate.” *Id.* (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). The Intervenor States and their distinct sovereign interests easily satisfy that standard.

**2. This Court’s findings regarding the conduct of the federal Defendants compellingly reinforce that they are inadequate to represent the interests of the State Intervenor.**

This Court’s findings vis-à-vis the federal Defendants make clear that their representation is inadequate in-fact. This Court faulted the federal Defendants for the lack of progress in this case, and – implicitly – the corresponding harm to the State Intervenor from the resulting delay. Indeed, this Court found that the federal “Defendants’ repeated denial of the existence of an administrative record and failure to make any attempt to collect the administrative record . . . have necessitated delay of the preliminary injunction hearing and extension of the TRO.” TRO Extension at 13-14. The Court concluded:

based on Defendants’ violation of the Court’s Order to Produce the Administrative Record as discussed above, an extension of the TRO is necessary for Defendants to produce the OIG production and a privilege log; for the parties to litigate objections to at least four different grounds of privilege; for United States Magistrate Judges to resolve the parties’ privilege disputes; for the parties to file supplemental briefs on the motion for preliminary injunction addressing the OIG production; and for the Court to hold a hearing on the motion for preliminary injunction and to issue a reasoned decision.

TRO Extension at 17. The Court made a similar finding at yesterday’s preliminary injunction hearing, concluding that any delay in the preliminary injunction hearing was caused by the federal Defendants’ non-compliance with the Court’s orders. Where the State Intervenor are suffering irreparable harm as a result of delay and the Court has attributed that delay to the federal Defendants’ non-compliance with Court orders, those same federal Defendants clearly cannot be said to adequately represent the State Intervenor’s interests.

1 **II. Alternatively, the Court should permit permissive intervention pursuant to Rule 24(b).**

2 Even if this Court does not grant intervention as of right, the Court should permit the State  
3 Intervenors to intervene permissively pursuant Rule 24(b). Because the Court’s jurisdiction is based  
4 on federal questions raised by Plaintiffs and the applicants for intervention do not assert additional  
5 claims, the requirement for an independent ground for jurisdiction does not apply. *Freedom from*  
6 *Religion Found.*, 644 F.3d at 844. This application is timely for the reasons argued above.

7 Louisiana and Mississippi could partially protect their interests by filing a separate action to  
8 compel compliance with the statutory deadline for completing the census and the existing  
9 enumeration plan. *See Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 599-600 (2020) (Gorsuch, J.,  
10 concurring) (reviewing multiple district court litigations and noting that “[u]niversal injunctions have  
11 little basis in traditional equitable practice”). But such relief would inherently be partial given the  
12 effect of the TRO on other localities, which necessarily depletes Census Bureau resources.  
13 Additionally, the delay inherent in pursuing a separate action would adversely affect Louisiana’s and  
14 Mississippi’s interests while census resources continue to be misallocated or depleted. Such an action  
15 would, however, clearly involve common questions of law and fact with this one.

16 Moreover, with respect to remedies, the lagging enumeration in the State Intervenors’  
17 jurisdictions and the harms articulated by State Intervenors will provide a “helpful, alternative  
18 viewpoint” to those offered by Plaintiffs that have pursued litigation causing those very harms,  
19 thereby “contribut[ing] to full development of the underlying factual issues and to the just and  
20 equitable adjudication of the legal questions presented.” *Pickup v. Brown*, 2012 WL 6024387, at \*4  
21 (E.D. Cal. Dec. 4, 2012).

22 **CONCLUSION**

23 Federal Courts have repeatedly permitted States to intervene in disputes over the census. *See*,  
24 *e.g., Utah v. Evans*, 536 U.S. 452, 459 (2002). For the foregoing reasons, the State Intervenors request  
25 the Court do so here and grant their motion to intervene as a matter of right under Rule 24(a) or,  
26 alternatively for permissive intervention under Rule 24(b).

1 Dated: September 23, 2020

Respectfully submitted,

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*Counsel for the State of Louisiana*

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

NATIONAL URBAN LEAGUE *et al*,

Plaintiffs,

v.

WILBUR L. ROSS *et al*,

Defendants.

No. 5:20-cv-05799-LHK

**DECLARATION OF JOSEPH S. ST. JOHN**  
**ISO LOUISIANA AND MISSISSIPPI'S**  
**MOTION TO INTERVENE**

Judge: Hon. Lucy H. Koh  
Action Filed: Aug. 18, 2020

**DECLARATION OF JOSEPH S. ST. JOHN**

I, Joseph Scott St. John, am employed by the Louisiana Department of Justice; I serve as counsel to the State of Louisiana in connection with the above-captioned matter. I make this declaration in support of Louisiana and Mississippi's Motion to Intervene. I am competent to testify as to the matters set forth herein.

1. Attached hereto as Exhibit 1 is a true and accurate copy of excerpts from 2020 Census Operational Plan Version 4.0 as downloaded from the Census Bureau's website.<sup>1</sup>

2. Attached hereto as Exhibit 2 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.<sup>2</sup>

3. Attached hereto as Exhibit 3 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.

4. Attached hereto as Exhibit 4 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.

5. Attached hereto as Exhibit 5 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.

6. Attached hereto as Exhibit 6 is a true and accurate copy of a document as downloaded from the National Conference of State Legislatures's website.<sup>3</sup>

7. Attached hereto as Exhibit 7 is a true and accurate copy of a document as downloaded from the National Conference of State Legislatures.<sup>4</sup>

8. Attached hereto as Exhibit 8 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.

9. Attached hereto as Exhibit 9 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.

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<sup>1</sup> <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf>

<sup>2</sup> <https://www.census.gov/newsroom/press-releases.html>

<sup>3</sup> <https://www.ncsl.org/research/redistricting/state-redistricting-deadlines637224581.aspx>

<sup>4</sup> <https://www.ncsl.org/research/redistricting/2020-census-delays-and-the-impact-on-redistricting-637261879.aspx>



1           10.     On September 18, 2020, I attempted to appear via Zoom at a status conference in  
2 this case. The Courtroom Deputy did not admit me into the proceeding with counsel for the parties.  
3 When the Courtroom Deputy asked any counsel who had been missed to click the “raise hand”  
4 button on Zoom, I did so, but I was still not admitted. I therefore watched the proceeding as a  
5 member of the public.

6           11.     Had I been physically present in a courtroom or been permitted to participate in the  
7 Zoom hearing, I would have made my presence known and sought to be heard for the purpose of  
8 protecting the State of Louisiana’s interests, including by oral motion to intervene.

9           12.     I am informed and believe that Louisiana’s local counsel also attempted to participate  
10 in the September 18, 2020, status conference via Zoom.

11           13.     On September 22, 2020, I watched the preliminary injunction hearing in this  
12 proceeding as a member of the public.

13           14.     Attached hereto as Exhibit 10 is a true and accurate copy of a document downloaded  
14 from the Census Bureau’s website.

15           15.     Attached hereto as Exhibit 11 is a true and accurate copy of a document downloaded  
16 from the National Conference of State Legislatures’ website.

17           16.     Attached hereto as Exhibit 12 is a true and accurate copy of a document downloaded  
18 from the National Conference of State Legislatures’ website.

19           17.     Attached hereto as Exhibit 13 is a true and accurate copy of a document downloaded  
20 from the National Conference of State Legislatures’ website.

21           18.     Attached hereto as Exhibit 14 is a true and accurate copy of a media report.<sup>5</sup>

22           19.     Attached hereto as Exhibit 15 is a true and accurate printout from the website of the  
23 Louisiana legislature.

24           20.     Attached hereto as Exhibit 16 is a true and accurate printout of correspondence  
25 between counsel.

26  
27  
28           <sup>5</sup> [https://www.nola.com/news/politics/article\\_b18b9f36-212b-5cd5-82db-9685c9123a26.html](https://www.nola.com/news/politics/article_b18b9f36-212b-5cd5-82db-9685c9123a26.html)

21. Attached hereto as Exhibit 17 is a true and accurate printout of a document obtained from the website of the Louisiana legislature.

22. Further declarant sayeth naught.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA AND THE STATE OF LOUISIANA THAT THE FOREGOING IS TRUE AND CORRECT.

Executed in New Orleans, Louisiana this 23<sup>rd</sup> day of September 2020.

/s/ Joseph S. St. John

E IBIT 1

# 2020 Census Operational Plan

*A New Design for the 21st Century*

Issued December 2018  
Version 4.0



United States®  
**Census**

U.S. Department of Commerce  
Economics and Statistics Administration  
U.S. CENSUS BUREAU

United States®  
**Census**  
**2020**

**Other Self-Response:**

- ✓ Text messaging will not be used as a data collection mode.
- ✓ HUs from whom an Internet questionnaire is not received will be mailed a paper questionnaire.
- ✓ ISR will not be part of the Group Quarters (GQ) Operation enumeration. While GQ enumeration cannot prevent GQ residents from responding via the Internet, this method of data collection is not part of 2020 GQ enumeration plans.
- ✓ The 2020 Census printing and mailing workload as part of the OSR strategy is identified in the Life Cycle Cost Estimate.
- ✓ The response rate projections for all self-response modes are in the Life Cycle Cost Estimate that was released in December 2017 and will be updated for release in early 2019.

**Design Issues to Be Resolved**

There are no remaining design issues to be resolved for this operation.

**Cost and Quality**

Investment in ISR is projected to influence (reduce ↓ or increase ↑) the 2020 Census overall costs in the following ways:

- ↓ Reduced amount of self-response through paper questionnaire.
- ↓ Increased self-response, which will decrease the NRFU workload, thereby reducing field costs.

In addition:

- ↑ ISR is expected to increase the workload for CQA.

Impacts of this operation on overall 2020 Census quality include the following:

- ↑ Increase in overall self-response rates.
- ↑ Real-time edits to respondent data.
- ↑ More complete self-response for large households.
- ↑ Potential increase in self-response from traditionally hard-to-count populations.

**Risks**

Major concerns for the ISR Operation are covered by the 2020 Census risks listed in Chapter 6.

**Milestones**

Date	Activity
March 2016	Begin the 2016 Census Test.
June 2017	Release the ISR Detailed Operational Plan.
March 2017	Begin the 2017 Census Test.
March 2018	Begin the 2018 End-to-End Census Test.
March 2020	Begin 2020 Census ISR data collection.
July 2020	End 2020 Census ISR data collection.

**5.5.5 Non-ID Processing**

Detailed Planning Status:	<b>In Production DOP published in FY 2016</b>
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**Purpose**

The Non-ID Processing (NID) Operation is focused on making it easy for people to respond anytime, anywhere to increase self-response rates. The operation accomplishes this by:

- Providing response options that do not require a unique Census Identifier (ID).
- Maximizing real-time matching of NID respondent addresses to the census living quarters (LQs) address inventory.
- Accurately assigning nonmatching addresses to census basic collection units.

**Changes Made Since Version 3.0 Operational Plan Release:**

There have been no major changes to this operation.

**Lessons Learned**

Based on lessons learned from the 2010 Census studies and reviews, the following recommendations were made:

- The automated and manual NID processes should be planned and developed in parallel, rather than sequentially, as was done when preparing for the 2010 Census NID Operation.
- Involve the National Processing Center (NPC) throughout the life cycle of the 2020 Census NID Process to help prepare for the Clerical Processing component of the operation.

- 
- ✓ Proxy responses are used in the NRFU Operation when a resident of the nonresponding address is not available or cannot be found. Proxy responses will be allowed after the third unsuccessful contact attempt to reach a resident of a nonresponding address. Proxy responses are allowable on the first unsuccessful contact attempt for addresses deemed to be vacant or not meeting the definition of a HU.
  - ✓ Based on results from the 2016 Census Test, the following staffing structure will be used: Census Field Manager, Census Field Supervisor, and enumerator. The ratio of Census Field Supervisor to enumerator will be 1:20.
  - ✓ Administrative records and third-party data will be used for the identification of addresses in the NRFU workload deemed to be vacant or delete to reduce contact attempts to those addresses before any contact attempts. Administrative records and third-party data will be used for the identification and enumeration of addresses deemed to be occupied after one unsuccessful attempt at in-person enumeration. All other addresses in the NRFU workload will be subject to up to six contact attempts with cases becoming proxy eligible after the third unsuccessful attempt. Refinement of this contact strategy (e.g., additional contact attempts) may be possible if necessary to ensure an efficient and successful operational close-out.
  - ✓ Field verification will be conducted using NRFU enumerators with case assignment interspersed with their NRFU assignments. For Field Verification, enumerators will be expected to locate the problem address and collect GPS coordinates for the HU using the automated instrument. There does not need to be contact with HUs.
  - ✓ The operational design for the NRFU quality assurance component includes the following:
    - Use of an improved contact strategy to increase the likelihood of self-response.
    - Use of an automated data collection application for conducting NRFU.
    - Use of real-time paradata and editing capabilities to validate and ensure data quality.
    - Use of Best-Time-to-Contact model in the assignment optimization to increase the likelihood of finding respondents at home.
  - Use of Notices of Visit to push to self-response.
  - Use of follow-up postcard mailings to encourage self-response in the case of administrative records and third-party data vacant/nonexistent removal and occupied removal.
  - A reinterview component designed to deter and detect enumerator falsification.
  - ✓ All units identified as vacant or delete will be verified by either a proxy response or a second enumerator. Vacants from self-response will be verified by an enumerator.
  - ✓ The Census Bureau will have the capability to keep cases active throughout the enumeration process to aid in obtaining adequate response rates.
  - ✓ Enumerators, as part of their normal work on NRFU assignments, will not be looking for missing addresses and adding them to their workload, but they will have the capability to add addresses and enumerate those HUs if appropriate. Staff in the Area Census Offices will also have the capability to add addresses to the NRFU workload that have been deemed to be missing from the address list and require enumeration.
  - ✓ Case assignments are optimized based on the location of enumerators, the location of the NRFU cases, the hours the enumerators are available to work, and Best-Time-to-Contact probabilities associated with the NRFU cases.
  - ✓ The NRFU field data collection will occur from early-April 2020 through the end of July 2020. Field work in preidentified geographic areas surrounding colleges or universities with concentrations of off-campus housing will begin in early April. This is necessitated in areas where the spring semester will conclude prior to mid-May when the bulk of the NRFU workload begins.
  - ✓ NRFU will receive supplemental addresses from sources such as LUCA appeals, Count Review, New Construction, and a refresh from the spring 2020 Delivery Sequence File from the Postal Service. Other sources of cases contributing to the NRFU workload include, but are not limited to, Reverse Check-ins, SRQA cases, and Self-Responding Vacant cases.
-

- ✓ The tabulation system supporting the ACS will be generalized and enhanced to support both the ACS and the 2020 Census. The generalized system will be scaled to support both ACS and decennial tabulation needs during the 2020 Census production.
- ✓ The 2020 Census data products will be determined following the analysis of the feedback from the Federal Register Notice “Soliciting Feedback from Users on 2020 Census Data Products” and its extension and consultation with the Data Stewardship Executive Policy. For the 2018 End-to-End Census Test, the prototype P.L. 94-171 is the only data product that will be tabulated and released by April 1, 2019.

### **Design Issues to Be Resolved**

There are no remaining design issues that need to be resolved for this operation.

### **Cost and Quality**

Investment in DPD is projected to have minimal influence on the overall cost and quality of the 2020 Census.

### **Risks**

The 2018 and 2020 Disclosure Avoidance System (DAS) algorithms are highly complex, under active development, address subtle though precisely stated mathematical privacy issues, and solve genuinely novel outstanding scientific problems. All of these factors create an environment where only rigorous software engineering standards, code review, and formal external auditing of internal code can be expected to reasonably remove major bugs from the code. In a highly unlikely scenario, a coding error may lead to noise not being infused in some subset of census geographies, implying that each datum released in these geographies in the final Microdata Detailed File would constitute a Title 13 violation. **IF** there are errors in the implementation of the DAS software, **THEN** it might result in Title 13 data being improperly disclosed.

Congress establishes the method of calculating apportionment. Also, legislation has been proposed (but not passed) in recent decades that might have provided statehood (or at least a seat in the U.S. House of Representatives) to the District of Columbia or Puerto Rico. **IF** any bill that affects either the apportionment

calculation method or the allocation of U.S. House seats is passed before the legal apportionment results deadline of December 31, 2020, **THEN** the Census Bureau will need to change the 2020 Apportionment calculation programs to accommodate this change, and if it happens at the last minute, the 2020 Apportionment schedule and workflow must be condensed and/or refactored, potentially jeopardizing the quality assurance of the 2020 Apportionment results.

### **Milestones**

Date	Activity
March 2014	Release the concept of operations for a more customer-centric, streamlined, and flexible enterprise solution for data dissemination.
July 2014	Establish the Center for Enterprise Dissemination Services and Consumer Innovation.
October 2017	Release the DPD Detailed Operational Plan (delayed).
February 2019	Complete comprehensive review of data products and finalize 2020 Census Data Products Suite.
December 2018–April 1, 2019	Deploy DAS tabulation system and dissemination platform for production and release of the P.L. 94-171 Redistricting Data Prototype.
December 2020	Provide apportionment counts to the President of the United States.
By April 1, 2021	Complete the release of the P.L. 94-171 Redistricting Data to the states, the District of Columbia, and Puerto Rico.
May 2021–September 2022	Deliver 2020 Census statistical data to the enterprise data dissemination platform for the release of quick tables and API.
April 2023	Complete release of 2020 Census data products.

### **5.6.2 Redistricting Data Program**

Detailed Planning Status:	<b>In Production</b> <b>DOP published in FY 2016</b>
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#### **Purpose**

The purpose of the 2020 Census Redistricting Data Program (RDP) is to provide to each state the legally required Public Law (P.L.) 94-171 redistricting data tabulations by the mandated deadline of 1 year from Census Day: April 1, 2021.



of using administrative records in characteristic imputation.

Probability 3 (Moderately likely)	Impact 4 (Substantial impact)	Exposure level <b>MEDIUM</b>
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Mitigation Strategies include the following:

- Identify external stakeholders that have an interest in Census Bureau policies regarding administrative record and third-party data usage.
- Develop a stakeholder communications plan for identified external stakeholders.
- Regularly communicate to and seek feedback from identified external stakeholders on design decisions and research and testing results related to the use of administrative records and third-party data for the 2020 Census.
- Assess impacts of any changes to the design based on feedback from external stakeholders and update plans accordingly.
- Monitor external factors and policies that may impact the Census Bureau's planned use of administrative records and third-party data for the 2020 Census.

Changes since the last version of the 2020 Census Operational Plan:

The Cost Impact rating was lowered from 5 to 4. Even though there would be a cost increase associated with a higher Nonresponse Followup workload, there are processes in place to assist with rapidly up-scaling the operation as necessary. This changed the overall Impact rating to 4.

## 6.4 OPERATIONS AND SYSTEMS INTEGRATION

Due to the critical timing of 2020 Census operations and the potential impact of systems not being ready to support them, managers must have an accurate gauge of the progress made towards integrating the various operations and systems that support the 2020 Census. Progress towards integration must take place throughout the planning, development, and testing stages of the operations and systems.

**IF** the various operations and systems are not properly integrated prior to implementation,

**THEN** the strategic goals and objectives of the 2020 Census may not be met.

Probability 3 (Moderately likely)	Impact 4 (Substantial impact)	Exposure level <b>MEDIUM</b>
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Mitigation Strategies include the following:

- Leverage Decennial Information Technology Division's Systems Engineering and Integration (SEI) System Development Life Cycle system readiness/phase gate review process, the SEI program metrics dashboard, and various 2020 Census governance forums to provide a current sense of where all solutions providers are in the system development process and to raise issues quickly for corrective action.
- Conduct regularly scheduled reviews of the 2020 Census operations.
- Ensure all operational areas and their associated Integrated Project Teams have adequate resources assigned to integration efforts and required project artifacts are developed and approved.
- Ensure each planned census test has an approved Goals, Objectives, and Success Criteria document, adequate resources to plan and conduct are identified and assigned, a detailed test plan is developed and approved (including key milestones and roles and responsibilities), and deadlines are being met through a regular management review with the test team.
- Ensure adequate technical review sessions are planned and conducted in conjunction with SEI staff, including the systems engineers responsible for developing the solutions).
- Create an operational integration design team to support the 2020 Census through creation and distribution of artifacts which depict integration between the operations.

## 6.5 LATE OPERATIONAL DESIGN CHANGES

After key planning and development milestones are completed, stakeholders may disagree with the planned innovations behind the 2020 Census and propose modifications to the design, possibly resulting in late operational design changes.



**IF** operational design changes are required following the completion of key planning and development milestones, **THEN** costly design changes may have to be implemented, increasing the risk for not conducting a timely and successful 2020 Census.

Probability 3 (Moderately likely)	Impact 4 (Substantial impact)	Exposure level <b>MEDIUM</b>
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Mitigation Strategies include the following:

- Identify internal and external stakeholders that have an interest in the 2020 Census operational design.
- Develop a stakeholder communications plan for identified internal and external stakeholders.
- Regularly communicate with and seek feedback from identified external stakeholders on design decisions and research and testing results.
- Monitor external factors and policies that may impact the Census Bureau's planned innovations for the 2020 Census operational design.
- Establish a change-control management process to assess impacts of change requests to facilitate decision-making.
- Prepare for rapid response to address potential changes and make decisions based on the results of the change-control process.

