No. 20-16868

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL URBAN LEAGUE, et al.,
Plaintiffs-Appellees,

v.

WILBUR L. ROSS, JR., et al.,
Defendants-Appellants.

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

OPPOSITION TO MOTION FOR IMMEDIATE ADMINISTRATIVE STAY PENDING DISPOSITION OF EMERGENCY STAY MOTION

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TABLE OF CONTENTS

Page

INTRODUCTION

After multiple rounds of extensive briefing, a thorough review of the partial administrative record, and several lengthy hearings, the district court issued a detailed and comprehensive 78-page decision. That decision stayed and enjoined Defendants from implementing a "Replan" for the 2020 Census. The Replan, thrown together in four days, was contrary to the expert advice of high-level Census Bureau officials and stopped all counting on September 30. The district court's decision instead returned to the status quo ante: a schedule adopted and implemented by Defendants, after a decade of planning, which would allow counting to continue until October 31. Among other things, the district court found that the Replan's truncated timeline would cause irreparable harm to Plaintiffs and the public by rushing to a premature and inaccurate close a Census count that would control political representation and trillions of dollars in federal funding for the next decade.

Defendants appeal that decision and move for an emergency stay pending appeal. Plaintiffs will oppose that motion on any schedule ordered by the Court. But Defendants also ask this Court to issue an "immediate administrative stay" that would upend the status quo and end the 2020 Census in *two days*. Through the guise of this "administrative stay," Defendants seek to obtain the precise end relief they ultimately desire: the ability to end critical Census field operations, to immediately fire upwards of 200,000 Census enumerators who are still working to count millions

of uncounted Americans, and to ensure no practicable hope of restarting the count (as Defendants themselves concede). An administrative stay is wholly inappropriate when it would cause the very harm that the district court's stay and injunction was entered to prevent—harm that could not be fully remedied by a ruling on the stay pending appeal. That alone is reason to deny.

But Defendants also fail to satisfy their burden to show that an administrative stay is warranted under the four-factor test. Defendants do not address, let alone refute, the severe and irreparable harm that Plaintiffs (and the entire nation) will suffer from a count the Bureau has admitted will be incomplete and inaccurate by its own standards if stopped on September 30. Defendants, by contrast, will suffer no irreparable harm from continuing to implement the October 31 deadline the Bureau itself adopted—and they make no meaningful effort to show otherwise. Nor do Defendants even try to justify the fatal flaws in their decision to adopt the Replan. Defendants' arguments begin and end with the December 31 statutory deadline. But Defendants ignore now (as they did then) their competing statutory and constitutional duty to conduct an accurate census. And the December 31 deadline (still three months away) cannot excuse Defendants' utter failure to comply with the minimum standards of reasoned decisionmaking mandated by the Administrative Procedure Act—as the district court explained at length.

The Court should deny Defendants' request for an immediate administrative stay and order full briefing on Defendants' emergency motion to stay.

STATEMENT

A. Factual Background

Defendants' version of the facts bears no resemblance to the actual record in this case as described, in detail, by the district court. Add.2-15.

The Census Bureau spent most of the last decade planning, developing, testing, and re-testing the original operational plan for the 2020 Census. Add.2-3. The Bureau consulted with experts, stakeholders, and partners. Add.3. And the Bureau's plan was ultimately codified in a 200-page operational plan ("2018 Operational Plan"), as well as detailed plans for each sub-operation, containing precise timelines for each and every operation in the 2020 Census. Add. 3-4.

As relevant here, and consistent with prior censuses, the 2018 Operational Plan determined that the Bureau needed 20.5 weeks (March 12-July 31) for self-response, 11.5 weeks (May 13-July 31) for non-response follow up ("NRFU"), and 22 weeks (August 1-December 31) for data processing. Add.3. NRFU is the "most important census operation to ensuring a fair and accurate count" and is essential for capturing hard-to-count populations (Add.2 (quoting Thompson Decl. ¶15)), including communities of color, low-income individuals, undocumented immigrants, non-English speakers, and persons with mental and physical disabilities. During

NRFU, enumerators go door-to-door to households that have not otherwise responded and also perform quality control checks to ensure that the information provided is accurate. Add.2.

Then in March, just as census season began, the COVID-19 pandemic hit and the Bureau was forced to reevaluate its plan. Add.4. Among the many new challenges, the Bureau was unable to hire and train enumerators to go door-to-door and households were, not surprisingly, unwilling to answer their doors in the midst of a pandemic. Over the course of the next month, the Bureau developed a revised plan, which they announced on April 13 (the "COVID-19 Plan"). Add.6.

The COVID-19 Plan retained the key design choices from the 2018 Operational Plan; it simply adjusted the timeline for operations, ensuring that each was given the same amount of time or more. Add.6-7. As relevant here, the Bureau delayed and slightly expanded the timeline for NRFU, providing that it would last from August 11 to October 31, 2020. Add.6. The Bureau also expanded data processing from 22 weeks to 26 weeks, so that it would end (and apportionment counts would be delivered to the President) by April 30, 2021. Add.7. The additional time was necessary "to account for the pandemic's disruptions to Bureau operations," the "public's ability to respond to the census," and "the pandemic's effects on the quality of the data, especially for groups that are less likely to self-respond (often hard to count populations)." Add.6-7 (citation omitted); Add.49

(quoting DOC_265) (26 weeks for data processing represented "as much as we can" compress the schedule "without risking significant impacts on data quality").

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

Over the next four months, Defendants implemented the COVID-19 Plan. And senior "Bureau officials publicly stated that meeting the December 31, 2020 deadline would be impossible." Add.7; *see* Add.7-9 (collecting statements of Bureau and Commerce officials, as well as documents and recommendations, from April through early July). The consensus was that the completeness and accuracy of the Census in the face of a once-in-a-century-pandemic was what mattered most.

All of that changed when President Trump issued a memorandum on July 21 declaring that it was the United States' policy to exclude undocumented immigrants from the congressional apportionment base. Add.9. Immediately thereafter, there was a "push to complete NRFU asap." Add.10 (quoting DOC_7738). In response, high-level Bureau officials repeated what they had said earlier, with even more force. For example, on July 23, Associate Director Olson emphasized the "need to sound

the alarm to realities on the ground," explaining that "it is ludicrous to think we can complete 100% of the nation's data collection earlier than 10/13 and any thinking person who would believe we can deliver apportionment by 12/31 has either a mental deficiency or a political motivation." Add.10 (quoting DOC_7738); *see* Add.9-11 (other similar statements between July 21 and July 29).

Despite these warnings, on July 29, the Secretary "directed" the Bureau "to present a plan at our next weekly meeting on Monday, August 3, 2020, to accelerate the remaining [census] operations in order to meet the statutory apportionment deadline." Add.107 (¶81). Pursuant to that directive, senior Bureau officials gathered the next day "to begin to formalize a plan to meet the statutory deadline." *Id.* By the afternoon of July 31, the Bureau had thrown together a plan to truncate both data collection and processing, and spent the next two days reducing the plan to a slide deck. Add.11-12. At the same time, Bureau officials continued to sound the alarm that the accelerated plan would significantly compromise data quality and pose a grave and irreparable risk to the accuracy and completeness of the census. *See* Add.54-59.

On the morning of August 3, the Bureau submitted the final presentation to Secretary Ross. Add.14. It warned that "[a]ll of these activities represent abbreviated processes or eliminated activities that will reduce the accuracy of the 2020 Census," that the "compressed review period creates risk for serious errors not

being discovered in the data—thereby significantly decreasing data quality," and that those "serious errors" if discovered "may not be fixed" due to lack of time. Add.55, 58 (citations omitted). Without considering or addressing any of that, the Secretary approved the plan the same day, and the Bureau announced the "Replan" in an August 3 press release. Add.11 (quoting August 3 Press Release).

The Replan drastically cut the timelines for accomplishing the 2020 Census. It required that all data collection conclude on September 30—shortening the time for door-to-door NRFU operations from 11.5 weeks to 7.5 weeks. Add.11-12. Data processing, meanwhile, was cut in half from 26 weeks to 13 weeks, with the deadline advancing from April 30, 2021 to December 31, 2020. Add.12.

Independent agencies and experts—including the Government Accountability Office, the Commerce Department's Office of Inspector General ("OIG"), and the Bureau's own Scientific Advisory Committee—repeatedly and recently issued dire warnings that the Replan's revised timeline poses significant risks to the accuracy, completeness, and reliability of the 2020 Census. Add.12-15 (collecting reports).

B. Procedural Background

Like their factual recitation, Defendants' version of the procedural history bears little resemblance to that recounted by the district court (Add.15-20) and observed by Plaintiffs. Defendants assert:

> That an immediate stay is needed from this Court on an emergency basis is in no small part a byproduct of the district court's repeated

> refusal to issue an appealable order. The court instead enjoined operations for 19 days under temporary restraining orders for the sole purpose of pursuing massive court-initiated discovery under the guise of compiling an administrative record regarding the Bureau's non-final set of scheduling waystations en route to the December 31 statutory deadline.