## 6.6 INSUFFICIENT LEVELS OF STAFF WITH SUBJECT-MATTER SKILL SETS

The 2020 Census consists of programs and projects that require subject-matter skill sets to complete the work. The potential of not having the necessary staffing levels and staff with the appropriate competencies to satisfy objectives is an ongoing concern. This is the result of a lack of consistent strategic workforce planning throughout the 2020 Census life cycle. Staff with the necessary skill sets leave due to retirements and movement within and out of the Decennial Census Programs Directorate, hiring freezes and processes that delay or cause an inability to recruit and hire candidates that possess the knowledge, skills, and abilities to perform core functions of the 2020 Census, and budgetary constraints. In addition, with increasing numbers of staff eligible

for retirement before 2020, there is also the potential of losing valuable institutional knowledge, as employees in key positions may not be accessible to share their knowledge and participate in succession planning.

**IF** the 2020 Census does not hire and retain staff with the necessary subject-matter skill sets at the levels required, **THEN** the additional staffing shortages may occur, making it difficult to meet the goals and objectives of the 2020 Census.

Probability 3 (Moderately likely)	Impact 4 (Substantial impact)	Exposure level <b>MEDIUM</b>
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Mitigation Strategies include the following:

- Identify high priority competencies and staffing positions needed for the work of the 2020 Census.
- Decennial Directorate Support Services Office will continue to collaborate with the Human Resources Division to facilitate hiring.
- Employ various strategies to facilitate staff retention, development, and knowledge-sharing.

## 6.7 ABILITY OF IT SOLUTIONS TO SUPPORT THE 2020 CENSUS

There are 52 systems supporting the 2020 Census, including enterprise systems, vendor-developed systems, and in-house-developed systems. There is the possibility that one or more of these systems does not address all of the baselined requirements and does not function as required, negatively impacting the operations being supported. Proper development and testing is needed for each system, as well as integration testing between systems, in order to ensure a successful deployment of the IT solutions supporting the implementation of the 2020 Census operations.

**IF** the IT solutions supporting the 2020 Census cannot meet the baselined requirements or workloads, **THEN** the systems may require substantial modifications or manual workarounds may have to be developed, adding complexity and increasing risk for a timely and successful 2020 Census.

E IBIT 2

# Census Bureau Statement on Modifying 2020 Census Operations to Make Sure College Students are Counted

Census Bureau also announces updates to special operations, assistance program and early nonresponse followup.

**MARCH 15, 2020**

**RELEASE NUMBER CB20-RTQ.06**

**MARCH 15, 2020** — The U.S. Census Bureau continues to carefully monitor the coronavirus (COVID-19) situation and follow the guidance of federal, state and local health authorities. We are adjusting some operations as outlined below with two key principles in mind: protecting the health and safety of our staff and the public and fulfilling our statutory requirement to deliver the 2020 Census counts to the President on schedule.

As of today, over 5 million have responded online to the 2020 Census. Currently, the planned completion date for data collection for the 2020 Census is **July 31, 2020**, however, that date can and will be adjusted if necessary as the situation evolves in order to achieve a complete and accurate count.

**It has never been easier to respond on your own, whether online, over the phone or by mail—all without having to meet a census taker.**

**We are adjusting operations to make sure college students are counted.**

- College students living in on-campus housing are counted through their university as part of our Group Quarters Operation, which counts all students living in university owned housing. In addition to college dormitories, the Group Quarters Operation also includes places like nursing homes, group homes, halfway houses and prisons.

- During our recent 2020 Census Group Quarters Advance Contact operation we contacted college/university student housing administrators to get their input on the enumeration methods that will allow students to participate in the 2020 Census.
- Nearly half, about 47 percent, have chosen the eResponse methodology and about 7 percent chose paper listings, both of which provide the Census Bureau directory information (electronically or via paper records) about each student. About 35 percent, however, chose drop-off/pick-up which allows students to self-respond using an Individual Census Questionnaire (or ICQ). We are contacting those schools to ask whether they would like to change that preference in light of the emerging situation.
- In general, students in colleges and universities temporarily closed due to the COVID-19 virus will still be counted as part of this process. Even if they are home on census day, **April 1**, they should be counted according to the residence criteria which states they should be counted where they live and sleep most of the time. We are asking schools to contact their students and remind them to respond.
- Per the Census Bureau's residence criteria, in most cases students living away from home at school should be counted at school, even if they are temporarily elsewhere due to the COVID-19 pandemic.

**We're working with group quarters administrators to ensure we count their residents.**

- The 2020 Census is designed to offer multiple ways to respond. We're encouraging administrators of group housing to choose a way to count their residents that requires less in-person contact.
- For the "group quarters" operation, which counts people in nursing homes, college dorms, prisons and other institutional living facilities, we offer a myriad of ways to respond, such as via eResponse, paper listing or self-enumeration by the facility.

- We're contacting all group quarters administrators that have requested an in-person visit and asking them to consider an eResponse or offering to drop off and later pick up paper forms to minimize in person contact with our census staff.

**We're working with service providers to determine the best way forward.**

- We are working with service providers at emergency and transitional shelters, soup kitchens and regularly schedule mobile food vans to adapt plans to count the populations they serve.
- The plan has been to interview each person served a meal or staying at the facility at a date and time the service providers choose **between March 30 and April 1**.
- We are now contacting the service providers to determine whether they will be open **between March 30 and April 1** and whether they would be able to provide a paper listing of census response data for each person served or staying at the facility instead.

**We're delaying the start of our Mobile Questionnaire Assistance program.**

- We plan to offer assistance with responding to the 2020 Census at events and locations where people naturally gather as part of our Mobile Questionnaire Assistance program.
- We now plan to offer this assistance fully across the country **on April 13**, delaying from the previously planned start of **March 30**.

**We're delaying our Early Nonresponse Followup operation.**

- In this operation, census takers begin following up with households that haven't responded yet around some colleges and universities. By starting early, we can count households in areas with off-campus housing before the end of the spring semester when students may leave for another residence. We're delaying the start of this effort **from April 9 to April 23**.

The Census Bureau is also making changes to its paid media campaign, earned media efforts, and partnership outreach efforts to adapt to changing conditions while continuing to promote self-response. The key message right now for anyone with questions about how COVID-19 will affect the 2020 Census: **It has never been easier to respond on your own, whether online, over the phone or by mail—all without having to meet a census taker.**

We will continue to monitor the situation, take appropriate steps in consultation with public health authorities and provide ongoing updates.

## Contact

Public Information Office

[301-763-3030](tel:301-763-3030)

[pio@census.gov](mailto:pio@census.gov)

## Related Information

PRESS KIT | 2020

## COVID-19

The U.S. Census Bureau is monitoring coronavirus (COVID-19) carefully, and the health, safety and well-being of the public and our staff is our top priority.

E IBIT 3

## The 2020 Census is Happening Now. Respond Today.

FOR IMMEDIATE RELEASE: WEDNESDAY, MARCH 18, 2020

# U.S. Census Bureau Director Steven Dillingham on Operational Updates

MARCH 18, 2020

RELEASE NUMBER CB20-RTQ.08

**MARCH 18, 2020** — Less than one week ago, the 2020 Census fully kicked off, and invitations continue to arrive in mailboxes across the nation. **As of this morning, more than eleven million households have responded. America is stepping up to shape our future and ensure families and communities are counted.**

Beginning today, in support of guidance on what we can all do to help slow the spread of coronavirus, 2020 Census field operations will be suspended for two weeks until April 1, 2020. The Census Bureau is taking this step to help protect the health and safety of the American public, Census Bureau employees, and everyone going through the hiring process for temporary census taker positions.

During this pause in field operations, the Census Bureau will continue to evaluate all 2020 Census operations. Should any additional adjustments need to be made, the Census Bureau will communicate these changes broadly and promptly.

In late May, census takers around the nation will begin visiting households that have not yet responded to the 2020 Census to help complete the count. As we continue to monitor the evolving COVID-19 outbreak, we will adjust census taker and survey operations as necessary in order to follow the guidance of federal, state and local health authorities.

The public is strongly encouraged to respond to the 2020 Census online using a desktop computer, laptop, smartphone, or tablet, and can also respond by phone or mail. Everyone should respond to the 2020 Census as soon as they receive their invitation — and when they're finished, they can make sure their friends, families and social networks know about the importance of responding.

It has never been easier to respond to the census, and the 2020 Census will count everyone accurately. We recognize that many people plan to access the 2020 Census through other response modes, such as phone or paper, which is why the 2020 Census has such a nimble design.

On March 15, 2020, the Census Bureau announced several adaptations to our group quarters operations to accommodate recent scheduling changes on college campuses as leadership takes action to keep students and faculty safe.

For all other Census Bureau household and economic surveys separate from the 2020 Decennial Census, Bureau personnel will begin using phone calls instead of in-person visits. In the limited number of instances where an in-person visit is necessary, we are working closely with public health authorities to ensure each visit is accomplished safely.

Once again, we encourage everyone to respond online today at [2020Census.gov](https://2020census.gov). With the flexibility and support of the American people, we will achieve a complete and accurate count which helps guide funding decisions for things like hospitals, roads and emergency services. Respondents can also respond by calling the number provided in their invitation or by mail once they have received a paper form.

###

## Contact

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Public Information Office  
301-763-3030  
[pio@census.gov](mailto:pio@census.gov)



E IBIT 4

# Census Bureau Update on 2020 Census Field Operations

MARCH 28, 2020

RELEASE NUMBER CB20-RTQ.14

**MARCH 28, 2020** — Based on continuing assessments of guidance from federal, state and local health authorities, the U.S. Census Bureau is suspending 2020 Census field operations for two additional weeks to April 15, 2020. The Census Bureau is taking this step to help protect the health and safety of the American public, Census Bureau employees, and everyone who will go through the hiring process for temporary census taker positions.

The Census Bureau continues to evaluate all 2020 Census field operations, and will communicate any further updates as soon as possible.

The 2020 Census is open for self-response online at [2020Census.gov](https://2020census.gov/en.html) (<https://2020census.gov/en.html>), over the phone (<https://2020census.gov/en/contact-us.html>) by calling the number provided in your invitation, and by paper through the mail.

###

## Contact

Public Information Office

[301-763-3030](tel:301-763-3030)

[pio@census.gov](mailto:pio@census.gov)

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E IBIT 5

# The 2020 Census is Happening Now. Respond Today.

FOR IMMEDIATE RELEASE: MONDAY, APRIL 13, 2020

## U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19

APRIL 13, 2020

RELEASE NUMBER CB20-RTQ.16

APRIL 13, 2020 — The 2020 Census is underway and more households across America are responding every day. Over 100 million households have responded to date, representing over 80 percent of all households in America. In light of the COVID-19 outbreak, the U.S. Census Bureau is adjusting 2020 Census operations in order to

- Protect the health and safety of the American public and Census Bureau employees.

- Implement guidance from federal, state and local authorities.

- Ensure a complete and accurate count of all communities.

The Census Bureau temporarily suspended 2020 Census field data collection activities in March. Steps are already being taken to reactivate field offices beginning June 1, 2020, in preparation for the resumption of field data collection operations as quickly as possible following June 1.

In-person activities, including all interaction with the public, enumeration, office work and processing activities, will incorporate the most current guidance to promote the health and safety of staff and the public. This will include recommended personal protective equipment use and social distancing practices.

lengthy, thorough and scientifically rigorous process to produce the apportionment counts, redistricting information and other statistical data products that help guide hundreds of billions of dollars in public and private sector spending per year.

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

Under this plan, the Census Bureau would extend the window for field data collection and self-response to October 1, 2020, which will allow for apportionment counts to be delivered to the President by April 10, 2021, and redistricting data to be delivered to the states no later than July 1, 2021.

###

## Contact

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Public Information Office

301-763-3030

[pio@census.gov](mailto:pio@census.gov)

## Related Information

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 2020 Census Operational Adjustments Due to COVID-19

E IBIT 6



OUR AMERICAN STATES



The NCSL Podcast

# 2020 Census Delays and the Impact on Redistricting

9/9/2020



## Introduction

***Note:** On August 3, 2020, the U.S. Census Bureau announced that both self-response and field data collection will end by September 30—a change from October 31, the delayed deadline announced on April 13, 2020 due to the COVID-19 pandemic. Both of these dates are well past the originally planned July 31 end date to data collection.*

*The April 13 announcement included a request to Congress for authority to delay the release of census data to be used for congressional apportionment by 120 days, to April 30, 2021, and census data to be used for redistricting by 120 days as well, to July 31, 2021.*



*The Bureau's reversal in its operational plans means a cut-back in data collection by a month and an accelerated pace to complete data collection. It signaled the Bureau's intention to deliver apportionment counts by the statutory deadline of December 31, 2020. A formal announcement has not addressed the release of data for redistricting, however informally it is believed that the Census Bureau plans to get the redistricting data out by April 1, 2021.*

*Information provided below was developed with the requested delays in mind. It is unclear whether Congress will take action on the delays.*

The U.S. Census Bureau on April 13, 2020, delayed its field operations by about 90 days due to the COVID-19 pandemic, and at the same time asked Congress for authority to delay the release of census data by 120 days. If granted, the delay would be the first in at least 100 years. The requested delay in releasing data stems from the delay in field operations and relates to two federally mandated deadlines:

Under current law, data to be used for reapportioning districts in the U.S. House of Representatives is to be delivered to the president by Dec. 31, 2020 (13 U.S.C. § 141). This data determines how many congressional seats each state will have for the following 10 years. **The request would delay this deadline until April 30, 2021.**

Under current law, data to be used by the states for redistricting legislative and congressional seats is due to the states no later than March 31, 2021 (13 U.S.C. § 141). In previous decades, this data has been provided to the states on a rolling basis, starting at least six weeks prior to the deadline. **The request would delay this deadline until July 31, 2021.**

Congress will decide whether to grant the request for these delays. Its considerations may include:

Whether the data release dates can be moved up without jeopardizing health and safety, or the quality and accuracy, of the data.

Whether the rollout of state data will occur over the course of six weeks leading up to the July 31, 2021, deadline, or if it needs to be statutorily set.

What impact these delays will have on the states.

In all states, a delay in the release of data will compress the timeline for redistricting. For some states, the requested delays would be uncomfortable; for others, the delays would mean deadlines that are established in state constitutions or statutes will be impossible to meet. States that will have the most difficulty with the requested delays include:

Two states that have legislative elections scheduled in November 2021 (New Jersey and Virginia).

Six states with constitutional redistricting deadlines in 2021 (California, Colorado, Ohio, Missouri, South Dakota and Maine).

Four states with statutory redistricting deadlines in 2021 (Delaware, Iowa, Vermont and Washington).

Fourteen states with constitutions calling for redistricting in the year after the census, effectively meaning in 2021 (Alabama, Arkansas, Connecticut, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon and Wisconsin).

Note that in most states, the regularly scheduled legislative session for 2021 is anticipated to end well before July 31.

This webpage addresses the following topics each in its own accordion folder:

### States With Legislative Elections Regularly Scheduled for November 2021

Two states, New Jersey (N.J. Const., Art. IV, Sec. III, Para. 1) and Virginia (Va. Const. Art. II, Section 6), have legislative elections scheduled for November 2021. In previous decades, any states with November legislative elections have received their data earlier than other states so they could complete legislative redistricting in time for candidate filing.

Even if census data is provided to these states as early as the middle of June, preparing for a November election is nearly impossible. These states might ask a court for relief, as Virginia did in the 1981 case of *Cosner v. Dalton*. Under this scenario, the state would hold elections under current maps in 2021, under the newly redrawn maps in a special election in 2022, and again during its regularly scheduled legislative elections in 2023.

### States With Constitutional Redistricting Deadlines in 2021

California (Aug. 15, Cal Const, Art. XXI § 2).\*

Colorado (Sept. 1, Colo. Const. Art. V, Section 48.2, Colo. Const. Art. V, Section 44.4).

Ohio (Sept. 1, Oh. Const. Art. XI, § 1 and Sept. 30, Oh. Const. Art. XIX, § 1).

South Dakota (Dec. 1, S.D. Const. Article III, § 5).

Missouri (Mo. Const. Art. III, § 3).

Maine (June 11, Me. Const. Art. IV, Pt. 1, § 3, Me. Const. Art. IV, Pt. 2, § 2, Me. Rev. Stat. tit. 21-A, § 1206).

Washington (Nov. 15, Wash. Const. Art. II, § 43).

In California\*, Maine and Ohio, with relatively early constitutional deadlines, census delays present the challenge of amending their constitutions or seeking a remedy in court. In the case of California, there is a July 1, 2020, deadline for getting a constitutional amendment on the 2020 general election ballot, and the constitution cannot be amended without a vote of the people. Ohio will have specific requirements for seeking an amendment as well, if that is the route the state chooses to follow.

Colorado's deadline is similar to California's, but the constitution provides that "the commissions may adjust the deadlines specified in this section if conditions outside of the commission's control require such an adjustment to ensure adopting a final plan..." ("Colo. Const. art. V, §§ 44.4(1), 48.2(1)). This flexibility could permit Colorado to draw maps on an accelerated timeline and still comply with its constitutional deadlines.

South Dakota, with a Dec. 1 constitutional deadline, would likely consider a special session to undertake redistricting since its regularly scheduled legislative session is scheduled to end in March 2021; it used a special session last decade.

\*Please note: On July 17, 2020, the California Supreme Court granted the Legislature's emergency petition and issued a peremptory writ of mandate for a four-month extension to California's redistricting deadlines. The Commission is directed to approve and certify the final statewide maps to the Secretary of State by no later than December 15, 2021.

## States With Statutory Redistricting Deadlines in 2021

Delaware (June 30, Del. Code Ann. Tit. 29, § 805)

Iowa (Sept. 15, Iowa Code § 42.3)

Vermont (Aug. 15, Vt. Stat. Ann. tit. 17, § 1905 - § 1907)

Washington (Nov. 15, Wash. Rev. Code Ann. § 44.05.100)

In these states, the legislature may choose to enact a new deadline for this decade to accommodate the delayed release of census data. Because regular legislative sessions in these states are completed before July 31, a bill in the regular session to extend the deadline would be required, along with calling a special session after the data is released.

### States With Constitutional Requirements for Redistricting to Take Place in the Year After the Census

Alabama (Const. Art. IX, Sec. 199).

Arkansas (Ark. Const. Art. 8, § 4).

Connecticut (Conn. Const. Art. III., Sec. 6).

Illinois (Illinois Const., Art. IV, § 3).

Indiana (Ind. Const. Art. 4, § 5, Ind. Code Ann. § 3-3-2-1, Ind. Code Ann. § 3-3-2-2).

Louisiana (La. Const. Art. III, § 6).

Massachusetts (ALM Constitution Amend. Art. CI).

Michigan (MCLS Const. Art. IV, § 6, Mich. Comp. Laws Serv. § 3.62, Mich. Comp. Laws Serv. § 4.261).

Nevada (Nev. Const. Art. 4, § 5).

New Hampshire (N.H. Const. Pt. SECOND, Art. 9, N.H. Const. Pt. SECOND, Art. 26).

North Dakota (N.D. Const. Art. IV, § 2).

Oklahoma (Okl. Const. Art. V, § 11A).

Oregon (Ore. Const. Art. IV, § 6, Or. Rev. Stat. Ann. § 188.125).

These states' constitutions call for redistricting to take place in the year after the census is taken, not the year after the data is released. For states in this category where the legislature is full-time (Illinois, Massachusetts and Wisconsin) and can meet throughout the year, the delay in the release of data will compress the timeline. For the other states where the regular legislative session is scheduled to be over before July 31, a special session is likely to be required to complete redistricting in 2021.

North Dakota's deadline requires that redistricting occur in the legislative session immediately following the census. While this typically means years ending in 1, North Dakota considers its legislative sessions to last two years, so redistricting could occur in 2022 and be in compliance with the constitutional deadline.

### States With Constitutional Requirements for Redistricting to Take Place in the Year After Census Data Is Delivered

Alaska (Alaska Const. Art. VI § 10).

Idaho (Idaho Const. Art. III, Section 2).

Montana (for congressional redistricting, if the state is awarded a second seat in the U.S. House; legislative redistricting is not required to be completed until 2023; Mont. Const., Art. V § 14).

North Carolina (N.C. Const. art. II, Section 3, N.C. Const. art. II, Section 5).

Pennsylvania (Pa. Const. Art. II, § 17).

Texas (Tex. Const. Art. III, § 28).

Utah (Utah Const. Art. IX, § 1).

Wisconsin (Wis. Const. Art. IV § 3).

These states' constitutions direct that redistricting be undertaken in the next session after the delivery of census data, rather than when the census is taken.

In preparation for the 2022 general election, all these states would need to prepare districts in time for candidate filing dates prior to 2022 primary elections. These deadlines are typically in the spring of even-numbered years.

Pennsylvania's legislature can meet year-round and could address redistricting in the fall of 2021.

The other states could redistrict in 2022, rather than as expected in 2021, or hold a special session in the fall of 2021.

Texas' legislature is biennial and does not have a regularly scheduled session in 2022, so the next regular session after census data is released would be in 2023. A special session may be a solution.

### States With Other Deadlines

Missouri's legislative redistricting deadline is based on when census data is six months after the date of the appointment of commission members (Mo. Const. Art. III, § 2, Mo. Const. Art. III, § 7).

Hawaii's deadline is based on the date its commission members are certified; in effect, this would be September 2021 (HRS Const. Art. IV, § 2).