Stay Mot. 3. That is flat wrong. It was Defendants who refused to produce *any* administrative record in an APA case. It was Defendants who violated court orders requiring such production. And it was Defendants who repeatedly changed their positions, refused to answer the district court's questions, and feigned ignorance of facts in their possession. The district court worked tirelessly on this case and issued every order within 24 to 48 hours. Any delay in moving this case to an appeal was entirely of Defendants' own making.

This suit was filed on August 18, 2020. Because data collection was scheduled to continue until September 30, the parties stipulated to an accelerated briefing schedule that would culminate in a preliminary injunction hearing on September 17, and Plaintiffs filed their motion for a preliminary injunction on August 25. Add.15-16. The next day, the district court held a case management conference, at which "Defendants repeatedly denied the existence of an administrative record." Add.16 (quoting transcript). Nonetheless, the court instructed Defendants that "[i]f there's an administrative record, it should be produced." Add.16 (quoting transcript). The court also ordered Defendants to

provide the date upon which the Bureau planned to wind down field operations, to assess how quickly a ruling was needed. Add.126-27.

A week later, on September 2, Defendants informed the court they had already begun winding down field operations—nearly a month before September 30 and three weeks after starting NRFU in most of the country. Add.127. This early wind down would have left the court practically incapable of granting effective relief after the September 17 hearing to which the parties jointly agreed. With no other options, Plaintiffs immediately moved for a temporary restraining order ("TRO."). Add.127.

At the September 4 TRO hearing, Defendants told the district court that it should wait to review the declaration of Associate Director Albert Fontenot before ruling. But that declaration, once filed, only confirmed the need for a TRO. It revealed that field operations could start closing on September 11 region-by-region regardless of the completion rate; that the Bureau had already started terminating enumerators; and that it would be extremely difficult to restart field operations once they had been shut down. Add.112-13 (¶¶95-98). After finding "serious questions" on the merits, a likelihood of irreparable harm, and that the equities tipped "sharply" in favor of Plaintiffs, the court granted a 12-day TRO to preserve the status quo and prevent Defendants from shutting down data collection before September 17. Add.116-22.

Defendants, at that same hearing, also "reiterated their position that no administrative record existed," but for the first time "disclosed that there were documents considered by agency decisionmakers at the time the Replan was adopted." Add.16. But Defendants insisted that the court must rule on their threshold arguments before ordering production of the administrative record. Add.129. After full briefing, the district court rejected their threshold arguments and ordered a phased initial production. Add.17. In particular, the court ordered that the most crucial portions of the administrative record be produced on September 13 and 16, before the September 17 hearing. Add.17.

Defendants did not comply. On the date of the first production, Defendants reviewed only 25% of the responsive documents, stopped that review 12 hours short of the deadline, claimed privilege over the vast majority of the documents, and later informed the court they would be unable to meet the second deadline as well. Add.18, 130. But rather than sanction Defendants and order the record produced immediately, the court instead allowed them to produce a subset of the record (for purposes of the preliminary injunction) comprising only those documents previously provided to OIG. Add.18-19. With the TRO set to expire within 48 hours, and still no administrative record, the court granted a short extension and rescheduled the preliminary injunction hearing for September 22. Add.123-40.

Defendants complied with this new production order and the (still limited) administrative record was finally produced on September 19, 20, and 21. Add.20. On September 22, the court held the preliminary injunction hearing. *Id*. Two days later, it issued a 78-page decision granting the preliminary injunction. Add.1-78. The following day, the court denied a stay pending appeal. Dkt. No. 212.

ARGUMENT

"A stay is an 'intrusion into the ordinary process of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." *Id.* at 433-34. In deciding whether to grant a stay, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (citation omitted). A temporary or "administrative" stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits." *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). Defendants fall far short of satisfying their burden.

A. Any "Administrative Stay" Would Upend The Status Quo

Defendants' request for an administrative stay "would not preserve the status quo: it would upend it." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778 (9th Cir. 2018). For months now, the Census Bureau has been employing hundreds of thousands of enumerators, conducting field operations, and engaging in data collection. That was true under the COVID-19 Plan (which continued data collection until October 31), and it remained true under the Replan (which would have ended data collection on September 30). Before and after the TRO, issued weeks before the September 30 end date, the Bureau was and is still counting.