### States With No Mention of Redistricting Deadlines in the Constitution or Statutes

Georgia

Arizona

Nebraska

Rhode Island

South Carolina

Tennessee

West Virginia

New Mexico

While these states do not have a redistricting deadline in their constitution or statutes, all states need to prepare districts in time for candidate filing dates for 2022 primary elections. These deadlines are typically in the spring of even-numbered years.

### States With Redistricting Deadlines in 2022

Florida (Fla. Const. Art. III, § 16, for legislative redistricting).

Maryland (Md. Const. art. III, Section 5, for legislative redistricting).

Minnesota (Minn. Const., Art. IV, § 3, 12; Minn. Stat. § 204B.14).

Mississippi (Miss. Const. Ann. Art. 13, § 254, Miss. Const. Ann. Art. 4, § 36, Miss. Code Ann. § 5-3-93, Miss. Code Ann. § 5-3-123).

New York (NY CLS Const Art III, § 5-b).

Wyoming (Wyo. Const. Art. 3, § 48, for legislative redistricting).

Kansas (Kan. Const. Art. 10, § 1, May 2022, for legislative redistricting).

Kentucky (Ky. Const. § 33, April 2022, for legislative redistricting).

Some states' constitutions call for redistricting in the second year after the census is conducted; redistricting may be the first order of business when their legislative sessions begin.

## What States May Consider When Facing Census Delays

For states with constitutional deadlines:

Amending the constitution is an option (which has its own deadlines and hurdles).

The state could file a lawsuit for relief.

For states with statutorily set deadlines, setting a new deadline is an option.

In states where a deadline is set each decade by the adoption of guidelines, the new census data release timing can be taken into account when drafting guidelines.

For states where the census data delays will make it difficult to complete redistricting before candidate filing deadlines for the state primary:

Either the primary date or the filing data could be moved (which has its own hurdles and consequences).

Where permitted, the state could hold a special session for redistricting; some states do this as usual practice already, such as New Mexico.

## Additional Resources

NCSL's State Redistricting Deadlines

NCSL's Redistricting and the Use of Census Data

NCSL's Into the Thicket: A Redistricting Starter Kit for Legislative Staff webpage

NCSL's Redistricting Law 2020 book

NCSL's letter to the House Committee on Oversight and Reform regarding census delays and differential privacy

NCSL's letter to the Senate Committee on Homeland Security and Governmental Affairs regarding census delays and differential privacy

NCSL's letter to the Census Bureau regarding census delays and differential privacy

GAO's August 27, 2020 report on Recent Decision to Compress Census Timeframes Poses Additional Risks to an Accurate Count



E IBIT 7

OUR AMERICAN STATES



The NCSL Podcast



# State Redistricting Deadlines

8/27/2020



Every 10 years following the federal decennial census, all federal, state and local election district boundaries must be redrawn or revised. Redistricting begins when the new census data is delivered to the states.

Title 13 of the United States Code requires the secretary of commerce to provide governors and the officials responsible for redistricting in each state with the census results. Public Law 94-171 directs the Census Bureau to only furnish total population counts, but the bureau does offer additional data, including tables covering voting age, race and ethnicity. These summary files provide population data from American Indian areas, counties and cities down to the census block level. The data is delivered to the states by April 1 of the year following the decennial census.

**Note:** On August 3, 2020, the U.S. Census Bureau announced that both self-response and field data collection will end by September 30—a change from October 31, the delayed deadline announced on April 13, 2020 due to the COVID-19 pandemic. Both of these dates are well past the originally planned July 31 end date to data collection.

The April 13 announcement included a request to Congress for authority to delay the release of census data to be used for congressional apportionment by 120 days, to April 30, 2021, and census data to be used for redistricting by 120 days as well, to July 31, 2021.

*The Bureau's reversal in its operational plans means a cut-back in data collection by a month and an accelerated pace to complete data collection. It signaled the Bureau's intention to deliver apportionment counts by the statutory deadline of December 31, 2020. A formal announcement has not addressed the release of data for redistricting, however informally it is believed that the Census Bureau plans to get the redistricting data out by April 1, 2021.*

As a general rule, legislative and congressional redistricting must be completed before filing deadlines for the next primary elections for federal and state legislators. Some states go beyond this rule, however, and set specific redistricting deadlines. These are listed below. If you have any questions or concerns, please contact [christi.zamarripa@ncsl.org](mailto:christi.zamarripa@ncsl.org).

The box allows you to conduct a full text search or type the state name.

State Redistricting Deadlines	
Alabama Alabama Const. Art. IX, Sec. 199	Legislative: Legislature to conduct redistricting at its first session after the taking of the decennial census. Congressional: None
Alaska Alaska Const. Art. VI, § 10	Legislative: 90 days after the board has been appointed and the official reporting of the decennial census, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. Congressional: None
Arizona	Legislative and congressional: None
Arkansas Ark. Const. Art. 8, § 4	Legislative: On or before Feb. 1 immediately following each federal census, the board shall reapportion the state for representatives. Congressional: None
California Cal Const, Art. XXI § 2	Legislative and congressional: By Aug. 15 in each year ending in the number 1, the commission shall approve four final maps that separately set forth the district boundary lines for the congressional, senatorial, assembly, and State Board of Equalization districts.*  *Please note: On July 17, 2020, the California Supreme Court granted the Legislature's emergency petition and issued a peremptory writ of mandate for a four-month extension to California's redistricting deadlines. The Commission is directed to approve and certify the final statewide maps to the Secretary of State by no later than December 15, 2021.
Colorado Colo. Const. Art. V, Section 48.2, Colo. Const. Art. V, Section 44.4	Legislative: No later than Sept. 15 of the redistricting year, the commission shall adopt final senate and house plans. Congressional: No later than Sept. 1 of the redistricting year, the commission shall adopt a final plan, which must then be submitted to the supreme court for its review.

Connecticut Conn. Const. Art. III, Sec. 6	Legislative and congressional: By Sept. 15 following the year in which the decennial census of the United States is taken.
Delaware Del. Code Ann. tit. 29, § 805	Legislative: Not later than June 30, 2021. Congressional: None
Florida Fla. Const. Art. III, § 16	Legislative: At its regular session in the second year following each decennial census. Congressional: None
Georgia	Legislative and congressional: None
Hawaii HRS Const. Art. IV, § 2	Legislative and congressional: Not more than 150 days from the date on which its members are certified, the commission shall file with the chief election officer a reapportionment plan for the state legislature and a reapportionment plan for the United States congressional districts.
Idaho Idaho Const. Art. III, Section 2	Legislative and congressional: Within 90 days after the commission has been organized or the necessary census data are available, whichever is later.
Illinois Illinois Const., Art. IV, § 3	Legislative: General Assembly has until June 30 in the year following each decennial census. Congressional: None
Indiana Ind. Const. Art. 4, § 5, Ind. Code Ann. § 3-3- 2-1, Ind. Code Ann. § 3-3-2-2	Legislative and congressional: At the first regular session of the general assembly convening immediately following the United States decennial census.
Iowa Iowa Code § 42.3	Legislative and congressional: Not later than Sept. 1 of each year ending in 1. The legislature shall complete legislative redistricting by September 1 and for the bill to become law through Governor signature (or veto override) by September 15.
Kansas Kan. Const. Art. 10, § 1	Legislative: By the end of its regular session. Congressional: None
Kentucky Ky. Const. § 33	Legislative: The first General Assembly after the adoption of this constitution shall divide the state into 38 senatorial districts, and 100 representative districts. The General Assembly shall then, and every 10 years thereafter, redistrict the state. (Constitution was first adopted in 1792). Congressional: None

Louisiana La. Const. Art. III, § 6	Legislative: By the end of the year following the year in which the population of this state is reported to the president of the United States for each decennial federal census. Congressional: None
Maine Me. Const. Art. IV, Pt. 1, § 3, Me. Const. Art. IV, Pt. 2, § 2, Me. Rev. Stat. tit. 21-A, § 1206	Legislative: The apportionment plan of the commission shall be submitted to the clerk of the House and the secretary of the Senate no later than June 1 of the year in which apportionment is required. The Legislature shall enact the submitted plan of the commission or a plan of its own by June 11 of the year in which apportionment is required. Congressional: In 2021 and every 10 years thereafter, the commission shall submit its plan to the clerk of the House of Representatives no later than June 1. The Legislature shall enact the submitted plan of the commission or a plan of its own in regular or special session by a vote of 2/3 of the members of each house by June 11. This action is subject to the Governor's approval.
Maryland Md. Const. art. III, Section 5	Legislative: By the 45th day after the opening of the regular session of the General Assembly in the second year following every census. Congressional: None
Massachusetts ALM Constitution Amend. Art. CI	Legislative: At its first regular session after the year in which said census was taken Congressional: None
Michigan MCLS Const. Art. IV, § 6, Mich. Comp. Laws Serv. § 3.62, Mich. Comp. Laws Serv. § 4.261	Legislative and congressional: Not later than Nov. 1 in the year immediately following the federal decennial census, the commission shall adopt a redistricting plan for each of the following types of districts: state senate districts, state house representative districts, and congressional districts.
Minnesota Minn. Const., Art. IV, § 3, Minn. Stat. § 204B.14	Legislative and congressional: At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts.
Mississippi Miss. Const. Ann. Art. 13, § 254, Miss. Const. Ann. Art. 4, § 36, Miss. Code Ann. § 5-3-93, Miss. Code Ann. § 5-3-123	Legislative: At its regular session in the second year following the decennial census. Congressional: The members of the committee shall draw a plan to redistrict no later than thirty (30) days preceding the convening of the next regular session of the legislature after the results of the 1980 decennial census are published and every ten (10) years thereafter.

Missouri Mo. Const. Art. III, § 2, Mo. Const. Art. III, § 3, Mo. Const. Art. III, § 7	Legislative: The non-partisan State Demographer to begin drawing maps within 10 days of when the President receives the Census counts and file a tentative plan within 6 months of when the population counts are reported to the President. The tentative plan filed by the Non-Partisan State Demographer, or adjustments to the plan made by the House Apportionment Commission, will become final within 8 months of when the population counts are reported to the President. Not later than five months after the appointment of the commission, the commission shall file with the secretary of state a tentative plan of apportionment and map of the proposed districts. Not later than six months after the appointment of the commission, the commission shall file with the secretary of state a final statement of the numbers and the boundaries of the district. Congressional: None
Montana Mont. Const., Art. V § 14	Legislative: The commission shall submit its plan for legislative districts to the legislature at the first regular session after its appointment or after the census figures are available. This is the 2023 session. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan for legislative districts with the secretary of state and it shall become law. Congressional: Within 90 days after the final decennial census figures are available
Nebraska	Legislative and congressional: None
Nevada Nev. Const. Art. 4, § 5	Legislative: In the first session after the taking of the decennial census. (2021) Congressional: None
New Hampshire N.H. Const. Pt. SECOND, Art. 9, N.H. Const. Pt. SECOND, Art. 26	Legislative: By the end of the regular session following the decennial census Congressional: None
New Jersey N.J. Const., Art. IV, Sec. III, Para. 1	Legislative: One month of the receipt by the governor of the official decennial census or on or before Feb. 1 of the year following the year in which the census is taken, whichever date is later. Congressional: On or before the third Tuesday of each year ending in 2, or within three months after receipt in each decade by the appropriate state officer of the official statement by the clerk of the United States House of Representatives.
New Mexico	Legislative and congressional: None
New York NY CLS Const Art III, § 5-b	Legislative and congressional: There are no legislative deadlines, but the New York Independent Commission has a deadline. The Commission must combine the Senate and Assembly plans in one proposed bill and submit it to the legislature by Jan. 1, 2022 (with an allowance to submit as late as Jan. 15, 2022 if necessary). If the legislature rejects the first plan or the governor vetoes it, the commission must submit a second plan to the legislature no later than Feb. 28, 2022. If the legislature rejects the first and second plan, there is still no deadline for the legislature itself to act.

North Carolina N.C. Const. art. II, Section 3, N.C. Const. art. II, Section 5	Legislative: At the first regular session convening after the return of every decennial census. Congressional: None
North Dakota N.D. Const. Art. IV, § 2	Legislative: Until the adjournment of the first regular session after each decennial census. (2021) Congressional: None
Ohio Oh. Const. Art. XI, § 1, Oh. Const. Art. XIX, § 1	Legislative: Not later than the first day of September of a year ending in the numeral 1. If there is no such bipartisan commission approval by that date, the commission has until Sept. 15 to try again to adopt a bipartisan approved 10 year map, or instead just a simple majority 4 year map. Congressional: Not later than the last day of September of a year ending in the numeral 1. If there is no such bipartisan legislature approval by that date, the Ohio redistricting commission has until Oct. 31 to adopt a bipartisan commission approved 10 year map; further, if there is no such bipartisan commission approval by that date, the legislature has until Nov. 30 to try again to adopt a bipartisan legislature approved 10 year map, or instead just a simple majority 4 year map.
Oklahoma Okl. Const. Art. V, § 11A	Legislative: Within 90 legislative days after the convening of the first regular session of the legislature following each federal decennial census. Congressional: None
Oregon Ore. Const. Art. IV, § 6, Or. Rev. Stat. Ann. § 188.125	Legislative: By July 1 of the year of the odd-numbered year regular session following an enumeration of the inhabitants by the US government. If there is no legislative plan enacted by July 1, the Secretary of State must adopt a plan by August 15. Congressional: By July 1 of the year of the odd-numbered year regular session. If the legislature does not pass a congressional plan by July 1, a citizen can file a suit in Marion County Court. The Chief Justice of the Oregon Supreme Court appoints retired judges to be on a panel that adopts a congressional plan. Then the Supreme Court reviews the plan and approves or rejects it.
Pennsylvania Pa. Const. Art. II, § 17	Legislative: No later than 90 days after either the commission has been duly certified or the population data for the commonwealth as determined by the federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan. Congressional: None
Rhode Island	Legislative and congressional: None
South Carolina	Legislative and congressional: None
South Dakota S.D. Const. Article III, § 5	Legislative: By Dec. 1 of the year in which the apportionment is required. Congressional: None

Tennessee	Legislative and congressional: None
Texas Tex. Const. Art. III, § 28	Legislative: During the first regular session after the publication of each United States decennial census, the legislature will apportion the state into senatorial and representative districts. Texas has biennial session and the next session will be 2021. Congressional: None
Utah Utah Const. Art. IX, § 1	Legislative and congressional: No later than the annual general session next following the legislature's receipt of the census.
Vermont Vt. Stat. Ann. tit. 17, § 1905 - § 1907	Legislative and congressional: A tentative plan is due on or before July 1 of the year following each decennial census; the final proposal is due not later than Aug. 15.
Virginia Va. Const. Art. II, Section 6	Legislative and congressional: The General Assembly shall reapportion the Commonwealth into electoral districts in the year 2011 and every 10 years thereafter.
Washington Wash. Const. Art. II, § 43; Wash. Rev. Code Ann. § 44.05.100	Legislative and congressional: Not later than Nov. 15 of the year ending in 1, Washington commission must submit its plan to the legislature. After submission, the legislature will have 30 days to amend the commission's plan.
West Virginia	Legislative and congressional: None
Wisconsin Wis. Const. Art. IV, § 3	Legislative: At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly. Congressional: None
Wyoming Wyo. Const. Art. 3, § 48	Legislative: At the first budget session of the legislature following the federal census. (2022) Congressional: None

## Additional Resources

[NCSL Redistricting Homepage](#)

[NCSL Redistricting Commissions: State Legislative Plans](#)

[NCSL Redistricting Commissions: Congressional Plans](#)

[NCSL Redistricting Criteria](#)

[NCSL Redistricting and Use of Census Data](#)

[NCSL Census Delays and the Impact on Redistricting](#)



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E IBIT 8

# The 2020 Census is Happening Now. Respond Today.

FOR IMMEDIATE RELEASE: MONDAY, AUGUST 3, 2020

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

AUGUST 03, 2020

RELEASE NUMBER CB20-RTQ.23

AUGUST 3, 2020 — The U.S. Census Bureau continues to evaluate its operational plans to collect and process 2020 Census data. Today, we are announcing updates to our plan that will include enumerator awards and the hiring of more employees to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 1, 2020, as required by law and directed by the Secretary of Commerce. The Census Bureau's new plan reflects our continued commitment to conduct a complete count, provide accurate apportionment data, and protect the health and safety of the public and our workforce.

**Complete Count** A robust field data collection operation will ensure we receive responses from households that have not yet self-responded to the 2020 Census.

We will improve the speed of our count without sacrificing completeness. As part of our revised plan, we will conduct additional training sessions and provide awards to enumerators in recognition of those who maximize hours worked. We will also keep phone and tablet computer devices for enumeration in use for the maximum time possible.

We will end field data collection by September 10, 2020. Self-response options will also close on that date to permit the commencement of data processing. Under this plan, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities.

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

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

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

Order 1 880 issued July 11, 2019 and the Residential Memorandum issued July 21, 2020. A team of experts are examining methodologies and options to be employed for this purpose. The collection and use of pertinent administrative data continues.

We are committed to a complete and accurate 2020 Census. To date, 9 million households, nearly percent of all households in the ation, have responded to the 2020 Census. Building on our successful and innovative internet response option, the dedicated women and men of the Census Bureau, including our temporary workforce deploying in communities across the country in upcoming weeks, will work diligently to achieve an accurate count.

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

###

## Contact

Public Information Office  
301-763-3030

pio@census.gov

E IBIT 9

# 2020 Census Operational Adjustments Due to COVID- 19

We are adapting or delaying some of our operations to protect the health and safety of our staff and the public and make sure we get the same population counted another way.

In light of the COVID-19 outbreak, the U.S. Census Bureau is continually adjusting 2020 Census operations in order to:

- Protect the health and safety of the American public and Census Bureau employees.
- Implement guidance from Federal, State, and local authorities regarding COVID-19.
- Ensure a complete and accurate count of all communities.

To help the Census Bureau continue to adapt to the COVID-19 pandemic, the White House Office of Management and Budget recently submitted a supplemental request of \$1 billion for the 2020 Census. This funding would allow for supplemental hiring, pay incentives, additional outreach and advertising, and replenished contingency funding to provide needed flexibility as the Census Bureau conducts its largest component of the field operation, Nonresponse Followup. This flexibility is critical to helping us operate in the midst of an unprecedented public health crisis, including accelerated efforts to conduct our field data collection as quickly, and safely as possible, while ensuring a complete and accurate count and a timely delivery of quality data.

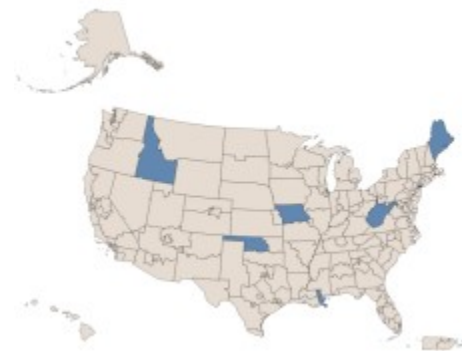
Since the suspension of field operations in mid-March, the Census Bureau has continually assessed our operational plans, taking into account Federal, state and local guidance, and the status of COVID-19 cases to ensure that we can safely fulfill our mission. Our continuing rigorous analysis led to a phased restart that began in May, and a soft launch of the Nonresponse Follow-up operation that began early in a number of area census offices in mid-July. The supplemental request is an extension of our effort to ensure we are ready to adapt to challenges in the environment.

On August 3, 2020, Census Bureau Director Steve Dillingham released a [statement \(https://2020census.gov/en/news-events/press-releases/delivering-complete-accurate-count.html\)](https://2020census.gov/en/news-events/press-releases/delivering-complete-accurate-count.html) on recent updates to the 2020 Census operational plan.

## Census takers are rolling out nonresponding households

Starting July 16, census takers will begin interviewing households that have yet to respond to the 2020 Census in regions managed by the area census offices on [this map](#) -.

In subsequent weeks, the Census Bureau will announce additional census offices as it prepares to begin enumeration activities nationwide. The majority of census offices across the country will begin follow-up work on August 11.



**The Census Bureau is working to complete data collection as quickly and safely as possible, while ensuring a complete and accurate count as it strives to comply with the law and statutory deadlines. All offices are schedule to complete their work by September 30, 2020.**

Census takers will follow local public health guidelines when they visit. Learn more at [Census Takers In Your Neighborhood](#).

## Review of 2020 Census Operational Plan

This presentation - updates partners, stakeholders and the public on 2020 Census operational changes.

### Status of Current Operations

#### Self-Response Phase

Online, phone and mailed self-responses continue throughout the data collection process.

##### Planned Schedule

March 12 – July 31

##### Revised Schedule

March 12 - September 30, 2020

#### Door-to-door Response

Census takers will interview households in person. New dates will cover areas previously scheduled for "Early NRFU."

##### Planned Schedule

May 13 – July 31

##### Revised Schedule

The Census Bureau began soft-launching NRFU on July 16, 2020, and it will soon be underway across the entire country. All area census offices will complete their work by September 30, 2020.



## **Group Quarters - Response Paper Enumeration**

Many group quarters have already begun responding through our e-Response enumeration option.

### **Planned Schedule**

April 2 – June 5

### **Revised Schedule**

**April 2 – September 3**

## **Remote Alaska**

Early operation to reach parts of Alaska which may be difficult to reach later in the year and whose populations depart for other activities. The operation will be mostly completed on the original planned schedule, though some areas with year-round populations will be enumerated when it is safe to do so.