Defendants have not denied that if this Court were to stay the district court's order they would *immediately* shut down operations and would stop counting entirely by September 30. *See* Stay Mot. 3 (complaining that district court's order "requires the Bureau to continue field operations beyond September 30"). And Defendants certainly do not suggest they could or would restart field operations once halted, no matter the outcome of this litigation. Defendants ask this Court to upend the status quo and bring data collection to a crashing halt—the exact opposite of what an administrative stay is intended to do. That is reason enough to deny.

B. Defendants Cannot Satisfy Their Burden

Plaintiffs welcome the opportunity to fully brief the reasons why Defendants cannot satisfy their burden under the four-factor test when this Court sets a briefing

schedule on the emergency motion for a stay pending appeal. But those factors also demonstrate why an administrative stay is wholly inappropriate here.

1. An Administrative Stay Will Inflict Serious And Irreparable Harm On Plaintiffs And The Public

Plaintiffs and the public will suffer serious and irreparable harm if an administrative stay is granted. An inaccurate count will lead to a loss of critical funding and political rights for Plaintiffs, their residents, and their members. Add.23-27. And as noted, *supra* at 12, a stay would allow Defendants to stop counting *two days* from today. Freed from the district court's order, Defendants would immediately stop "assigning new reinterview cases" and engaging in other "quality assurance" checks. Add.145 (¶10) ("If we were not under the TRO, we would have ceased assigning reinterview cases, SRQA (Self Response Quality Assurance) cases, and field verification cases."). They would reduce the number of visits to housing units. Add.147 (¶13). And they would immediately start to terminate enumerators and other field operations staff. Add.113 (¶98).

As the district court explained, "termination of data collection is practically irreversible." Add.35. To that point, Associate Director Fontenot specifically declared that "[l]ack of field staff would be a barrier to reverting to the COVID Schedule"; that "[t]he Census Bureau begins terminating staff as operations wind down, even prior to closeout"; and that "[i]t is difficult to bring back field staff once we have terminated their employment." Add.75 (quoting Sept. 5 Fontenot Decl.

¶98). If Defendants' administrative stay is granted, there will be no time to rule on the emergency motion for stay before that harm is inflicted. In other words, even if Plaintiffs prevail, Defendants will have obtained a ruling that permits the Bureau to achieve their goal of concluding data collection by September 30. And there will be no time for Congress to extend the December 31 deadline (still three months away).[1]

Tellingly, Defendants never dispute that data collection will *not* be complete (as measured by the Bureau's own standards) before September 30. Nor could they. The Bureau's benchmark for an "acceptable level of accuracy" for the 2020 Census requires resolution of "at least 99% of Housing Units in *every state*." Add.11 (quoting DOC_10275-76) (emphasis added). That has been the historic benchmark as well and, in the past, when the Bureau has fallen short by the end of the scheduled data collection period, they have extended field operations to complete the count.[2]

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[1] The House has already passed a bill to extend the deadlines, and the Senate is currently considering a similar bill with bipartisan support. *See* H.R. 6800, 116th Cong., § 70201 (passed May 15, 2020); S. 4571, 116th Cong. (introduced Sept. 15, 2020); Hansi Lo Wang, *Bipartisan Senate Push to Extend Census Begins Weeks Before Count Is Set to End,* NPR (Sept. 15, 2020), https://www.npr.org/2020/09/15/913163016/bipartisan-senate-push-to-extend-census-begins-weeks-before-count-is-set-to-end; *see also* Press Release, *Murkowski Welcomes Court Ruling Moving 2020 Census Deadline Back to Late October* (Sept. 25, 2020), https://www.murkowski.senate.gov/press/release/murkowski-welcomes-court-ruling-moving-2020-census-deadline-back-to-late-october.

[2] Census Bureau, U.S. Dep't of Commerce, *1990 Census of Population and Housing—History* (1990), https://www.census.gov/history/pdf/1990proceduralhistory.pdf; *1990 Census Coverage Evaluation Operations: Hearing Before the Comm. on Post Office and Civil Service,* 101st Cong. 75-76 (1990) (statement of

But as of September 27, only 16 states have hit 99% and 6 states are at or below 95%.[3] With only two days remaining, that is a significant shortfall—even putting to one side the harm to the accuracy of data obtained from Defendants' rushing the count, as well as considerably lower resolution rates in areas within states with large hard-to-count populations.[4]

All of this mirrors Defendants' own statements. On September 11, Mr. Fontenot declared that the Bureau was "facing significant risks to complete all states by September 30." Add.147 (¶14). On September 17, he told the Census Advisory Committee that he "did not know whether Mother Nature would allow us to meet the September 30 date." *Id.* And, on September 22, he reaffirmed that his "concerns in this regard continue." *Id.* That Defendants continue to insist that the count immediately end *regardless* only reinforces the very real, imminent, and irreparable harm an administrative stay would cause.