### **Planned Schedule**

January 21 – April 30

### **Revised Schedule**

**January 21 – August 31**

## **Island Areas**

Census takers interview households in American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands. This operation is coordinated with the local Island Areas governments. Census takers use paper questionnaires to interview households.

### **Planned Schedule**

February 3 - June 30

### **Revised Schedule**

**February 3 - September 30**

### **Field Offices at Peak Operations**

Managers and staff commence administrative, training, deployment and support activities for peak data collection operations. This includes selecting and hiring field staff.

### **Planned Schedule**

March 1

### **Revised Schedule**

Phased re-opening occurred between **May 4** and **June 12**.

### **Update ea e - Stateside**

Census takers drop off invitations to respond and paper questionnaires at the front doors of 5 million households stateside while updating the addresses.

### **Planned Schedule**

March 15 - April 17

### **Revised Schedule**

Phased re-opening occurred between **May 4** and **June 12**.

## **Update leave operations for Puerto Rico**

Update Leave operations for the Commonwealth of Puerto Rico, approximately 1.7 million households, will be coordinated separately.

### **Planned Schedule**

March 15 – April 17

### **Revised Schedule**

May 22

## **Update numerate**

Census takers interview about 2,000 households in remote parts of northern Maine and southeast Alaska.

### **Planned Schedule**

March 16 – April 30

### **Revised Schedule**

June 14 – July 29

## **In-person group quarters numeration**

Group Quarters that remain as part of our in-person group quarters enumeration efforts will begin in July.

### **Planned Schedule**

April 2 – June 5

## **Revised Schedule**

**July 1 – September 3**

### **Service Based Enumeration**

We're working with service providers at soup kitchens, shelters, and regularly scheduled food vans to count the people they serve.

#### **Planned Schedule**

March 30 – April 1

## **Revised Schedule**

**September 22 – September 24**

### **Mobile Questionnaire Assistance**

Census Bureau staff assists people with responding online at places people gather (events, grocery stores, etc.).

#### **Planned Schedule**

March 30 – July 31

## **Revised Schedule**

**To be completed on September 30**

### **Count of People Experiencing Homelessness Outdoors**

Census takers count people under bridges, in parks, in all-night businesses, etc.

## **Planned Schedule**

April 1

## **Revised Schedule**

**September 23 - September 24**

## **Enumeration of Transitory Locations**

Census takers count people staying at campgrounds, RV parks, marinas, and hotels if they do not usually live elsewhere.

## **Planned Schedule**

April 9 - May 4

## **Revised Schedule**

**September 3 - September 28**

## **Process Apportionment Counts**

After collection activities are complete, Census Bureau experts run and review output from programs to unduplicate responses, determine final housing unit status, populate any missing housing unit data on household size and finalize the universe to be included in the apportionment count file.

**The statutory deadline to provide apportionment counts is December 31, 2020.**

## **Process Redistricting Data**

Census Bureau experts run and review programs to populate any missing demographic data for each household, run differential privacy programs to ensure confidentiality and run tabulation programs for each state delivery.

**The statutory deadline to provide redistricting data is March 31, 2021.**

## Press Kit COVID-19

The Census Bureau continues to carefully monitor the COVID-19 situation and follow the guidance of federal, state, and local health authorities.

### Related Information

#### PRESS RELEASE

### Statement on 2020 Census Operational Adjustments Due to COVID-19

In light of the COVID-19 outbreak, the U.S. Census Bureau is adjusting 2020 Census operations.

### Response Rates

How many people in your community have already responded to the 2020 Census? Keep track with this map of response rates.

### 2020 Census Operations

Extensive preparations for the 2020 Census began far in advance to ensure a complete and accurate count.

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## 2020 Census Housing Unit Enumeration Progress by State

The 2020 Census will conclude data collection operations on September 30, 2020. Use this table to keep track of households in your state enumerated across all collection operations.

State	Report date: 9/20/2020 As of 9/19/2020, percentage of housing units:		
	Self-responded	Enumerated in Nonresponse Followup (NRFU)	Enumerated
<b>U.S. Total</b> . . . . .	<b>66.1</b>	<b>28.9</b>	<b>95.0</b>
Alabama	62.7	25.1	87.8
Alaska	53.8	42.9	96.7
Arizona	63.1	28.4	91.5
Arkansas	60.1	37.9	98.0
California	68.5	28.2	96.7
Colorado	69.3	25.4	94.7
Connecticut	70.0	28.1	98.1
Delaware	64.0	29.7	93.7
District of Columbia	62.7	30.9	93.6
Florida	62.9	29.0	92.0
Georgia	61.6	28.3	90.0
Hawaii	62.5	36.8	99.3
Idaho	69.0	30.8	99.8
Illinois	70.5	26.2	96.8
Indiana	69.8	28.6	98.4
Iowa	70.8	22.8	93.6
Kansas	69.3	29.2	98.4
Kentucky	67.8	25.2	92.9
Louisiana	59.3	29.8	89.1
Maine	57.8	40.9	98.7
Maryland	70.3	26.1	96.3
Massachusetts	68.6	28.0	96.5
Michigan	70.8	24.6	95.4
Minnesota	74.6	23.1	97.7
Mississippi	59.6	30.0	89.6
Missouri	65.3	31.7	97.0
Montana	59.5	29.5	89.0
Nebraska	71.4	24.8	96.1
Nevada	65.8	29.2	95.0
New Hampshire	66.4	30.5	96.9
New Jersey	68.5	27.2	95.6
New Mexico	57.3	33.6	90.9
New York	63.0	32.6	95.5
North Carolina	62.3	29.0	91.3
North Dakota	64.7	31.7	96.5
Ohio	70.1	26.5	96.6
Oklahoma	60.3	33.0	93.3
Oregon	68.6	28.6	97.2
Pennsylvania	68.7	27.5	96.2
Rhode Island	64.5	31.9	96.3
South Carolina	60.1	29.6	89.6
South Dakota	66.7	27.2	93.8
Tennessee	65.4	30.5	95.9
Texas	61.8	33.4	95.2
Utah	70.4	26.7	97.1
Vermont	60.0	38.3	98.3
Virginia	70.5	24.8	95.3
Washington	71.8	26.6	98.4
West Virginia	55.9	43.9	99.8
Wisconsin	71.8	26.4	98.2
Wyoming	60.4	32.7	93.2
Puerto Rico	34.2	63.5	97.7

Note: Percentages may not sum due to rounding. A limited number of areas were part of the NRFU "soft launch" beginning July 16, 2020, and could have higher completion rates due to more time in the field. Percentages for the U.S. total do not include housing units in Puerto Rico.

Source: U.S. Census Bureau.

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For more information:

**2020CENSUS.GOV**

D-FS-GP-EN-039

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## FREQUENTLY ASKED QUESTIONS

### How should I interpret the “Percentage of Housing Units Enumerated” column?

Of the housing units in your state, this is the percentage enumerated either through self-response or as part of our field data collection operations.

### What do the three columns in the table mean?

#### **Percentage of housing units self-responded:**

The percentage of self-responding housing units reported in the response rate map <<https://2020census.gov/en/response-rates.html>>.

#### **Percentage of housing units enumerated in NRFU:**

The percentage of total housing units resolved in the field during the Nonresponse Followup (NRFU) Operation (excludes self-response). Cases completed in the field for Update Enumerate and Remote Alaska Operations are included in this rate to ensure coverage of the full housing unit universe. This rate does not reflect the progress within the NRFU operation as it is relative to total housing units and not just the NRFU workload.

#### **Percentage of housing units enumerated:**

The cumulative percentage of total housing units enumerated via self-response or during the NRFU Operation as of 11:59 p.m. of the previous day. This rate will always increase.

### Does the self-response rate match the rate in the 2020 Self-Response Rate map?

Yes. See the response rate map <<https://2020census.gov/en/response-rates.html>>.

### How often will you publish this table?

We will post it to the Web site by 3 p.m. EDT daily. Updates will be provided August 19 through October 1, 2020.

### Where can I find a comparable table for the 2010 Census?

The U.S. Census Bureau has not historically produced a table that shows this information by state during data collection operations.

The Operational Assessments for the 2010 Census are the most complete source of operational data from the various 2010 Census operations. You can find them at <[www.census.gov/programs-surveys/decennial-census/decade/2010/program-management/cpex.html#par\\_list\\_528542037](http://www.census.gov/programs-surveys/decennial-census/decade/2010/program-management/cpex.html#par_list_528542037)>.

### What is included in the denominator?

All housing units in the United States or state. For Puerto Rico, all housing units in Puerto Rico.

### How does the Census Bureau use these data?

The Census Bureau is committed to a complete and accurate count. This table provides our progress.

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OUR AMERICAN STATES



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## 21 Lots of Questions as Census Bureau Delays the Count

**By Wendy Underhill**

Last week, the U.S. Census Bureau asked Congress for permission to delay its 2020 Census data releases by 120 days.



That information a) determines how many congressional seats each state will have for the next 10 years and b) provides states with the detailed data they need to redistrict. For politicians, this is huge news, and it's one more Covid-19 impact on our nation.

The bureau has delayed the beginning of its field operations until June 1, an understandable decision in light of the Covid-19 pandemic and shelter-in-place and stay-at-home orders.

It makes sense for the bureau to not have workers knocking on Americans' doors at the moment. (I have a personal interest in this: My husband is a census enumerator.) If the door-knocking starts later, it delays everything downstream. For instance, now data collection will end 90 days later than originally planned, on October 31, 2020.

Only when data collection is complete can the bureau’s “lengthy, thorough and scientifically rigorous process” to prepare the data for release begin. Hence, the bureau’s request to Congress, to change the Congressional apportionment due date to April 30, 2021, and the deadline for releasing redistricting data to the states to July 31, 2021.

Understandable, all of this. We are living in extraordinary times.

But these delays confound state redistricting schedules. Perhaps hardest hit are the four states that have legislative elections scheduled, as usual, in 2021: Louisiana, Mississippi, New Jersey and Virginia. If their data arrives in July, it will take some fancy legerdemain for those states to create new districts and set new filing dates and primary dates to run an election in November 2021. And that’s without mentioning that local election officials need time to adjust their operations to the new maps, so that the right ballot goes to each voter.

A handful of states have constitutionally set deadlines for redistricting—and we all know it’s no small task to change a state’s constitution. Still more states have deadlines in statute or rules, all of which may need adjustments. NCSL has a list of state redistricting deadlines.

Everyone is thinking about whether this will be the only delay needed by the Census Bureau, given the uncertainties of the virus.

Other questions have state-specific answers: Will the delayed data releases work with the state’s existing schedule? If not, can the legislature change deadlines? Will a special session for redistricting be required? Can the state wait for its 2022 session? How fast can the job be done? What will an accelerated timeframe mean for public input? Is there a backup plan in place, such as a commission or a court? Is the state required to use census data? (A few states have provisions for alternatives—not that I know of any good alternative sources yet.)

More broadly: If the states can have a unified voice before Congress on this question, what would that voice say? If you’ve got an answer to that, please let me know.

*Wendy Underhill is the director of NCSL’s elections and redistricting program.*

Email Wendy.

Posted in: Elections, Census, COVID-19

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E IBIT 12



# Louisiana and the Census

The U.S. Census Bureau's goal for the federal decennial census is to **count all the people** living in the United States, **count them only once and count them in the right place**. States care about the census because its data are used for the distribution of federal funding and political power, and is used by decision-makers in the private and public sectors at all levels.

The census is a **federal project** conducted with federal funding, although **some states have allocated funding for census outreach**.

This profile includes: a) what census data means for Louisiana in terms of political and economic power, b) key demographic data for Louisiana, and c) what Louisiana is doing to encourage a full count.

## POLITICAL POWER

Every decade, the seats in the U.S. House of Representatives are recalculated based on the latest census data. The new apportionment of congressional seats will be released on Dec. 31, 2020. According to Election Data Services, **Louisiana is projected to keep the same number of seats**, which is 6 congressional seats. That means Louisiana also will have the same number of electoral college seats.

Census data is also the foundation for **Louisiana's Legislature to draw congressional districts and legislative districts**.

## CORE LOUISIANA STATS

Louisiana's total population was 4,533,372, according to the 2010 Census. **In 2018, the Census Bureau's estimate for Louisiana's population was 4,659,978, a growth of 2.79% in nine years.** Louisiana has the 25<sup>th</sup> largest population in the nation, and its growth rate is 32<sup>nd</sup>.

## HARD TO COUNT POPULATIONS AND UNDERCOUNTS

The Census Bureau estimates **25.5% of people in Louisiana did not self-respond to the 2010 census**, representing what have come to be known as "hard to count" populations. Generally, the hard-to-count groups tend to be children younger than 5, immigrants, racial and ethnic minorities, rural residents, low-income people, homeless and Native Americans.

Nationwide, the Census Bureau estimated an overcount of 0.01% in 2010, though individual states could have either an overcount or an undercount. Both overcounts and undercounts can create inaccuracies and affect states' needs. **In Louisiana the overcount was estimated at 16,700.** Undercounts affect a state's federal funding and potentially congressional representation if they are on the cusp of losing or gaining a seat.

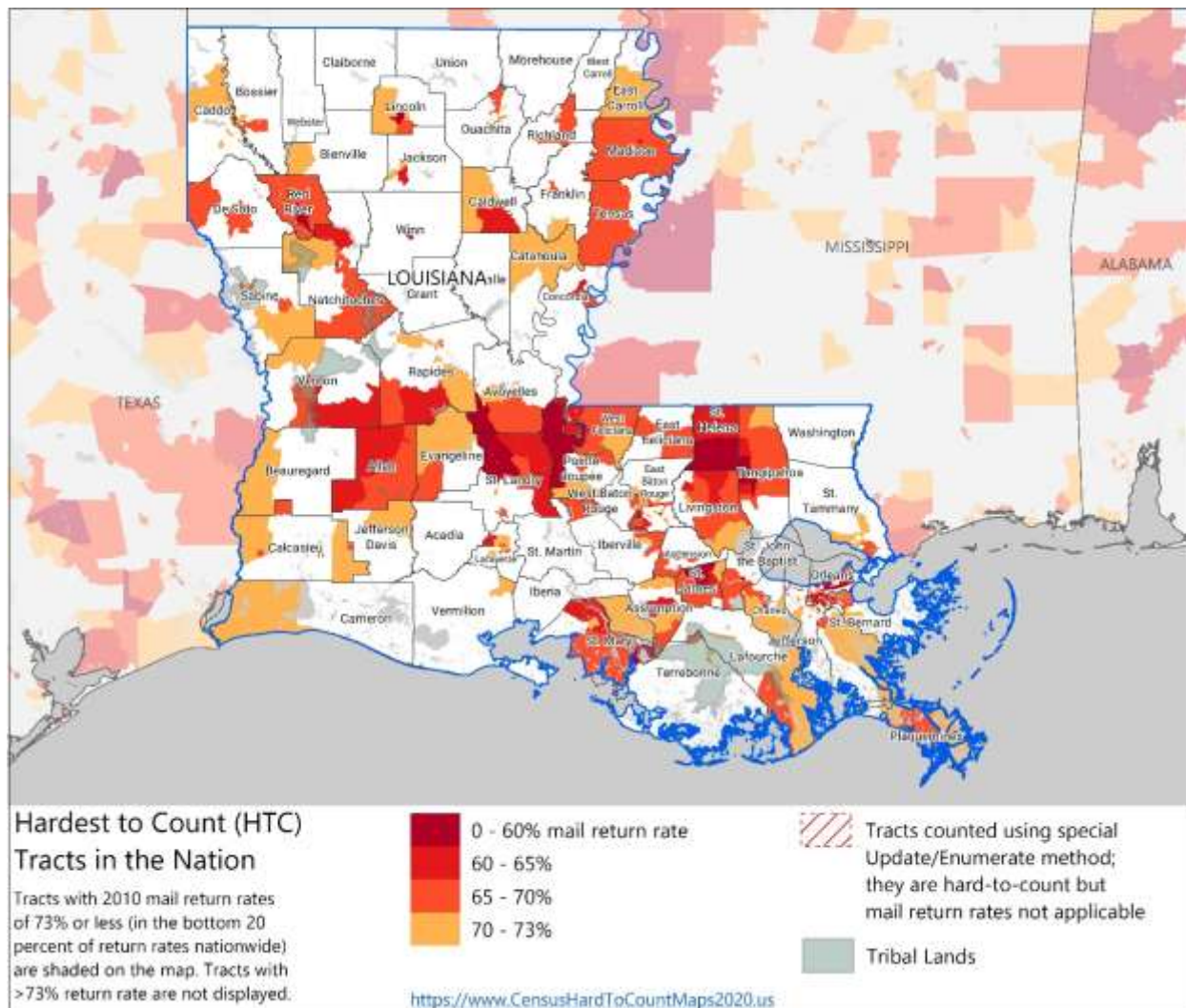
## ECONOMIC POWER

Federal funding is distributed to states and localities based on formulas that rely on census data. Based on Counting for Dollars 2020 by Andrew Reamer of George Washington University, **Louisiana received \$14,470,446,489 in FY2016** from federal funds distributed through 55 federal spending programs that are guided by data derived from the 2010 census. **That equals \$3,191.98 per Louisiana resident**, on average, and every year in this decade.

Private and public sector decisionmakers often rely on census data as well. The Census Bureau has created several tools for public use, including the Economic Census and the Census Business Builder.

## ENSURING A COMPLETE COUNT

Louisiana has created the **Louisiana Complete Count Committee** a complete count committee. While some states are providing additional funds, others have decided not to do. Their reasoning stems from the fact the census is a federal action and there are already many local committees and philanthropic and nonprofit agencies working to support it.



## CONTACTS AND RESOURCES

- Louisiana state census contact: Dr. Tai Istre, [tai.istre@la.gov](mailto:tai.istre@la.gov)
- [Census Bureau's Regional Offices](#) and [Census Bureau's 2020 Census Toolkit for State and Local Officials](#)
- POGO Report on how five federal programs affect [Louisiana](#) communities.
- NCSL's LegisBrief, [State Efforts to Support the Census](#)
- NCSL's LegisBrief, [What You Need to Know about the Census](#)
- NCSL's LegisBrief, [Everyone Needs to Be Counted, But How?](#)
- NCSL's [2020 Census Talking Points \(for Legislators and Others\)](#)
- NCSL's webpage, [2020 Census Resources and Legislation](#)
- NCSL contacts: Wendy Underhill ([Wendy.underhill@ncsl.org](mailto:Wendy.underhill@ncsl.org)) and Christi Zamarripa ([Christi.zamarripa@ncsl.org](mailto:Christi.zamarripa@ncsl.org))

Thank you to the Center for Urban Research at the CUNY Graduate Center for providing the map for this profile. An interactive version of the map is online at [www.CensusHardtoCountMaps2020.us](http://www.CensusHardtoCountMaps2020.us).



E IBIT 13



# Mississippi and the Census

The U.S. Census Bureau's goal for the federal decennial census is to **count all the people** living in the United States, **count them only once and count them in the right place**. States care about the census because its data are used for the distribution of federal funding and political power, and is used by decision-makers in the private and public sectors at all levels.

The census is a **federal project** conducted with federal funding, although **some states have allocated funding for census outreach**.

This profile includes: a) what census data means for Mississippi in terms of political and economic power, b) key demographic data for Mississippi, and c) what Mississippi is doing to encourage a full count.

## POLITICAL POWER

Every decade, the seats in the U.S. House of Representatives are recalculated based on the latest census data. The new apportionment of congressional seats will be released on Dec. 31, 2020. According to Election Data Services, **Mississippi is projected to keep the same number of seats**, which is 4 congressional seats. That means Mississippi also will have the same number of electoral college seats.

Census data is also the foundation for **Mississippi's Legislature to draw congressional districts and legislative districts**.

## CORE MISSISSIPPI STATS

Mississippi total population was 2,967,297, according to the 2010 Census. **In 2018, the Census Bureau's estimate for Mississippi population was 2,986,530, a growth of 0.65% in nine years.** Mississippi has the 34<sup>th</sup> largest population in the nation, and its growth rate is 45<sup>th</sup>.

## HARD TO COUNT POPULATIONS AND UNDERCOUNTS

The Census Bureau estimates **23.6% of people in Mississippi did not self-respond to the 2010 census**, representing what have come to be known as "hard to count" populations. Generally, the hard-to-count groups tend to be children younger than 5, immigrants, racial and ethnic minorities, rural residents, low-income people, homeless and Native Americans.

Nationwide, the Census Bureau estimated an overcount of 0.01% in 2010, though individual states could have either an overcount or an undercount. Both overcounts and undercounts can create inaccuracies and affect states' needs. In **Mississippi the undercount was estimated at 6,900**. Undercounts affect a state's federal funding and potentially congressional representation if they are on the cusp of losing or gaining a seat.