Prof. Eugene P. Ericksen, Temple University), https://www.loc.gov/law/find/hearings/pdf/00183650932.pdf.

[3] *See* Census Bureau, *2020 Census Self-Response By State* (Sept. 27, 2020 Report Date) https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-27.pdf.

[4] Even these completion numbers are likely misleading, as Defendants have repeatedly downgraded their definition of what processes are required to "complete" counting a household. *See* Prelim. Injunction Reply Ex. 32 at 2, Dkt. No. 131-18 (acknowledging Defendants were forced to downgrade "completion" rate "due to cases that were reopened" following the TRO).

2. Defendants Will Suffer No Irreparable Harm Without An Administrative Stay

Defendants, in contrast, cannot show they will suffer irreparable harm from the district court's stay and injunction. Defendants' (very limited) articulation of the harm is as follows: (1) the Bureau cannot start data processing until after completing data collection, and it cannot compress data processing any further than it already has; (2) under the district court's decision, the Bureau must revert back to the COVID-19 Plan and, as such, must continue data collection until October 31; and (3) if the Bureau has to keep counting until October 31, it cannot possibly meet the December 31 deadline. Stay Mot. 19-20. But that does not explain how the relief *granted* by the district court—which stays the Replan's December 31 deadline—harms Defendants. The only possible harm would come from this Court *staying* that relief. *Only then* would the Bureau be in the difficult position of having to complete data collection in two days (when it is already far behind where it needs to be), and rushing data processing to finish by December 31.

Nor can Defendants articulate what harm (irreparable or otherwise) they would suffer from the Bureau's failure to meet the Census Act's December 31 deadline. That is unsurprising: the district court's order simply restores the status quo ante and allows the Bureau's own previously adopted deadline of April 30, 2021 in the COVID-19 Plan to become operative once again. The Bureau is already on record saying, repeatedly, that it cannot complete an accurate census by December

31. *See, e.g.*, Add.7-9. And the duty to conduct an accurate count is itself a statutory requirement—and one with constitutional valence. *See* Part B.3, *infra*.

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

On the merits, Defendants cannot make a strong showing that they are likely to succeed. It is worth noting, at the outset, that Defendants have now abandoned most of the "threshold" arguments they rested on below. For good reason. As the district court explained, similar arguments have been routinely and recently rejected in census cases and are similarly misplaced here. *See* Add.21-44.[5]

As the district court also explained, at length, Defendants failed to comply with the APA's minimum standards of reasoned decisionmaking—five times over. Add.44-74. The administrative record (1) shows that Defendants did not consider key aspects of the problem before them, including "how the Replan would feasibly

[5] Defendants do not ground their assertion that there are no "judicially manageable or enforceable standards of census accuracy" in any particular doctrine. Stay Mot. 14. But that argument fails regardless. The Supreme Court confirmed just last year that the Census Act is not "drawn so that it furnishes no meaningful standard" of review—that is, despite the "broad authority [conferred] on the Secretary" the Act does "not leave his discretion unbounded" and "constrains" his authority in important respects. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019). And neither the district court nor this Court is required to "evaluat[e] a particular census plan" for accuracy. Stay Mot. 14. The district court considered only whether Defendants had adequately explained their decision to adopt the Replan knowing that *the Bureau itself* had warned that the Replan would create grave risks to the census's accuracy, and without offering any countervailing justification or considering the various aspects of the problem as required by the APA.

protect the same essential interests that the Bureau had identified"; (2) "belies Defendants' claim that Congressional inaction on the deadline justified the Replan"; (3) demonstrates that Defendants "failed to consider" the alternative course of "not adopting the Replan while striving in good faith to meet statutory deadlines"; (4) makes clear that Defendants failed to articulate a satisfactory explanation for the Replan or "explain why they disregarded the facts and circumstances that underlay their previous policy: the COVID-19 Plan"; and (5) proves that Defendants failed to "consider the reliance interests" engendered by the previous policy. Add.57-71.