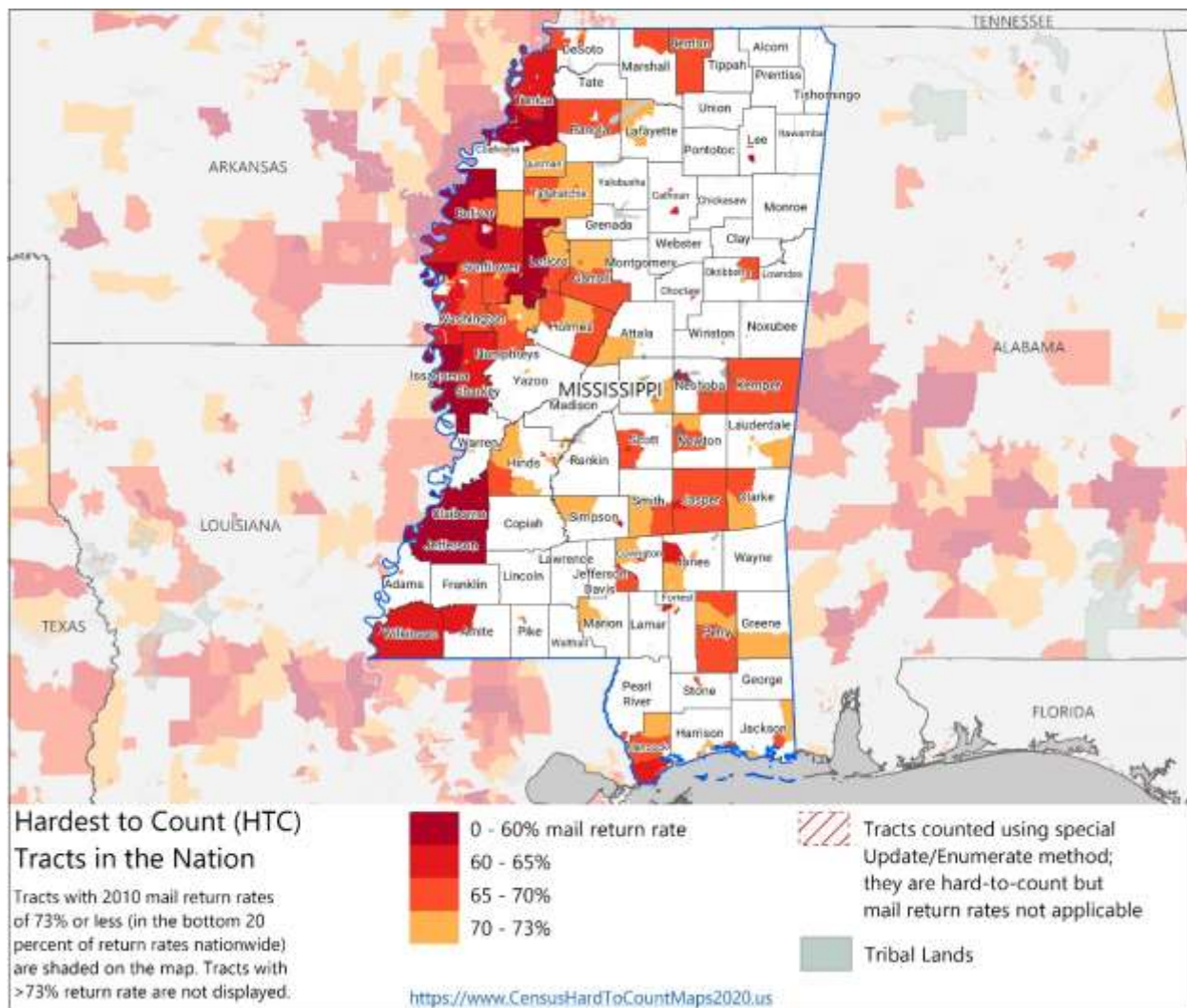
## ECONOMIC POWER

Federal funding is distributed to states and localities based on formulas that rely on census data. Based on Counting for Dollars 2020 by Andrew Reamer of George Washington University, **Mississippi received \$10,113,194,229 in FY2016** from federal funds distributed through 55 federal spending programs that are guided by data derived from the 2010 census. **That equals \$3,408.22 per Mississippi resident**, on average, and every year in this decade.

Private and public sector decisionmakers often rely on census data as well. The Census Bureau has created several tools for public use, including the Economic Census and the

## ENSURING A COMPLETE COUNT

Mississippi has created **Mississippi's Complete Count Committee**. While some states are providing additional funds, others have decided not to do. Their reasoning stems from the fact the census is a federal action and there are already many local committees and philanthropic and nonprofit agencies working to support it.



## CONTACTS AND RESOURCES

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- [Census Bureau's 2020 Census Toolkit for State and Local Officials](#)
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# EXHIBIT 14

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# Louisiana Legislature's three special sessions cost over \$1.5 million

Julia O'Donoghue, NOLA.com | The Times-Picayune

**PUBLISHED JUL 20, 2018 AT 7:32 PM | UPDATED JUL 11, 2019 AT 12:38 PM**

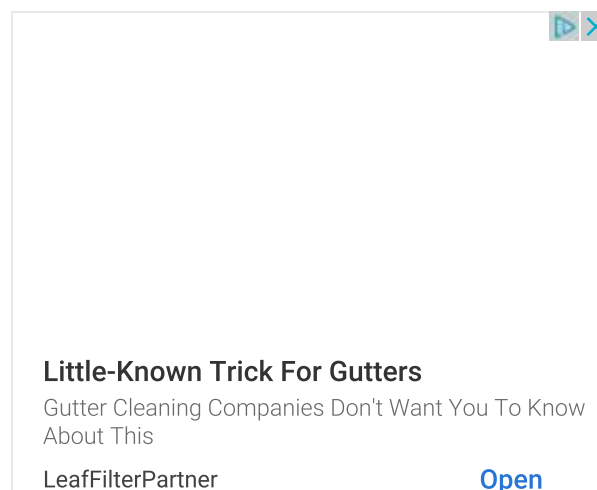


Louisiana's three special sessions held in 2018 to pass taxes cost the public over \$1.5 million. (Gerald Herbert)

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The Louisiana Legislature spent \$1.55 million holding three special sessions in an attempt to pass taxes in 2018, according to information provided by the state House and Senate in response to a public records request. The sessions lasted a collective 36 days and cost an average of \$42,921 in public funding per day to hold.

Almost 60 percent of the \$1.55 million spent went to paying lawmakers' per diem expenses and the reimbursements they receive for driving to Baton Rouge. In total, that cost the state \$906,293 over three special sessions, according to the records provided.



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None of the sessions would have been necessary if the state had resolved its dispute over taxes and budgeting during the Legislature's regular session in 2017, when raising taxes could be considered. Lawmakers are prohibited by state law from considering taxes during regular sessions in even-numbered years, like 2018. That is why they had to call special sessions to deal with their tax disputes this year.

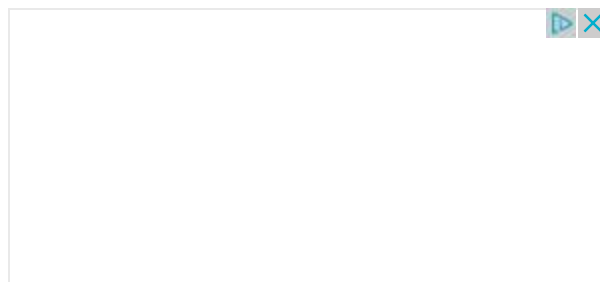
The first and second special sessions ended in failure, without the tax standoff being resolved. During the third special session, Gov. John Bel Edwards and the Legislature agreed to renew an expiring portion of the state sales tax for another seven years.

Louisiana's sales tax was originally scheduled to drop from 5 to 4 percent on June 30, but Edwards and the Legislature enacted a new rate of 4.45

percent in order to avoid large funding  
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reductions to health care and higher  
education.

Conservative lawmakers in the House had said they were happy that the Legislature didn't end up passing taxes in 2017, or even during the first special session held in 2018. Louisiana's budget gap -- which was driving the push for higher taxes -- became considerably smaller in April, after the first special session was held.

A federal tax cut this year resulted in a state income tax increase in Louisiana, which is estimated to bring an additional \$346 million into the state in the current budget cycle. Had the Legislature passed new taxes in 2017, lawmakers wouldn't have known about that extra funding and the tax rate may have been higher than it needed to be.





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Early estimates -- ones used during the first special session -- for the boost in income tax collections were also lower than the later projections ended up being, as the state collected better data. The delay, conservative lawmakers have argued, ensured Louisiana didn't raise taxes as high as it might have.

Still, after the first special session ended in a meltdown, the Legislature tried to save money by holding the second special session at the end of when the Legislature's regular session was supposed to be held. Essentially, they agreed to end their regular session early -- so they could cut costs and hold the second special session during the same time period.

Records show that the second special session was the cheapest of the three in some ways. Its costs were about \$38,247 per day, as opposed to the \$42,865 per day that was charged during the first special session.

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"Any cost saving was used to figure the cost of the session," in the House, said

Alfred Speer, Clerk of the House and keep of its public records. "The lower per day cost is reflective of expense reductions due to the 2nd special utilizing days allotted to the regular."

Senate staff, however, said its chamber didn't actually spend any additional money on the second special sessio. Yolanda Dixon, first assistant secretary of the Senate, said she would have expected the regular session to fully absorb the cost of the second special session in the Senate under normal circumstances.

"[B]ecause the 2nd special session occurred within the same time frame as a normal Regular Session, the costs for the 2nd special session are the same costs as would have been incurred during the Regular Session," wrote Dixon in an email Friday. "So actually, the costs of the 2nd special are not additional costs because they would have been incurred anyway."

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But the Legislature and Edwards failed to reach a tax agreement during the second special session -- which meant a third special session was held. And that third session was the most expensive of the bunch by some calculations. It was cheaper only because it was shorter -- lasting seven days instead of two weeks like the other two. But the per day costs of the third special session were much higher than the other two. Records show the third session cost \$52,385 per day.

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E IBIT 15

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P.O. Box 94062 (900 North Third Street) Baton Rouge, Louisiana 70804-9062



E IBIT 16

## St. John, Joseph

---

**From:** Sadik.Huseny@lw.com  
**Sent:** Wednesday, September 23, 2020 10:47 AM  
**To:** Alexander.V.Sverdlov@usdoj.gov; St. John, Joseph  
**Cc:** steven.bauer@lw.com; Amit.Makker@lw.com; Shannon.Lankenau@lw.com; rick.bress@lw.com; Melissa.Sherry@lw.com; Anne.Robinson@lw.com; Tyce.Walters@lw.com; Genevieve.Hoffman@lw.com; Gemma.Donofrio@lw.com; kclarke@lawyerscommittee.org; jgreenbaum@lawyerscommittee.org; erosenberg@lawyerscommittee.org; dspence@lawyerscommittee.org; asaini@lawyerscommittee.org; mjordan@lawyerscommittee.org; pchaudhuri@lawyerscommittee.org; mike.feuer@lacity.org; kathleen.kenealy@lacity.org; danielle.goldstein@lacity.org; mike.dundas@lacity.org; weiserw@brennan.law.nyu.edu; wolf@brennan.law.nyu.edu; percivalk@brennan.law.nyu.edu; legalwebmail@ci.salinas.ca.us; michaelmu@ci.salinas.ca.us; dmcspaul@nndoj.org; jasearle@nndoj.org; mrosenbaum@publiccounsel.org; rbalabanian@edelson.com; lthough@edelson.com; dponggrace@akingump.com; dfrommer@akingump.com; Rebecca.hirsch2@cityofchicago.org; David.Holtzman@hklaw.com; Brad.Rosenberg@usdoj.gov; FedProg.ECF@usdoj.gov; david.m.morrell@usdoj.gov; alexander.haas@usdoj.gov; Dan.Mauler@usdoj.gov; Murrill, Elizabeth; brad@benbrooklawgroup.com; Kollmeyer, Josiah  
**Subject:** RE: National Urban League et al v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal.)

*This email originated outside of Louisiana Department of Justice. Do not click links or open attachments unless you recognize the sender and know the content is safe.*

Hi Scott,

We're a little confused about the timing of your potential motion here, as our lawsuit was filed over a month ago, and Louisiana's Attorney General could have reached out to us a long time ago to discuss the case/talk through any relevant issues. Given the current procedural posture, we would need to know a bit more before agreeing to anything regarding a potential motion or related briefing.

Let's proceed in this fashion. Please send us whatever motion Louisiana/any other states intend to file. Also, please let us know who at the Louisiana Governor's office you've been in touch with, along with those folks at other states you have reached out to, so that we may understand the relevant constituencies and claimed interests at play. Once we have your motion and that information, I'd be happy to get on a call with you to meet and confer; I would also be in position to separately meet and confer with the other relevant state actors. And all of that would allow us to gauge our position about the claimed interests at issue that would drive any motion to intervene, and let you know Plaintiffs' position on any such intervention.

Many thanks.

Sadik

**Sadik Huseny | LATHAM & WATKINS LLP**  
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email: [sadik.huseny@lw.com](mailto:sadik.huseny@lw.com) | web: [SadikHuseny](http://SadikHuseny.com)

Sverdlov, Alexander V. <Alexander.V.Sverdlov@usdoj.gov>

Wednesday, September 23, 2020 5:33 AM

St. John, Joseph <StJohnJ@ag.louisiana.gov>

Bauer, Steve (Bay Area) <steven.bauer@lw.com>; Huseny, Sadik (Bay Area) <Sadik.Huseny@lw.com>; Makker, Amit (Bay Area) <Amit.Makker@lw.com>; Lankenau, Shannon (Bay Area) <Shannon.Lankenau@lw.com>; Bress, Rick (DC) <rick.bress@lw.com>; Sherry, Melissa (DC) <Melissa.Sherry@lw.com>; Robinson, Anne (DC) <Anne.Robinson@lw.com>; Walters, Tyce (DC) <Tyce.Walters@lw.com>; Hoffman, Genevieve (DC) <Genevieve.Hoffman@lw.com>; Donofrio, Gemma (DC) <Gemma.Donofrio@lw.com>; kclarke@lawyerscommittee.org; jgreenbaum@lawyerscommittee.org; erosenberg@lawyerscommittee.org; dspence@lawyerscommittee.org; asaini@lawyerscommittee.org; mjordan@lawyerscommittee.org; pchaudhuri@lawyerscommittee.org; mike.feuer@lacity.org; kathleen.kenealy@lacity.org; danielle.goldstein@lacity.org; mike.dundas@lacity.org; weiserw@brennan.law.nyu.edu; wolf@brennan.law.nyu.edu; percivalk@brennan.law.nyu.edu; legalwebmail@ci.salinas.ca.us; michaelmu@ci.salinas.ca.us; dmcpaul@nndoj.org; jasearle@nndoj.org; mrosenbaum@publiccounsel.org; rbalabanian@edelson.com; lthough@edelson.com; dponggrace@akingump.com; dfrommer@akingump.com; Rebecca.hirsch2@cityofchicago.org; David.Holtzman@hklaw.com; Rosenberg, Brad (CIV) <Brad.Rosenberg@usdoj.gov>; ECF, FedProg (CIV) <FedProg.ECF@usdoj.gov>; david.m.morrell@usdoj.gov; alexander.haas@usdoj.gov; Mauler, Dan (CIV) <Dan.Mauler@usdoj.gov>; Murrill, Elizabeth <MurrillE@ag.louisiana.gov>; Bradley Benbrook <brad@benbrooklawgroup.com>; Kollmeyer, Josiah <KollmeyerJ@ag.louisiana.gov>

Re: National Urban League et al v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal.)

Scott,

Please represent the Defendants' position as follows:

"Defendants consent, but respectfully urge the Court not to delay resolution of Plaintiffs' motion for a preliminary injunction."

Thanks,

Aleks Sverdlov

On Sep 22, 2020, at 7:41 PM, St. John, Joseph <[StJohnJ@ag.louisiana.gov](mailto:StJohnJ@ag.louisiana.gov)> wrote:

Counsel:

As previously indicated, the State of Louisiana, potentially joined by other States, intends to intervene in the above-captioned matter. In view of the district court's stated intent to issue a ruling within 48 hours, Louisiana contemplates filing its motion tomorrow morning. Louisiana will also move for expedited action and – to the extent any party opposes – a shortened response time of 24 hours. Please let me know your position by 08:00 a.m. Central tomorrow, September 23, 2020.

Don't hesitate to call with any questions or if you would like to meet-and-confer via telephone.

Best regards,

Scott

<image001.png>

Deputy Solicitor General  
Office of Attorney General Jeff Landry  
Tel: (225) 485-2458  
[stjohnj@ag.louisiana.gov](mailto:stjohnj@ag.louisiana.gov)



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E IBIT 17

Redistricting Timeline

as of 1/24/11

\*Indicates tentative date

- December 21, 2010: President of the U.S. notified of the population of each state
- January 19, 2011: House Committee Hearing on Redistricting Rules
- February 2, 2011\*: Census Data is delivered to the Legislature
- February 15, 2011\*: Committee hearing on Census data

- February 17-March 1, 2011: Public Hearings around the state

February

Thursday, 17th	10:00 a.m.	Covington
Thursday, 17th	6:00 p.m.	New Orleans
Monday, 21st	10:00 a.m.	Houma
Monday, 21st	6:00 p.m.	Baton Rouge
Tuesday, 22nd	10:00 a.m.	Lake Charles
Tuesday, 22nd	6:00 p.m.	Lafayette
Monday, 28th	6:00 p.m.	Shreveport

March

Tuesday, 1st	10:00 a.m.	Monroe
Tuesday, 1st	6:00 p.m.	Alexandria

- March 17-18, 2011\*: Committee Hearings on draft plans
- March 20–April 13, 2011: Extraordinary Session to establish new Legislative, Congressional, Supreme Court, Courts of Appeal, Public Service Commission, and Board of Elementary and Secondary Education (BESE) districts
- April 25-June 23, 2011: Regular Session
- End of April-May 2, 2011\*: Submission of Plans for preclearance
- August 29, 2011: Deadline for Secretary of State to receive notice of preclearance of plans for Legislature and BESE for inclusion on fall ballot
- September 6 - 8, 2011: Qualifying dates for Legislative & BESE elections
- October 22, 2011: Primary Election for the legislature and BESE
- November 19, 2011: General Election
- December 31, 2011: Article III, §6 deadline for the Legislature to redistrict itself
- January 9, 2012: Inauguration Day for the legislature and statewide elected officials
- March 12-June 4, 2012: Regular Session

Dates related to the 2012 fall election cycle (except the Nov. 6, 2012, election date) are dependent upon the preclearance of Act No. 570 of the 2010 R.S. and are not included in this timeline

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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

NATIONAL URBAN LEAGUE

Plaintiffs,

v.

WILBUR L. ROSS,

Defendants.

No. 5:20-cv-05799-LHK

**PROPOSED ANSWER OF  
INTERVENOR STATES LOUISIANA  
AND MISSISSIPPI TO PLAINTIFFS'  
FIRST AMENDED COMPLAINT**

Judge: Hon. Lucy H. Koh  
Action Filed: Aug. 18, 2020

## **INTERVENOR STATES' PROPOSED ANSWER TO AMENDED COMPLAINT**

Intervenors Louisiana and Mississippi (“Intervenor States”) make this Answer to Plaintiffs’ Complaint in the above-captioned case. Pursuant to Federal Rule of Civil Procedure 8(b), Intervenor States deny each and every allegation contained in Plaintiffs’ Complaint except for those expressly admitted herein. For the avoidance of doubt, (a) Intervenor States deny all summations, characterizations, etc. of legal authorities on the basis that such allegations state a legal conclusion as to which no response is required and that legal authorities speak for themselves, and (b) deny all headings.

### **INTRODUCTION**

1. Admitted that this lawsuit purports to challenge a decision by Secretary of Commerce Wilbur Ross (“Ross”) and Census Bureau Director Steve Dillingham (“Dillingham”). Intervenor States lack knowledge or information sufficient to determine if this purported decision was “against the judgment of the Bureau’s staff”; that allegation is therefore denied. Admitted that the country is in the midst of a pandemic. Otherwise denied.
2. Admitted that the Census Bureau developed an operational plan prior to the COVID-19 pandemic, and later revised this plan in an attempt to account for difficulties associated with the pandemic. Otherwise denied.
3. Admitted that the Census Bureau released a press release on August 3, 2020, announcing that the Bureau was accelerating data collection in order to meet the statutory deadline on December 31, 2020. Otherwise denied.
4. The final sentence of this paragraph states legal conclusions as to which no response is required. To the extent a response is required, it is denied. Otherwise denied.
5. Admitted that “[d]uring Non-Response Follow Up, the Bureau sends its employees to knock on the doors of households that have not yet responded to the census.” Admitted that the COVID-19 pandemic has disrupted Census operations, though Intervenor States lack knowledge and information sufficient to admit to the extent of disruption claimed by the Complaint. Otherwise denied.
6. Admitted that Ross and Dillingham released a statement on April 13, 2020, announcing

**TAB D**

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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

NATIONAL URBAN LEAGUE *et al*

Plaintiffs,

v.

WILBUR L. ROSS *et al*,

Defendants.

No. 5:20-cv-05799-LHK

**NOTICE OF MOTION AND MOTION TO  
SHORTEN TIME AND TO E PEDITE  
BY STATES OF LOUISIANA AND  
MISSISSIPPI**

Judge: Hon. Lucy H. Koh  
Location: San Jose Courthouse, Courtroom 8

Action Filed: Aug. 18, 2020

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that pursuant to Local Rule 6-3, the States of Louisiana and Mississippi (collectively, “State Intervenor”) respectfully move to shorten the response time to their Motion to Intervene (ECF 204) to make any opposition due no later than 5 p.m. on September 24, 2020. State Intervenor further request that the Court rule on their Motion to Intervene promptly thereafter. In support thereof, the State Intervenor state:

1. Louisiana and Mississippi are sovereign States that have significant protectable interests in connection with the census, including the size of their Congressional delegations, proportionate allocation of limited federal resources, and the Equal Protection rights of their citizens.

2. On September 5, 2020, the Court granted Plaintiffs’ motion for a temporary restraining order until a September 17, 2020, hearing on Plaintiffs’ motion for a preliminary injunction. Order (ECF 84) (“TRO”). That TRO enjoined the federal defendants from implementing their current plan for the census, *id.* at 6-7, which would have reallocated Census Bureau resources to jurisdictions like Louisiana and Mississippi that are lagging in enumeration, then ceased data collection on or about September 30, 2020, *see* Fontenot Decl. (ECF 81-1) ¶¶ 95-97, 100; St. John Decl. Exhs. 10, 12, 13 (ECF 204-11, 204-13, 204-14).

3. If census data collection is extended beyond September 30, “the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021.” (ECF 81-1) at ¶ 100. Like other states, Louisiana and Mississippi would suffer additional harms from that delay as their own redistricting and reapportionment procedures are delayed. A morass of litigation will likely follow.

4. Nevertheless, on September 17, this Court continued a previously-set preliminary injunction hearing to September 22, 2020, and extended its TRO until “until the Court issues its decision on the preliminary injunction motion or through September 24, 2020, whichever is sooner.” Order (ECF 142) (“TRO Extension”) at 3. The TRO Extension also made clear that the federal Defendants were not adequately representing the Intervenor States’ interests in prompt resolution of this case. *See id.* at 13-17.



5. The Louisiana Attorney General's Office first learned of this litigation, the TRO, and the TRO Extension on the afternoon of September 17, 2020. *See* St. John Decl. ¶ 1.

6. Louisiana believed it needed to intervene to protect its interests, but recognized that drafting a Proposed Answer to Plaintiffs' 370 paragraph Amended Complaint, as required by Fed. R. Civ. P. 24, would require significant time. St. John Decl. ¶ 2. Louisiana accordingly retained local counsel and appeared on September 17, 2020, Notice of Appearance (ECF 144), then filed a Notice of Intent to Intervene (ECF 146) ("Notice of Intent") on the morning of September 18, *i.e.*, less than 24 hours after the Court entered the TRO Extension. The Notice of Intent identified in general terms Louisiana's interests, the harms this litigation poses to those interests, and Louisiana's intent to intervene.

7. During the September 22, 2020, preliminary injunction hearing, the Court stated it intended to rule on Plaintiffs' motion for a preliminary injunction within 24 to 48 hours. The Court expressly noted the likelihood of expedited appellate proceedings.

8. After the preliminary injunction hearing, counsel for Louisiana emailed counsel for the parties:

As previously indicated, the State of Louisiana, potentially joined by other States, intends to intervene in the above-captioned matter. In view of the district court's stated intent to issue a ruling within 48 hours, Louisiana contemplates filing its motion tomorrow morning. Louisiana will also move for expedited action and – to the extent any party opposes – a shortened response time of 24 hours. Please let me know your position by 08:00 a.m. Central tomorrow, September 23, 2020.

St. John Decl. Exh. 1.

9. Counsel for Defendants responded at 7:40 a.m. Central Time:

Defendants consent, but respectfully urge the Court not to delay resolution of Plaintiffs' motion for a preliminary injunction.

St. John Decl. Exh. 1.

10. Counsel for Plaintiffs delayed responding until 10:45 a.m. Central Time, and they demanded wholly irrelevant information such as "who at the Louisiana Governor's office you've been in touch with, along with those folks at other states you have reached out to" before meeting and conferring. St. John Decl. Exh. 1. Counsel for Plaintiffs did not provide a position on Louisiana's contemplated motions. *See id.*

11. Thereafter, Louisiana, joined by Mississippi, moved to intervene at approximately noon Pacific Time on September 23, 2020. Motion to Intervene (ECF 204).

12. Counsel for Louisiana then again emailed counsel for Plaintiffs seeking their position on a motion to shorten response time and to expedite, and offered to meet-and-confer via telephone. St. John Decl. Exh. 1. Plaintiffs did not respond. St. John Decl. ¶ 5.

13. As detailed in State Intervenor's Motion to Intervene and under Plaintiffs' allegations, State Intervenor's have been and are being irreparably harmed by the TRO and TRO Extension because Census Bureau resources are being diverted to other jurisdictions, despite the lagging enumeration in Louisiana and Mississippi and their significant hard-to-count populations. State Intervenor's will be further harmed by any preliminary injunction.

14. Although intervention at the appellate stage is permissible, the standard is demanding. *See, e.g., Peruta v. Cnty. of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) (en banc); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). State Intervenor's seek a shortened response time and expedited resolution of their Motion to Intervene to ensure they can participate in the expedited appellate proceedings that this Court noted are likely to follow any preliminary injunction.

15. State Intervenor's have not previously requested any time modifications in this case. The requested time modification should not have any effect on other aspects of this case.

### CONCLUSION

Federal Courts have recognized the interest of States in the census and have accordingly permitted States to intervene in disputes over the census. *See, e.g., Utah v. Evans*, 536 U.S. 452, 459 (2002). To ensure that Louisiana and Mississippi can protect their interests and participate in any expedited appellate proceedings, they respectfully request that this Court make any response to their Motion to Intervene due no later than 5 p.m. Pacific Time on September 24, 2020, and rule on that motion promptly thereafter.

1 Dated: September 23, 2020

Respectfully submitted,

2 **BENBROOK LAW GROUP, P.C.**

3 /s/ Bradley A. Benbrook

4 

---

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5 STEPHEN M. DUVERNAY (CA 250957)  
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12 *Counsel for State Intervenors*

13 **JEFF LANDRY**  
14 **ATTORNEY GENERAL OF LOUISIANA**

15 /s/ Joseph S. St. John

16 

---

JOSEPH S. ST. JOHN (*pro hac vice* pending)  
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23 *Attorney for the State of Louisiana*

24 **LYNN FITCH**  
25 **ATTORNEY GENERAL OF MISSISSIPPI**

26 /s/ Krissy C. Nobile

27 

---

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9 *Counsel for the State of Louisiana*

10  
11  
12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN JOSE DIVISION**

15 NATIONAL URBAN LEAGUE *et al*,

16  
17 Plaintiffs,

18 v.

19 WILBUR L. ROSS *et al*,

20 Defendants.  
21  
22  
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26  
27  
28

No. 5:20-cv-05799-LHK

**DECLARATION OF JOSEPH S. ST. JOHN  
ISO LOUISIANA AND MISSISSIPPI'S  
MOTION TO SHORTEN RESPONSE  
TIME AND TO E PEDITE**

Judge: Hon. Lucy H. Koh  
Action Filed: Aug. 18, 2020

**DECLARATION OF JOSEPH S. ST. JOHN**

I, Joseph Scott St. John, am employed by the Louisiana Department of Justice; I serve as counsel to the State of Louisiana in connection with the above-captioned matter. I make this declaration in support of Louisiana and Mississippi's Motion to Shorten Response Time and to Expedite. I am competent to testify as to the matters set forth herein.

1. I am informed and believe that the Louisiana Attorney General's Office first learned of this litigation, the TRO, and the TRO Extension on the afternoon of September 17, 2020.

2. Although Louisiana decided on September 17, 2020, that it likely needed to intervene to protect its interests, I recognized that drafting a Proposed Answer to Plaintiffs' 370 paragraph Amended Complaint, as required by Fed. R. Civ. P. 24, would require significant time.

3. I performed an initial review of the facts in this case, then researched and drafted a Notice of Intent to Intervene overnight on September 17-18, 2020 so as to timely alert the Court and the parties about Louisiana's interests and the impact of this litigation on those interests. That Notice was filed on the morning of September 18, 2020.

4. Attached hereto as Exhibit 1 is a true and accurate copy of email correspondence between counsel regarding Louisiana's contemplated Motion to Intervene and Motion to Shorten Time and Expedite.

5. As of 5:30 p.m. Central Time, Counsel for Plaintiffs has not responded to Louisiana's offer to meet-and-confer telephonically.

6. Further declarant sayeth naught.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA AND THE STATE OF LOUISIANA THAT THE FOREGOING IS TRUE AND CORRECT.

Executed in New Orleans, Louisiana this 23<sup>rd</sup> day of September 2020.

/s/ Joseph S. St. John

E IBIT 1

## St. John, Joseph

---

**From:** St. John, Joseph  
**Sent:** Wednesday, September 23, 2020 2:4 PM  
**To:** Sadik.Huseny@lw.com ; Alexander.V.Sverdlov@usdoj.gov  
**Cc:** steven.bauer@lw.com; Amit.Makker@lw.com; Shannon.Lankenau@lw.com; rick.bress@lw.com; Melissa.Sherry@lw.com; Anne.Robinson@lw.com; Tyce.Walters@lw.com; Genevieve.Hoffman@lw.com; Gemma.Donofrio@lw.com; kclarke@lawyerscommittee.org; jgreenbaum@lawyerscommittee.org; erosenberg@lawyerscommittee.org; dspence@lawyerscommittee.org; asaini@lawyerscommittee.org; mjordan@lawyerscommittee.org; pchaudhuri@lawyerscommittee.org; mike.feuer@lacity.org; kathleen.kenealy@lacity.org; danielle.goldstein@lacity.org; mike.dundas@lacity.org; weiserw@brennan.law.nyu.edu; wolf@brennan.law.nyu.edu; percival@brennan.law.nyu.edu; legalwebmail@ci.salinas.ca.us; michaelmu@ci.salinas.ca.us; dmcpaul@nndoj.org; jasearle@nndoj.org; mrosenbaum@publiccounsel.org; rbalabanian@edelson.com; lthough@edelson.com; dponggrace@akingump.com; dfrommer@akingump.com; Rebecca.hirsch2@cityofchicago.org; David.Holtzman@hklaw.com; Brad.Rosenberg@usdoj.gov; FedProg.ECF@usdoj.gov; david.m.morrell@usdoj.gov; alexander.haas@usdoj.gov; Dan.Mauler@usdoj.gov; Murrill, Elizabeth; brad@benbrooklawgroup.com; Kollmeyer, Josiah  
**Subject:** RE: National Urban League et al v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal.)

Sadik:

Plaintiffs' actions are harming Louisiana; Plaintiffs never sought the Louisiana Attorney General's input before taking those actions; and Louisiana is taking prompt action to protect its interests and the interests of its citizens. I'm disappointed that a large California law firm feels the need for an extensive back-and-forth over whether Louisiana and its citizens should be heard. Nevertheless, I'm available to discuss the simple question of a shortened response time and expedited relief at any time in the next hour. You can reach me at 225-485-2458. Otherwise, we will state that Plaintiffs declined to provide a response.

Best regards,  
Scott

---

r Sadik.Huseny@lw.com [mailto:Sadik.Huseny@lw.com]  
Wednesday, September 23, 2020 10:47 AM  
Alexander.V.Sverdlov@usdoj.gov; St. John, Joseph  
steven.bauer@lw.com; Amit.Makker@lw.com; Shannon.Lankenau@lw.com; rick.bress@lw.com; Melissa.Sherry@lw.com; Anne.Robinson@lw.com; Tyce.Walters@lw.com; Genevieve.Hoffman@lw.com; Gemma.Donofrio@lw.com; kclarke@lawyerscommittee.org; jgreenbaum@lawyerscommittee.org; erosenberg@lawyerscommittee.org; dspence@lawyerscommittee.org; asaini@lawyerscommittee.org; mjordan@lawyerscommittee.org; pchaudhuri@lawyerscommittee.org; mike.feuer@lacity.org; kathleen.kenealy@lacity.org; danielle.goldstein@lacity.org; mike.dundas@lacity.org; weiserw@brennan.law.nyu.edu; wolf@brennan.law.nyu.edu; percival@brennan.law.nyu.edu; legalwebmail@ci.salinas.ca.us; michaelmu@ci.salinas.ca.us; dmcpaul@nndoj.org; jasearle@nndoj.org; mrosenbaum@publiccounsel.org; rbalabanian@edelson.com; lthough@edelson.com; dponggrace@akingump.com; dfrommer@akingump.com; Rebecca.hirsch2@cityofchicago.org; David.Holtzman@hklaw.com; Brad.Rosenberg@usdoj.gov; FedProg.ECF@usdoj.gov; david.m.morrell@usdoj.gov; alexander.haas@usdoj.gov; Dan.Mauler@usdoj.gov; Murrill, Elizabeth; brad@benbrooklawgroup.com; Kollmeyer, Josiah  
RE: National Urban League et al v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal.)

**CAUTION:** This email originated outside of Louisiana Department of Justice. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Scott,

We're a little confused about the timing of your potential motion here, as our lawsuit was filed over a month ago, and Louisiana's Attorney General could have reached out to us a long time ago to discuss the case/talk through any relevant issues. Given the current procedural posture, we would need to know a bit more before agreeing to anything regarding a potential motion or related briefing.

Let's proceed in this fashion. Please send us whatever motion Louisiana/any other states intend to file. Also, please let us know who at the Louisiana Governor's office you've been in touch with, along with those folks at other states you have reached out to, so that we may understand the relevant constituencies and claimed interests at play. Once we have your motion and that information, I'd be happy to get on a call with you to meet and confer; I would also be in position to separately meet and confer with the other relevant state actors. And all of that would allow us to gauge our position about the claimed interests at issue that would drive any motion to intervene, and let you know Plaintiffs' position on any such intervention.

Many thanks.

Sadik

**Sadik Huseny | LATHAM & WATKINS LLP**  
505 Montgomery Street, San Francisco, CA 94111  
office: +1.415.395.8116 | cell: +1.415.860.0401  
email: [sadik.huseny@lw.com](mailto:sadik.huseny@lw.com) | web: [SadikHuseny](http://SadikHuseny.com)

---

**From:** Sverdlov, Alexander V. <[Alexander.V.Sverdlov@usdoj.gov](mailto:Alexander.V.Sverdlov@usdoj.gov)>

**Sent:** Wednesday, September 23, 2020 5:33 AM

**To:** St. John, Joseph <[StJohnJ@ag.louisiana.gov](mailto:StJohnJ@ag.louisiana.gov)>

**Cc:** Bauer, Steve (Bay Area) <[steven.bauer@lw.com](mailto:steven.bauer@lw.com)>; Huseny, Sadik (Bay Area) <[Sadik.Huseny@lw.com](mailto:Sadik.Huseny@lw.com)>; Makker, Amit (Bay Area) <[Amit.Makker@lw.com](mailto:Amit.Makker@lw.com)>; Lankenau, Shannon (Bay Area) <[Shannon.Lankenau@lw.com](mailto:Shannon.Lankenau@lw.com)>; Bress, Rick (DC) <[rick.bress@lw.com](mailto:rick.bress@lw.com)>; Sherry, Melissa (DC) <[Melissa.Sherry@lw.com](mailto:Melissa.Sherry@lw.com)>; Robinson, Anne (DC) <[Anne.Robinson@lw.com](mailto:Anne.Robinson@lw.com)>; Walters, Tyce (DC) <[Tyce.Walters@lw.com](mailto:Tyce.Walters@lw.com)>; Hoffman, Genevieve (DC) <[Genevieve.Hoffman@lw.com](mailto:Genevieve.Hoffman@lw.com)>; Donofrio, Gemma (DC) <[Gemma.Donofrio@lw.com](mailto:Gemma.Donofrio@lw.com)>; kclarke@lawyerscommittee.org; jgreenbaum@lawyerscommittee.org; erosenberg@lawyerscommittee.org; dspence@lawyerscommittee.org; asaini@lawyerscommittee.org; mjordan@lawyerscommittee.org; pchaudhuri@lawyerscommittee.org; mike.feuer@lacity.org; kathleen.kenealy@lacity.org; danielle.goldstein@lacity.org; mike.dundas@lacity.org; weiserw@brennan.law.nyu.edu; wolf@brennan.law.nyu.edu; percivalk@brennan.law.nyu.edu; legalwebmail@ci.salinas.ca.us; michaelmu@ci.salinas.ca.us; dmcpaul@nndoj.org; jasearle@nndoj.org; mrosenbaum@publiccounsel.org; rbalabanian@edelson.com; lthough@edelson.com; dponggrace@akingump.com; dfrommer@akingump.com; Rebecca.hirsch2@cityofchicago.org; David.Holtzman@hklaw.com; Rosenberg, Brad (CIV) <[Brad.Rosenberg@usdoj.gov](mailto:Brad.Rosenberg@usdoj.gov)>; ECF, FedProg (CIV) <[FedProg.ECF@usdoj.gov](mailto:FedProg.ECF@usdoj.gov)>; david.m.morrell@usdoj.gov; alexander.haas@usdoj.gov; Mauler, Dan (CIV) <[Dan.Mauler@usdoj.gov](mailto:Dan.Mauler@usdoj.gov)>; Murrill, Elizabeth <[MurrillE@ag.louisiana.gov](mailto:MurrillE@ag.louisiana.gov)>; Bradley Benbrook <[brad@benbrooklawgroup.com](mailto:brad@benbrooklawgroup.com)>; Kollmeyer, Josiah <[KollmeyerJ@ag.louisiana.gov](mailto:KollmeyerJ@ag.louisiana.gov)>  
**Subject:** Re: National Urban League et al v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal.)

Scott,

Please represent the Defendants' position as follows:



"Defendants consent, but respectfully urge the Court not to delay resolution of Plaintiffs' motion for a preliminary injunction."

Thanks,  
Aleks Sverdlov

On Sep 22, 2020, at 7:41 PM, St. John, Joseph <[StJohnJ@ag.louisiana.gov](mailto:StJohnJ@ag.louisiana.gov)> wrote:

Counsel:

As previously indicated, the State of Louisiana, potentially joined by other States, intends to intervene in the above-captioned matter. In view of the district court's stated intent to issue a ruling within 48 hours, Louisiana contemplates filing its motion tomorrow morning. Louisiana will also move for expedited action and – to the extent any party opposes – a shortened response time of 24 hours. Please let me know your position by 08:00 a.m. Central tomorrow, September 23, 2020.

Don't hesitate to call with any questions or if you would like to meet-and-confer via telephone.

Best regards,  
Scott

<image001.png>

**Joseph Scott St. John**

Deputy Solicitor General  
Office of Attorney General Jeff Landry  
Tel: (225) 485-2458  
[stjohnj@ag.louisiana.gov](mailto:stjohnj@ag.louisiana.gov)  
[www.AGJeffLandry.com](http://www.AGJeffLandry.com)

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1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA  
3 SAN JOSE DIVISION

4 NATIONAL URBAN LEAGUE *et al*,

No. 5:20-cv-05799-LHK

5  
6 Plaintiffs,

PROPOSED ORDER

7 v.

Judge: Hon. Lucy H. Koh  
Action Filed: Aug. 18, 2020

8 WILBUR L. ROSS *et al*,

9 Defendants.

10  
11 PROPOSED ORDER

12 The Motion to Shorten Time and to Expedite file by the States of Louisiana and Mississippi  
13 is GRANTED. Any response to their Motion to Intervene (ECF 204) shall be filed no later than 5  
14 p.m. Pacific Time on September 24, 2020.

15  
16  
17 HON. LUCY H. KOH  
18 UNITED STATES DISTRICT JUDGE  
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TAB E

United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,  
Plaintiffs,  
v.  
WILBUR L. ROSS, et al.,  
Defendants.

Case No. 20-CV-05799-LHK

**ORDER GRANTING PLAINTIFFS’  
MOTION FOR STAY AND  
PRELIMINARY INJUNCTION**

Re: Dkt. No. 36

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

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

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

## **I. BACKGROUND**

### **A. Factual Background**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- The document stated that “staff had covered only about 10% of the workload when [the Bureau] had to stop.” DOC\_7087.
- The document further noted that operations “focused on counting populations not living in traditional housing, such as nursing home residents, college students, the military, prisoners, the homeless, and the transitory populations are being planned and will be conducted as it is safe for Census employees and the public to engage in face-to-face activities. These operations and our nonresponse follow-up operation, all need to be completed before the Census Bureau can begin processing the data to ensure that we have a complete count of the population and not undercount specific population groups.” DOC\_7088.

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

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



The Chief of Staff to Secretary Ross, Michael Walsh, analyzed the issues for the Secretary on May 8, 2020. He wrote that “[p]ursuant to OMB guidance, the Census Bureau *completely* suspended decennial field operations for 47 days between March 18 and May 4,” and then resumed operations in phases thereafter. DOC\_2287 (emphasis in original) (“Operational Timeline” memo). Walsh flagged issues with two operations especially important to avoiding undercounts, enumerator onboarding and “Update Leave”:

- Onboarding enumerators “entails recruitment, selection, acceptance and gathering of any additional information, fingerprinting, background checks, onboarding, and training” approximately 340,000–500,000 enumerators. *Id.* “The suspension of field operations curtailed preparation for this [onboarding], as much of it required personal contact.” *Id.* After onboarding, enumerators “visit non-responding households and conduct in-person interview to obtain census responses.” DOC\_2287.
- Update Leave, as Walsh wrote, “helps reach 5 million homes in the USA in rural and remote areas that lack city-style mail.” *Id.* Update Leave reaches those homes by having Census “field staff hand-deliver questionnaires,” *id.* at 6, to “areas where the majority of the housing units do not have mail delivery . . . or the mail delivery information for the housing unit cannot be verified.” Fontenot Decl. ¶ 46. Before the complete suspension of operations, “approximately 10% of the initial [Update Leave] workload had been completed.” DOC\_2287. By contrast, “[u]nder initial projections, 100% of the Update Leave workload should have been completed by April 17.” *Id.*

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

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

1 into much slower production in the field because we have less than half the number of  
2 enumerators (38%) we need to get the job done.” DOC\_7737.