And although the district court did not reach Plaintiffs' Enumeration Clause claim (Add.44), Defendants cannot make a strong showing of success on that claim either. The Replan does not bear a "reasonable relationship to the accomplishment of an actual enumeration of the population," *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996), and it would require the Bureau to use statistical imputation in ways that cannot be squared with the Constitution's requirements, *see Utah v. Evans*, 536 U.S. 452, 472-79 (2002).

Defendants offer no meaningful response to any of that. Instead, their entire merits argument is trained on the Census Act's statutory deadline. But as the district court spent nearly 30 pages explaining, that is no excuse for violating the APA. Add.46-74. Agencies should, of course, strive to comply with statutory deadlines—and no one is "cavalierly" suggesting otherwise. Stay Mot. 20. But the mere

existence of a statutory deadline does not free an agency from considering its *other* statutory—and constitutional—obligations, such as the 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, 2568-69 (2019) (citation omitted); *see also Utah v. Evans*, 536 U.S. at 478. Nor does it free an agency of its duty to consider key aspects of the problem before it, explain its decisions in ways consistent with the evidence, justify departures from previous policy, consider alternatives, or take account of reliance interests. Defendants do not deny that they did none of the above.

Defendants' insistence that the Replan was adopted to meet the December 31 deadline because Congress failed to act also "runs counter to the facts." Add.63. 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." *Id.* And Defendants' current view that it would be unlawful for the Secretary to report after the statutory deadline—no matter the circumstances, no matter the accuracy of the count, no matter the costs—similarly finds no support in the record. The reality is that agencies *do* miss statutory deadlines for far less weighty reasons than the need to complete the critically important, difficult, and constitutionally mandated work of a decennial census that will dictate apportionment, redistricting, and over a trillion dollars in federal funding

for the next decade—during a once-in-a-lifetime global pandemic. *See* Add.64-67 (citing cases). The APA does not allow the Secretary to turn a blind eye to that reality and to the Bureau's own repeated and unequivocal view that the statutory deadline *must* yield in these extraordinary circumstances.

Defendants also fail to cast doubt on the district court's holding that they were required to consider the alternative policy of "not adopting the Replan while striving in good faith to meet statutory deadlines." Add.64. In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court vacated the DHS Secretary's recession of DACA despite the Attorney General's conclusion that the program was illegal and must be rescinded on that basis. 140 S. Ct. 1891, 1911 (2020). The Supreme Court declined to rule on whether that determination of illegality was correct because, even if it were, the Secretary had still violated the APA by failing to consider important aspects of the decision and possible alternatives to complete rescission. *Id.* This case is stronger still because, unlike *Regents*, there is no contemporaneous statement declaring that the COVID-19 Plan is or would become unlawful as of December 31. But even had such a determination been made, it would not excuse Defendants from complying with the APA—particularly given Defendants' competing statutory and constitutional obligations.

Defendants seek to dismiss all of this by noting that *Regents* concerned the "wind down of an enforcement policy adopted by the agency *as a matter of*

discretion." Stay Mot. 13-14. But that is true here, too. As the district court explained, Defendants could have continued to operate under the COVID-19 Plan while striving to meet statutory deadlines; could have "taken measures short of terminating the census early" such as undertaking "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"; or could have selected a plan that would balance the statutory and constitutional directive to conduct an accurate census with the statutory directive to complete such a census by a particular deadline. Add.64 (citation omitted; alterations in original). That Defendants did not even *consider* these alternatives is, again, undisputed.

Finally, Defendants' rhetoric to the side, this is not a broad programmatic attack on the internal operations of the Bureau, and the remedy ordered by the district court does not require "hands-on" management of the 2020 Census. Add.30. The district court merely granted the run-of-mine remedy for an APA violation that stays the unlawful action (the Replan) and, returning to the status quo ante, allows the *Bureau*'s previously adopted COVID-19 Plan to govern in the interim. This Court should not accept Defendants' invitation to override the Bureau's own expert judgment on what was needed to accomplish a complete and accurate census, or the district court's determination that the Secretary did not follow the most basic procedural steps in adopting the Replan. And it certainly should not do so in the

form of an "administrative stay" that would enable Defendants to immediately end data collection and fire enumerators in ways that would be practically impossible to reverse—causing irreparable harm to Plaintiffs and the nation for the next decade.

CONCLUSION

The Court should deny Defendants' motion for an administrative stay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion response complies with the type-volume limitation of Circuit Rules 27-1(1)(d) and 32-3(2) because the document contains 5,195 words according to the count of Microsoft Word, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f) and Circuit Rule 27-1(1)(d).

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

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