3 Issues with NRFU visits were flagged in a June 10, 2020 presentation sent by the Chief of  
4 Staff to Director Dillingham, Christa Jones, to Deputy Director Jarmin and the Chief of Staff to  
5 the Deputy Secretary of Commerce, Dan Risko. DOC\_6545. On a slide titled “Risks and  
6 Challenges Due to COVID-19,” the presentation stated that COVID-19 had “le[]d to new risks and  
7 unknowns for the operation.” *Id.* Four risks stood out: (1) a lower case resolution rate because  
8 respondents “may be less likely to answer their door”; (2) challenges with staffing and training;  
9 (3) a complex schedule; (4) and a “de-scoped” early NRFU operation that presumably had been  
10 delayed by COVID. *Id.*

11 By July 30, 2020—by which time the Bureau had already been directed to create the  
12 Replan, as discussed below—enumerator staffing was still low. DOC\_8623. Many cities across  
13 several Area Census Offices had roughly 50% shortfalls in enumerator staffing compared to the  
14 Bureau’s internal target. *Id.* Plaintiffs’ affidavits allude to similar issues with finding enumerators.  
15 In Monterey County, California, for instance, the pandemic made it harder to hire and retain  
16 enumerators “because traditional applicant groups like senior citizens have concerns about the risk  
17 of catching COVID-19.” Gurmilan Decl. ¶ 13.

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

20 As a result, on April 13, 2020, the Bureau issued an adjustment to its Operational Plan to  
21 account for the impact of COVID-19 (the “COVID-19 Plan”). ECF No. 37-3 (April 13, 2020  
22 statement of Secretary of Commerce Wilbur Ross and Census Bureau Director Steven  
23 Dillingham). The COVID-19 Plan extended the deadlines. Specifically, first, the COVID-19 Plan  
24 expanded the deadlines for self-responses from 20.5 weeks to 33.5 weeks (March 12 to October  
25 31, 2020) to account for the pandemic’s disruptions to Bureau operations and the public’s ability  
26 to respond to the census. Second, NRFU likewise expanded from 11.5 weeks (May 13 to July 31,  
27 2020) to 12 weeks (August 11 to October 31, 2020).

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

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

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

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

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

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

The Bureau’s internal view on missing the statutory deadlines was similar. Days after announcing the COVID-19 Plan, the Bureau prepared for a call on April 28, 2020 with Congressman Jamie Raskin, Chair of the House Oversight Subcommittee on Civil Rights and Civil Liberties, which has jurisdiction over the census. In preparation for that call, the Bureau’s Chief of Congressional Affairs, Christopher Stanley, circulated a memo to Director Dillingham and other senior officials. *See* DOC\_2224. The memo answered possible questions about missed deadlines.

Two questions and answers (“Q&As”) stood out. The first Q&A contemplated that any data collection after August 14 would make meeting the deadlines infeasible. The Q&A asked why the Bureau couldn’t “collect data after August 14 and still deliver redistricting data on time?” DOC\_2227. The answer was that the Bureau had “examined [the] schedule and compressed it as much as [the Bureau] c[ould] without risking significant impacts on data quality. Given the important uses of census data collection processing, it is vital that [the Bureau] not shortcut these efforts or quality assurance steps.” *Id.*

The second Q&A asked whether “delaying the apportionment data [was] constitutional?” The answer was that “[t]he proposal underwent a constitutional review, and we believe it is constitutional and that the adjusted schedule will help us fulfill the constitutional requirement of a complete and accurate census. . . . In history, especially for the many of the earlier censuses, data collection and reporting the counts shifted beyond the zero year.” DOC\_2228. By “counts shifted beyond the zero year,” the Bureau presumably was referring to census reports that had been made in the calendar year after the statutory deadline. Those reports were for the censuses of 1810, 1820, 1830, and 1840. ECF No. 203 (explaining examples); *see, e.g.*, Act of Sept. 1, 1841, ch. 15, § 1, 5 Stat. 452, 452 (second *post hoc* extension of September 1, 1841 for original deadline missed by over nine months). In those censuses, after one or more deadlines had passed without the enumeration having been completed, Congress extended the relevant deadlines after the fact. *See*

ECF No. 203.

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

If the Census Bureau could fully restart today, under ideal conditions . . . the earliest you could finish NRFU, even with the ability to restart immediately every state, is approximately September 1, 2020. By finishing NRFU on September 1, 2020, apportionment counts could not be delivered until January 31, 2021, already after the statutory deadline. Redistricting information would be provided to states by April 30, 2021, already after the statutory deadline.

**Based on the initial suspension of field activities in line with OMB guidance, the Census Bureau can no longer meet its statutory deadlines for delivering apportionment and redistricting data, even conducting operations under unrealistically ideal conditions.**

DOC\_2288 (emphasis in original) (bullet points omitted).

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

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

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

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

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

what we are going to do to address the technology drop outs.)

I think it is critical to lay the groundwork for the reality of the COVID Impacts and challenges.

Does anyone have any problems with my approach?

DOC\_7737. In response, Associate Director Olson “agree[d] that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about.”

DOC\_7738. Those reasons are not in the administrative record.

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

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

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

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

DOC\_7737.

On the same day as Associate Director Olson’s email (July 23, 2020), the Chief of Decennial Communications and Stakeholder Relationships, Kathleen Styles, shared a so-called “Elevator Speech” memo with GAO official Ty Mitchell and senior Bureau officials. *See* DOC\_8026 (sending to GAO). The purpose of the Elevator Speech, Chief Styles wrote, was “to explain, in layman’s terms, why we need a schedule extension.” The Speech begins with a “High



Level Message,” which in its entirety reads:

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

DOC\_8070.

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

By August 1, 2020, the Bureau had prepared several versions for a presentation to Secretary Ross on Monday, August 3, 2020 (“August 3 Presentation”). The parties identify one version as a key document. ECF Nos. 161 at 2 (Defendants’ identification of DOC\_10275), 190 at 6 (Plaintiffs’ identification of same). The Presentation’s very first slide, titled “Overview,” concludes that “to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved”:

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

DOC\_10275–76.

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

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

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

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

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

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



reported self-response rates below 3 percent. *Id.* at 9.<sup>3</sup>

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

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

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

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

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

[to-the-Census.html#document/p2/a581794](https://www.census.gov/2020census/data/2020census.html#document/p2/a581794). Specifically, the CSAC found the following:

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

*Id.* at 2.

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

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

On the first finding, the report detailed that:

As of mid-July 2020, the Bureau still viewed the statutory extension as necessary in order to conduct the 2020 Census completely and accurately. This view is consistent with previous public statements made by senior Bureau officials that the Bureau would no longer be able to meet the December 31, 2020, statutory deadline.

Then, in the late afternoon of Wednesday, July 29, 2020, a senior Department official told the Bureau to put together options for meeting the apportionment deadline of December 31, 2020, and brief the Secretary on those options on Monday morning, August 3, 2020.

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

As of September 21, 2020, the Census Bureau had resolved 99% of housing units in only four states. ECF No. 196-1 ¶ 13. The Bureau had stated internally in its August 3 Presentation that “[i]n order to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved.” DOC\_1026.<sup>4</sup>

### **B. Procedural History**

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

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

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

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

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

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

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

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

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

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

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

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

### 3. The Court ordered production of the administrative record.

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

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

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

Twelve hours before the production deadline on September 13, 2020, Defendants produced 58 unredacted documents and 14 heavily redacted documents. ECF No. 105; *see* ECF No. 177 (providing number of documents in September 13 Production). Many of the redacted documents contained little information other than the email metadata that Defendants included in their privilege log. *See, e.g.*, ECF No. 105-1 at 37 (DOC\_225: heavily redacted email); *id.* at 65 (DOC\_253: same); *id.* at 173 (DOC\_361: same); *id.* at 177 (DOC\_365: same). Defendants also stated that “[r]eview of the remaining documents remains ongoing” and that “[b]ecause review of the remaining documents remains ongoing, and due to the volume of documents involved, Defendants will be unable to produce or log any additional documents today.” *Id.* Moreover, Defendants did not identify when they would complete the September 13 Production.

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

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

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

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

1. Discussing or referring in any manner to the decision to accelerate the

2020 Census schedule as described in the August 3, 2020 press release.

2. Detailing the persons involved, and their respective involvement, in the decision to accelerate the 2020 Census schedule.

3. Detailing the reasons for the decision to accelerate the 2020 Census schedule.

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

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

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

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



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

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

## II. LEGAL STANDARD

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

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



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

### III. REVIEWABILITY

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

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

#### A. The Replan does not present a political question.

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

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

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

First, Defendants cite no case—and the Court is aware of none—in which a court declined jurisdiction over a census case on political question grounds. To the contrary, the Supreme Court and lower courts have repeatedly rejected the argument that the political question doctrine bars review of census-related decisionmaking. *See, e.g., U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 458–59 (1992) (holding that the “political question doctrine presents no bar”); *Franklin v. Massachusetts*, 505 U.S. 788, 801 n.2 (1992) (noting that the Court “recently rejected a similar argument” in *Montana* that “the courts have no subject-matter jurisdiction over this case because it involves a ‘political question’”); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (per curiam) (rejecting the Census Bureau’s argument that “allegations as to mismanagement of the census made in the complaint involve a political question,” and holding the case reviewable under the Constitution and APA) (quotation omitted); *New York v. U.S. Dep’t of Commerce*, 315 F. Supp. 3d 766, 791 (S.D.N.Y. 2018) (rejecting political question doctrine in citizenship question litigation; and collecting cases); *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980) (rejecting political question doctrine), *rev’d on other grounds*, 652 F.2d 617 (6th Cir. 1981); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 674 (E.D. Pa. 1980) (same); *Texas v. Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992) (same); *District of Columbia v. U.S. Dep’t of Commerce*, 789 F. Supp. 1179, 1185 (D.D.C. 1992) (same); *City of N.Y. v. U.S. Dep’t of Commerce*, 739 F. Supp. 761, 764 (E.D.N.Y. 1990) (same); *U.S. House of Representatives v. U.S. Dep’t of Commerce*, 11 F. Supp. 2d 76, 95 (D.D.C. 1998) (three-judge court) (same; and stating “the court sees no reason to withdraw from litigation concerning the census”), *aff’d*, 525 U.S. 316 (1999); *see also Utah v. Evans*, 536 U.S. 452 (2002) (engaging in review without noting any jurisdictional defect stemming from political question doctrine); *Wisconsin v. City of N.Y.*, 517 U.S. 1 (1996) (same); *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000) (same), *aff’d sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001) (unpublished); *Prieto v. Stans*, 321 F. Supp. 420, 421 (N.D. Cal. 1970) (finding jurisdiction over a motion to preliminarily enjoin the census’s “mail-out, mail-back procedure” and “community education and follow-up procedures”).

Second, precedent supports the determination that there is a discoverable and manageable standard by which the Court can review the agency action at issue here. For example, the Census Act “imposes ‘a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.’” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Franklin*, 505 U.S. at 819–820 (Stevens, J., concurring in part and concurring in judgment)) (discussing 2 U.S.C. § 2a). Similarly, the text, structure, and history of the Constitution evinces “a strong constitutional interest in accuracy.” *Utah*, 536 U.S. at 455–56.

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

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

## **B. Plaintiffs have standing to challenge the Replan.**

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

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

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

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

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

Specifically, the Court notes the following:

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

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

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

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

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

17 For example, given the historically low census response rates in the City of Los Angeles  
 18 and City of Salinas in California, the Replan creates a substantial risk that their residents will not  
 19 be counted, and a substantial risk of diminished political representation. *See* M. Garcia Decl. ¶¶ 8–  
 20 15; Gurmilan Decl. ¶¶ 6, 8–14. Specifically:

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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



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

5 Here, Plaintiffs’ theory of standing rests “on the predictable effect of Government action on  
6 the decisions of third parties”—specifically, the predictable harms of accelerating census deadlines  
7 and curtailing key operations, without warning, after months of publicly operating under a plan  
8 tailored to COVID-19. *Id.* Accordingly, enjoining the implementation of the Replan’s September  
9 30, 2020 deadline for data collection and December 31, 2020 deadline for reporting the population  
10 tabulations to the President would redress those harms. *See, e.g., Dep’t of Commerce v. U.S. House*  
11 *of Representatives*, 525 U.S. at 328–34 (affirming injunction against the planned use of statistical  
12 sampling to prevent apportionment harms, among others); *New York v. United States Dep’t of*  
13 *Commerce*, 351 F. Supp. 3d at 675 (issuing injunction to prevent “the loss of political  
14 representation and the degradation of information”).

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

### 17 **C. The Replan constitutes agency action.**

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

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

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

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

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

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

1 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (finding that agency’s explanation for rescission  
2 was not the product of reasoned decisionmaking); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct.  
3 2117, 2126 (2016) (setting aside agency’s “change in position” for lacking reasoned explanation).

4 Second, the Replan is a circumscribed, discrete agency action. Indeed, Defendants treated  
5 the Replan accordingly. Defendants named it the “Replan” or “Replanned Operational Schedule.”  
6 *E.g.*, DOC\_10276 (version of August 3, 2020 slide deck identified as key by the parties);  
7 DOC\_8929 (July 30, 2020 email from Barbara LoPresti, Chief of the Decennial Information  
8 Technology Division, to senior officials discussing “this proposed replan”); DOC\_10066 (email  
9 thread titled “Replan” with senior officials); DOC\_11918 (August 3, 2020 email to the Chief of  
10 Staff for the Deputy Secretary of Commerce with subject “Revised Replan Deck”).

11 The Secretary directed the Bureau to develop the Replan. *See, e.g.*, August 3 Press Release,  
12 ECF No. 37-1 (“directed by the Secretary”). In response to the Secretary’s direction, the Bureau  
13 presented the Replan to the Secretary in a single slide deck. *See, e.g.*, DOC\_10276. The Secretary  
14 made an explicit decision to adopt the Replan. Fontenot Decl. ¶ 85. Census Bureau Director  
15 Dillingham announced the Replan in a single press release on August 3, 2020. ECF No. 37-1.  
16 Defendants consistently treated the Replan as a circumscribed, discrete agency action.

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

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

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

By contrast, Plaintiffs here challenge a circumscribed, discrete agency action: the Replan. “Replan” is not an “occasional[.]” informal name for “constantly changing” operations, *id.* at 890, but is a codified term for the agency action directed and adopted by the Secretary. *E.g.*, DOC\_11918. Nor is the Replan a disconnected series of hundreds of individual determinations with enough independent significance to be published in the Federal Register like the program in *Lujan*. Rather, the Replan is a census operational plan that replaced the COVID-19 Plan. As *Lujan* held plainly, though, judicial “intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole ‘program’ to be revised by the agency in order to avoid the unlawful result that the court discerns.” *Lujan*, 497 U.S. at 894.

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

#### **D. The Replan constitutes final agency action.**

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

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

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

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

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

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

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

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

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

12 Thus, the *Norton* Court observed that “[t]he implementing regulations make clear that land  
13 use plans are a *preliminary* step in the overall process of managing public lands—designed to  
14 guide and control future management actions and the development of subsequent, more detailed  
15 and limited scope plans for resources and uses.” *Id.* (emphasis added). As a result, “a land use plan  
16 is not ordinarily the medium for affirmative decisions that implement the agency’s  
17 ‘project[ions].’” *Id.* (quoting 43 U.S.C. § 1712(e)). Similarly, “the regulation defining a land use  
18 plan declares that a plan ‘is not a final implementation decision on actions which require further  
19 specific plans, process steps, or decisions under specific provisions of law and regulations.’” *Id.* at  
20 69–70. In sum, by contrast to a “final” agency action, the type of land use plan challenged by the  
21 *Norton* plaintiff “is generally a statement of priorities; it guides and constrains actions, but does  
22 not (at least in the usual case) prescribe them.” *Id.* at 71.

23 Here, the Replan was not a “preliminary step” toward deciding the Census schedule. Nor  
24 was the Replan a “statement of priorities” that merely “guides and constrains actions.” *See id.* at  
25 69, 71. Instead, the Replan constitutes a commitment to terminate the collection of data, analyze  
26 that data, and report “[t]he tabulation of total population” to the President by December 31, 2020.  
27 13 U.S.C. § 141(b).



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

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

Fontenot Decl. at ¶ 98.

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

## **2. The Replan directly affects the parties.**

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

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

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

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

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

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

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

25 1998 Appropriations Act, § 209(a)(8), 111 Stat. at 2480–81. Thus, because the Replan will likely  
26 result in an inaccurate enumeration, the Replan is an action from which legal consequences will  
27 flow.

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



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

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

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

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

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

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

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

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

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

7 A less weighty and more easily revocable constraint on the Government was found final in  
 8 *Hawkes Co.*, 136 S. Ct. at 1814. There, an internal memorandum of agreement between two  
 9 federal agencies provided that the Army Corps of Engineers could issue “jurisdictional  
 10 determinations” (“JDs”) that were generally “binding on the Government” for five years. *Id.* The  
 11 Supreme Court held that the JDs were final agency action under *Bennett v. Spear* even though  
 12 (1) the JDs could be appealed and “revisited,” *see id.* at 1813–14; and (2) the JDs’ source of  
 13 authority, the memorandum of agreement, never went through notice and comment and was  
 14 represented as *non*-binding by the United States. *See id.* at 1817 (opinions of Kennedy, J.,  
 15 concurring; and Ginsburg, J., concurring in part and concurring in the judgment). By contrast, here  
 16 (1) Defendants do not waver in their commitment to end data collection by September 30, 2020  
 17 and to report population data to the President by December 31, 2020; and (2) there is no doubt that  
 18 the Replan will bind the United States to this Census and “tabulation of total population” until  
 19 2030.

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

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

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

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

6 *Franklin* underscores why the Replan constitutes final agency action. The Replan is neither  
 7 a “tentative recommendation” nor a decision that will be reviewed by a higher official. *Id.* Rather,  
 8 the Secretary directed the Bureau to develop the Replan on July 29, 2020 and approved the Replan  
 9 on August 3, 2020. Moreover, as a practical matter, no time remains for agency reconsideration.  
 10 The Replan’s field operations will irreversibly wind down on September 30, 2020. Fontenot Decl.  
 11 ¶ 98.

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

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

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

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

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

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

The APA creates a “strong presumption favoring judicial review of administrative action.” *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015). One exception includes those actions that are “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). However, courts have read this exception quite narrowly. This exception encompasses situations where Congress explicitly precludes review, or “those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Weyerhaeuser*, 139 S. Ct. at 370 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). This latter exception has generally been limited to “certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion . . . such as a decision not to

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

5 *Department of Commerce v. New York* controls. There, the Supreme Court concluded that  
6 “[t]he taking of the census is not one of those areas traditionally committed to agency discretion.”  
7 139 S. Ct. at 2568. Collecting case law, the Supreme Court noted that “courts have entertained  
8 both constitutional and statutory challenges to census-related decisionmaking.” *Id.* (citing, *e.g.*,  
9 *Carey*, 637 F.2d at 839, in which the Second Circuit concluded that the Bureau’s decision not to  
10 use “Were You Counted” forms or to compare census records with records of Medicaid-eligible  
11 people “was not one of those ‘rare instances’ where agency action was committed to agency  
12 discretion”); *see also City of Los Angeles v. U.S. Dep’t of Commerce*, 307 F.3d 859, 869 n.6 (9th  
13 Cir. 2002) (rejecting argument that the Bureau’s decision not to adopt statistically adjusted  
14 population data was committed to agency discretion by law). The Supreme Court explained that  
15 there were meaningful standards against which to judge the taking of the census, including the  
16 Census Act, which requires that the agency “conduct a census that is accurate and that fairly  
17 accounts for the crucial representational rights that depend on the census and the apportionment.”  
18 *Id.* at 2568–69 (quoting *Franklin*, 505 U.S. at 819–20 (Stevens, J., concurring in part and  
19 concurring in judgment)).

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



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

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

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

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

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

#### IV. MERITS

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 In turn, the Census Act imposes a statutory duty of accuracy. “[B]y mandating a population  
4 count that will be used to apportion representatives, see § 141(b), 2 U.S.C. § 2(a), the [Census] Act  
5 imposes ‘a duty to conduct a census that is accurate and that fairly accounts for the crucial  
6 representational rights that depend on the census and the apportionment.’” *Dep’t of Commerce v.*  
7 *New York*, 139 S. Ct. at 2568–69 (quoting *Franklin*, 505 U.S. at 819–20 (Stevens, J., concurring in  
8 part and concurring in the judgment)). Congress has underscored this duty in legislation amending  
9 the Census Act. See 1998 Appropriations Act, § 209(a), 111 Stat. at 2480–81 (codified at 13  
10 U.S.C. § 141 note) (finding that “it is essential that the decennial enumeration of the population be  
11 as accurate as possible, consistent with the Constitution and laws of the United States”). Thus, the  
12 Census Act requires the Defendants to produce an accurate census.

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

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

24 First, a March 24, 2020 set of talking points explained the effect of reducing operations on  
25 accuracy. These talking points were circulated by Enrique Lamas, Chief Advisor to Deputy  
26 Director Ron Jarmin, to senior Bureau officials as late as July 21, 2020 on “urgent” notice.  
27 DOC\_7085–86. “Call me please,” he wrote to Senior Advisor for Decennial Affairs, James B.

1 Treat. DOC\_7075. The talking points stated: “The 2020 Census operations are designed to cover  
2 specific populations for a complete count of the population. If specific operation are cut or  
3 reduced, the effect would be to miss specific parts of the population [and] lead to an undercount of  
4 specific groups. That is why operations like Update Leave targeting rural populations or group  
5 quarters enumeration are critical to full coverage and need to be done in specific orders.”  
6 DOC\_7086.

7 A set of April 17, 2020 talking points regarding the COVID-19 Plan, which were drafted  
8 by Assistant Director for Decennial Programs Deborah Stempowski, stated: “We have examined  
9 our schedule and compressed it as much as we can without risking significant impacts on data  
10 quality.” DOC\_265. Bureau officials repeated this statement to Congressman Jamie Raskin, who  
11 chairs the House Subcommittee on Civil Rights and Civil Liberties, which has jurisdiction over  
12 the census. *See* DOC\_2224.

13 On July 23, 2020, the Chief of Decennial Communications and Stakeholder Relationships,  
14 Kathleen Styles, shared a so-called “Elevator Speech” memo with GAO official Ty Mitchell and  
15 senior Bureau officials. *See* DOC\_8026 (sending to GAO). The purpose of the Elevator Speech,  
16 Chief Styles wrote, was “to explain, in layman’s terms, why we need a schedule extension.” The  
17 Speech begins with a “High Level Message,” which in its entirety reads:

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

25 ECF No. 155-8 at 295, 332 (DOC\_8070).

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

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

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

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

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

The Elevator Speech’s last overarching point is that “[c]urtailing either field operations or post-processing may result in loss of public confidence in the census results such that census results would be unusable regardless of quality.” DOC\_8071. Specifically, “[t]he administration already requested 120 days and Census officials have repeatedly said we need this time.” *Id.* Changing tack could “result in great skepticism about the numbers and unwillingness to use them.” *Id.* That is because “[t]here are always winners and losers in census results.” *Id.* As a result,



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

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

- The Secretary directed the Bureau to develop a plan with an accelerated schedule within days, which led to the drafting of the Replan. *See* DOC\_10183.
- The Replan shortened both data collection and data processing.
- Four days before the Replan was announced, enumerator staffing was roughly 50 percent of the Bureau’s target at some sites within major regions such as the Los Angeles Region. *See* DOC\_8631.
- On the date of the Replan’s announcement, COVID-19 had resurged in much of the country, Hurricane Hanna had hit Texas, and Hurricane Isaias had almost made landfall in North Carolina.<sup>9</sup>

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

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

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

I think it is critical to lay the groundwork for the reality of the COVID Impacts and challenges.

Does anyone have any problems with my approach?

DOC\_7737. In response, Associate Director Olson “agree[d] that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about.”

DOC\_7738.

“All the reasons we know about” are not described in the administrative record. Olson does allude, however, to the reason of “political motivation.” DOC\_7737. In doing so, he “sound[s] the alarm” on “deliver[ing] apportionment by 12/31” in the strongest possible terms:

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

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

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

DOC\_7559.<sup>10</sup> The email thread thus showed senior Bureau officials’ serious concerns

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



about the Replan only days before July 29, 2020, the day Associate Director Fontenot asserts that the Secretary ordered the development of the Replan. The staffing shortfall persisted. In the Bureau’s July 30, 2020 Periodic Performance Management Reports slideshow, the Bureau acknowledged that “[s]taffing remains a challenge.” DOC\_9423.

Like field operations, data processing also needed more time in order to yield an accurate census. On July 24, 2020, a memo titled “2020 Decennial Census – Apportionment Data Processing” was circulated by Chief of Decennial Communications Stakeholder Relationships Kathleen Styles to senior staff, including Associate Director Fontenot and Assistant Director Stempowski. DOC\_8019. The Apportionment Data Processing memo explained that “[t]he time spent on data processing is essential to ensuring an accurate and complete count.” DOC\_8019. The Bureau further acknowledged that “[t]he three month delay in the largest field data collection operations, which impacted more than 35 percent of all responding households, will require additional data processing to ensure people are accurately counted in the correct location.” *Id.* The Bureau explained the shortfalls to accuracy that would result if data processing were cut short:

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

DOC\_8019.

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

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

before or on July 30, 2020<sup>11</sup> to create the Replan and present it to the Secretary on August 3, 2020. *Cf.* Fontenot Decl. ¶ 81 (“July 29, the Deputy Director informed us that the Secretary had directed us . . .”). Although the Bureau had taken nearly a decade to develop the Operational Plan Version 4.0 for the 2020 Census, the Bureau developed the Replan in the span of 4 or 5 days at most. On July 30, 2020, the Chief of the Population Division, Karen Battle, sent an email with the subject “EMERGENCY MEETING on 12\_31 Delivery of Appo\_\_.” DOC\_8364. Thereafter, senior Bureau officials met at 11 a.m., and again at 5:00 p.m. that day. The officials then conferred in an email thread that extended to at least 10:57 p.m. DOC\_8353. In the thread, the Chief of the Geography Division, Deirdre Bishop, thanked fellow senior officials for “exhibiting patience and kindness as we brainstormed and adjusted the schedule.” DOC\_8356.

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

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

DOC\_9073–74.

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<sup>11</sup> The administrative record does not contain any communications from Deputy Director Jarmin on July 29, 2020, let alone a specific communication between Deputy Director Jarmin and Associate Director Fontenot. Because Associate Director Fontenot’s declaration is not the administrative record, the Court relies on the July 30 “EMERGENCY MEETING” email discussed below and subsequent communications for the latest date of the Secretary’s order.

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

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

15 DOC\_9496.

16 Because of the Replan's negative impact on accuracy, top Bureau staff hesitated to "own"  
17 the Replan. On August 1, 2020, Christa Jones, Chief of Staff to Director Dillingham, wrote in an  
18 email to other senior officials: "I REALLY think we need to say something on page 2 [of the  
19 Bureau's presentation on the Replan] that this is what we've been directed to do or that we are  
20 presenting these in response to their direction/request. This is not our idea and we shouldn't have  
21 to own it." DOC\_10183. Jones also wrote that "I think we need to include the language about the  
22 quality that we have on the Word document. We really shouldn't give this as a presentation  
23 without making this clear up front." That Word document, "Options to meet September 30\_v11,"  
24 was circulated to senior Bureau officials by the Chief of the Decennial Census Management  
25 Division, Jennifer Reichert. The document stated that "accelerating the schedule by 30 days  
26 introduces significant risk to the accuracy of the census data. In order to achieve an acceptable  
27 level of accuracy, at[ ]least 99% of Housing Units in every state must be resolved." DOC\_9951;  
28 *accord* DOC\_8779 (another version of "Options to meet September 30" circulated by Assistant  
Director Stempowski on July 31, 2020, that states "[a]cceptable quality measure: 99% if HUs

resolved (similar to 2010)').

The same significant concerns were presented to Secretary Ross on August 3, 2020 ("August 3 Presentation").<sup>12</sup> That presentation began, like the Elevator Speech and the "Options to meet September 30" document, with a tough assessment: "Accelerating the schedule by 30 days introduces significant risk to the accuracy of the census data. In order to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved." DOC\_10276. The August 3 Presentation then described the many changes in field operations that the Replan will necessitate, such as reducing the number of NRFU visits from six to three or one.<sup>13</sup> See DOC\_10281–82.

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

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

DOC\_10281. The August 3 Presentation thus contemplated sacrificing not only the accuracy of the December 31, 2020 congressional apportionment figures, but also the accuracy and timeliness of

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<sup>12</sup> Like Defendants had done with the Elevator Speech, Defendants produced several versions of the August 3 Presentation as non-privileged and not pre-decisional. However, the parties identified one version, DOC\_10275, as a key document. ECF Nos. 161, 190. The Court thus mainly analyzes that version of the document. See 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party . . .").

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

the April 1, 2021 redistricting numbers.

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

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

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

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

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

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

2 Moreover, the Bureau's internal documents undermine the August 3 Press Release's claims  
3 of efficiency. As to enumerators and staffing, the Bureau's head of field operations had "sound[ed]  
4 the alarm" on July 23, 2020. DOC\_7738. "Crystal clear numbers" showed that "people are afraid  
5 to work for us." DOC\_7738. Specifically, the Bureau had an "awful deploy rate" and "less than  
6 half the number of enumerators (38%) [it] need[ed] to get the job done." *Id.* How "awards" and  
7 "additional training sessions" in the midst of a pandemic would close that 62% gap was unclear. A  
8 week later, the "High-Level Summary Status" dated July 30, 2020 confirmed the staffing shortfall.  
9 In sites and Area Census Offices across the county, the Bureau lacked about half of the  
10 enumerators "compared to [its] goal." DOC\_8623.

11 As for data processing, senior Bureau officials had received on July 29, 2020 a "High  
12 Level Summary of the Post-Data Collection" from the Director's Senior Advisor for Decennial  
13 Affairs, James Treat. DOC\_8337. The High Level Summary unambiguously concluded that:

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

20 *Id.*; accord DOC\_8086 (July 27, 2020 memo from Treat with similar language).

21 Similarly, in the very August 3 Presentation on the Replan, the Bureau found that a  
22 "compressed review period creates risk for serious errors not being discovered in the data –  
23 thereby significantly decreasing data quality. Additionally, serious errors discovered in the data  
24 may not be fixed." DOC\_10285.

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



apportionment and redistricting data w[ould] result in a census that has fatal data quality flaws that are unacceptable for a Constitutionally-mandated activity.” DOC\_8022.

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

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

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

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

why we need an additional 30 for risk mitigation.” DOC\_365. Risks included “another system shock, such as a Hurricane hitting the [S]outh during NRFU.” *Id.*

- On May 8, 2020, Secretary Ross’s Chief of Staff sent the Secretary a memo that among other things stated, “**Based on the initial suspension of field activities in line with OMB guidance, the Census Bureau can no longer meet its statutory deadlines for delivering apportionment and redistricting data, even conducting operations under unrealistically ideal conditions.**” DOC\_2287 (emphasis in original).
- On May 26, 2020, the head of census field operations, Tim Olson, publicly stated that “[w]e have passed the point where we could even meet the current legislative requirement of December 31. We can’t do that anymore. We – we’ve passed that for quite a while now.” Nat’l Conf. of Am. Indians, 2020 Census Webinar: American Indian/Alaska Native at 1:17:30–1:18:30, YouTube (May 26, 2020), <https://www.youtube.com/watch?v=F6IyJMtDDgY>.
- On July 8, 2020, Associate Director Fontenot publicly confirmed that the Bureau is “past the window of being able to get” accurate counts to the President by December 31, 2020. U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 20–21 (July 8, 2020), <https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf>.

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

- On July 23, 2020, Chief of Decennial Communications and Stakeholder Relationships, Kathleen Styles, shared the “Elevator Speech” memo with GAO. *See* DOC\_8026 (sending to GAO). The Elevator Speech echoed Associate Director Ahmad’s concerns about natural disasters: “[t]he Census Bureau needs [] 30-days for risk mitigation[] in case we are not able to complete data collection operations everywhere by October 31 (e.g., a hurricane, or a COVID outbreak).” DOC\_8022.
- Also on July 23, 2020, several senior officials stated internally that meeting the deadline was impossible. Associate Director Fontenot identified “the difference between goal and actual case enumeration[,] [c]urrently a shortfall (11% goal vs 7% actual).” DOC\_7739. He thus thought it “critical to lay the groundwork for the reality of the COVID Impacts and challenges” in an upcoming meeting with the Department of Commerce. Associate Director of Field Operations Olson agreed. He concluded that “any thinking person who would believe we can deliver apportionment by 12/31 has either a mental deficiency or a political motivation.” DOC\_7737.



- On July 27, 2020, the Director Dillingham’s Senior Advisor for Decennial Affairs, James B. Treat, circulated a memo intended for Deputy Director Jarmin and authored by Associate Director Fontenot. The memo stated that “appreciably shortening the quality checks and reviews would be extremely unwise. Each and every step in post data collection processing is necessary.” DOC\_8085. Furthermore, hurricane season, early snow events, and COVID-19 all “increased the risk of our ability to complete the field data collection operations by the [COVID-19 Plan] deadline of October 31, 2020.” DOC\_8086.
- On July 29, 2020, the Senior Advisor for Decennial Affairs to Director Dillingham, James Treat, circulated to Associate Director Fontenot and other senior officials a “High Level Summary of the Post-Data Collection.” DOC\_8337. The High Level Summary repeated the Bureau’s strong concerns. It stressed that “[d]ecades of experience have demonstrated that [processing and review] steps and time are necessary to produce data products that do not need to be recalled, meet data user expectations and needs, [are] delivered on time, and stand the test of time.” DOC\_8337.

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

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

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<sup>14</sup> The Court takes judicial notice of the congressional hearing dates. The Court may take judicial notice of matters that are either “generally known within the trial court’s territorial jurisdiction” or

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

Yet during that hearing, senior Bureau officials were strategizing how to resist the Department of Commerce’s ongoing pressure to accelerate census operations. On July 23, 2020, Associate Director Fontenot wrote at 10:31 a.m. that “[o]n Monday at DOC I plan to talk about the difference between goal and actual case enumeration[,] [c]urrently a shortfall (11% goal vs 7% actual). . . . [I]t is critical to lay the groundwork for the reality of the COVID Impacts and challenges.” DOC\_7739. Associate Director Olson responded at 11:19 a.m., “agree[ing] that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about.” DOC\_7738. Lastly, by 11:48 a.m., Associate Director Olson “sound[ed] the alarm to realities on the ground.” *Id.*

In fact, the Commerce Department’s pressure on the Bureau had started at least a few days earlier. Three days before the July 23, 2020 Senate hearing, the Bureau’s Chief Financial Officer, Ben Page, asked other senior officials whether the Bureau still supported Congressional extension of the statutory deadlines. DOC\_6852 (July 20, 2020 email to Director Dillingham et al.). Page wrote:

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

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

By July 28, 2020, the Bureau asked Congress for \$448 million for a timely completion of the Census without an extension of the statutory deadline. DOC\_8037 (July 28, 2020 email from Secretary Ross’s Director of Public Affairs, Meghan Burris, to Secretary Ross).

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

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

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

### 3. Defendants failed to consider an alternative.

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

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

Defendants similarly failed to consider an alternative here: not adopting the Replan while striving in good faith to meet statutory deadlines. By adopting the Replan, Defendants sacrificed adequate accuracy for an uncertain likelihood of meeting one statutory deadline. Defendants “did not appear to appreciate the full scope of [their] discretion.” *Regents*, 140 S. Ct. at 1911. Specifically, Defendants could have taken measures short of terminating the census early only to possibly meet the deadline. These measures could have included good faith efforts to meet the deadline coupled with an operational plan that would—at least in the Bureau’s view—generate results that were not “fatal[ly]” or “unacceptabl[y]” inaccurate. Elevator Speech, DOC\_8070.

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

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

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

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

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

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

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

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

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

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

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



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

Indeed, in analyzing the COVID-19 Plan—but never the Replan—the Bureau itself concluded that missing the statutory deadline was constitutional and in line with historical precedent. Bureau officials included these conclusions in their notes for their April 28, 2020 call with Congressman Jamie Raskin, Chair of the House Oversight Subcommittee on Civil Rights and Civil Liberties, which has jurisdiction over the census. DOC\_2224. The notes stated that the COVID-19 proposal “underwent a constitutional review, and we believe it is constitutional.” DOC\_2228; *see also* DOC\_1692 (preparation materials for April 19, 2020 briefing with House Oversight Committee, stating that the COVID-19 plan “went through inter-agency review, including review by the Department of Justice,” and “[t]heir view is that there is not a constitutional issue with the proposal”).

The notes further stated that “in history, especially for [] many of the earlier censuses, data collection and reporting in the counts shifted beyond the zero year.” DOC\_2228. Officials in charge of the census have previously missed statutory deadlines imposed by Congress. Assistants conducting four different censuses failed to transmit returns to marshals or the Secretary of State within the deadline imposed by Congress. In each case, only after the deadline had passed without the required transmission did Congress act by extending the statutory deadlines. This post-deadline extension took place in four censuses: the 1810, 1820, 1830, and 1840 Censuses. ECF No. 203 (explaining examples); *see, e.g.*, Act of Sept. 1, 1841, ch. 15, § 1, 5 Stat. 452, 452 (1841) (*post hoc* extension of September 1, 1841 for original deadline missed by over nine months).

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

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

4 Like the Secretary in *Regents*, Defendants argue that binding law compels their decision.  
 5 Similarly, the Court agrees that the Census Act’s statutory deadlines bind Defendants. Even so,  
 6 Defendants should have “appreciate[d] the full scope of their discretion” to preserve other  
 7 statutory and constitutional objectives while striving to meet the deadlines in good faith. *Regents*,  
 8 140 S. Ct. at 1911. By not appreciating their discretion, Defendants failed to consider important  
 9 aspects of the problem before them. That failure was likely arbitrary and capricious under the  
 10 APA.

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

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

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

27 When an agency changes position, the agency must provide a “reasoned explanation” why



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

6 More detail is required “when, for example, [the agency’s] new policy rests upon factual  
 7 findings that contradict those which underlay its prior policy; or when its prior policy has  
 8 engendered serious reliance interests that must be taken into account.” *Id.* “In such cases it is not  
 9 that further justification is demanded by the mere fact of policy change; but that a reasoned  
 10 explanation is needed for disregarding facts and circumstances that underlay or were engendered  
 11 by the prior policy.” *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television*, 556 U.S. at  
 12 515–16); *see also Organized Vill. of Kake*, 795 F.3d at 968 (“[A]n agency may not simply discard  
 13 prior factual findings without a reasoned explanation.”). “It follows that an ‘[u]nexplained  
 14 inconsistency’ in agency policy is ‘a reason for holding an interpretation to be an arbitrary and  
 15 capricious change from agency practice.’” *Encino Motorcars*, 136 S. Ct. at 2126 (alteration in  
 16 original) (quoting *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S.  
 17 967, 981 (2005)); *see, e.g., Humane Society v. Locke*, 626 F.3d 1040, 1049–50 (9th Cir. 2010)  
 18 (concluding that an agency acted arbitrarily and capriciously where the agency took a “seemingly  
 19 inconsistent approach” with the approach it had taken previously).

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

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

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

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

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<sup>17</sup> Defendants did not mention any other documents in their September 2, 2020 filing. ECF No. 63.

1 explanation. Here, Defendants failed to explain the options before them, failed to weigh the risks  
 2 and benefits of the various options, and failed to articulate why they chose the Replan. In other  
 3 words, Defendants failed to “articulate a rational connection between the facts found and the  
 4 choice made.” *State Farm*, 463 U.S. at 43. Specifically, Defendants failed to explain why they  
 5 disregarded the facts and circumstances that underlay their previous policy: the COVID-19 Plan.  
 6 The facts underlying the COVID-19 Plan include the rapid spread of the coronavirus pandemic  
 7 across the United States and its significant effect on Census operations, which are well-  
 8 documented throughout the record. *See, e.g.*, DOC\_2287 (“Operational Timeline” memo from  
 9 Secretary Ross’s Chief of Staff, Michael Walsh, to the Secretary on May 8, 2020).

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

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

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

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

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

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

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

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

21 Accordingly, when the COVID-19 pandemic began to spread in March 2020, Defendants  
22 concluded that “[t]he virus will cause operational changes for the census, and may necessitate  
23 changes in our planned communications approach.” DOC\_970 (March 13, 2020 “COVID-19  
24 Contingency Planning” sent by Program Analyst Christopher Denno to Director Dillingham et al.).  
25 Defendants thus stated that they would “[d]evelop[] talking points to share with our partners”  
26 about the pandemic. *Id.* Once Defendants adopted the COVID-19 Plan, Defendants’ partners  
27 began to rely on the extended deadlines. For instance:

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

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

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

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

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

**B. Plaintiffs will suffer irreparable harm without an injunction.**

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

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

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



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

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

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

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

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

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

**D. A preliminary injunction is in the public interest.**

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

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

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

**E. The scope of the injunction is narrowly tailored.**

The Bureau has explained that data processing cannot begin until data collection operations are completed nationwide. Because the steps are sequential, the Bureau cannot grant relief to particular geographic regions and not others. Specifically, the Bureau explained in its Elevator Speech, circulated to high level Bureau officials and to the GAO, “[n]or can post processing operations begin until data collection operations are completed everywhere. There is no option, e.g., to begin post processing in one region or state of the country while other areas are still collecting data.” Elevator Speech, DOC\_8071.

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

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



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

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

So I want to be clear about this. Our APA action challenges the timelines in the Replan. It is very discrete in that respect.

The final agency action is the announcement on August 3rd that they are going to shorten the deadlines for completing the Census, two deadlines in particular, leaving the October 31st one to September 30th for data collection and moving the April date to December 31st for reporting to the President. That is our APA

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

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

## V. CONCLUSION

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

**IT IS SO ORDERED.**

Dated: September 24, 2020

  
LUCY H. KOH  
United States District Judge