

1 LATHAM & WATKINS LLP
Steven M. Bauer (Bar No. 135067)
2 steven.bauer@lw.com
Sadik Huseny (Bar No. 224659)
3 sadik.huseny@lw.com
Amit Makker (Bar No. 280747)
4 amit.makker@lw.com
Shannon D. Lankenau (Bar No. 294263)
5 shannon.lankenau@lw.com
505 Montgomery Street, Suite 2000
6 San Francisco, CA 94111
Telephone: 415.391.0600
7 Facsimile: 415.395.8095

8 LATHAM & WATKINS LLP
Richard P. Bress (*pro hac vice*)
9 rick.bress@lw.com
Melissa Arbus Sherry (*pro hac vice*)
10 melissa.sherry@lw.com
Anne W. Robinson (*pro hac vice*)
11 anne.robinson@lw.com
Tyce R. Walters (*pro hac vice*)
12 tyce.walters@lw.com
Genevieve P. Hoffman (*pro hac vice*)
13 genevieve.hoffman@lw.com
Gemma Donofrio (*pro hac vice*)
14 gemma.donofrio@lw.com
555 Eleventh Street NW, Suite 1000
15 Washington, D.C. 20004
Telephone: 202.637.2200
16 Facsimile: 202.637.2201

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Kristen Clarke (*pro hac vice* forthcoming)
kclarke@lawyerscommittee.org
Jon M. Greenbaum (Bar No. 166733)
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (admitted *pro hac vice*)
erosenberg@lawyerscommittee.org
Dorian L. Spence (*pro hac vice* forthcoming)
dspence@lawyerscommittee.org
Ajay P. Saini (admitted *pro hac vice*)
asaini@lawyerscommittee.org
Maryum Jordan (Bar No. 325447)
mjordan@lawyerscommittee.org
Pooja Chaudhuri (Bar No. 314847)
pchaudhuri@lawyerscommittee.org
1500 K Street NW, Suite 900
Washington, D.C. 20005
Telephone: 202.662.8600
Facsimile: 202.783.0857

*Additional counsel and representation
information listed in signature block*

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

19 NATIONAL URBAN LEAGUE et al.,

20 Plaintiffs,

21 v.

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

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

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR TEMPORARY
RESTRAINING ORDER**

Date: TBD
Time: TBD
Place: Courtroom 8
Judge: Hon. Lucy H. Koh

1 **I. INTRODUCTION**

2 Defendants' submissions and arguments to this Court against a TRO, and especially the
 3 Fontenot Declaration submitted last night, have confirmed that a TRO now is necessary. Mr.
 4 Fontenot makes clear that, among other things, September 11 is the date by which critical Census
 5 field operations can be deemed "completed" regardless of actual completion percentages—a
 6 looming issue for the vast majority of census regions, according to Mr. Fontenot—and that Census
 7 field workers are being terminated now. A TRO is thus the only way to ensure the status quo
 8 remains in effect until the September 17 PI Hearing. Absent a TRO, Plaintiffs and the public
 9 interest will be irreparably harmed by Defendants' actions.

10 **II. THE CENSUS COUNT IS IN JEOPARDY AND THE THREAT OF**
 11 **IRREPARABLE INJURY IS CLEAR**

12 At the August 26, 2020 CMC, Defendants could not provide this Court with even basic
 13 information regarding the Bureau's wind-down operations. Under Court order to do so, on
 14 September 2, Defendants provided a three-sentence non-explanation, including that "the Census
 15 Bureau has already begun taking steps to conclude field operations" and would do so "throughout
 16 September." Dkt. 63. Alarmed that operations were already being shut down, but without being
 17 provided any detail, Plaintiffs felt compelled to file an immediate motion for TRO. And
 18 Defendants' September 4 Opposition to Plaintiffs' TRO (Dkt. No. 74)—which again provided no
 19 specifics, but just-trust-us assertions such as "Closeout for a particular area thus means that a census
 20 count in that area is complete—not that the count is being foreshortened"—has only heightened this
 21 concern. So, too, has Defendants' approach during the September 4, 2020 TRO Hearing, where the
 22 Court was told field operations were not being shut down until reaching a 85-90% completion rate,
 23 and that all would be made clear by Mr. Fontenot's forthcoming declaration.

24 Mr. Fontenot's declaration falls far short of that promise. Most critically, it does not state
 25 that the Bureau is following the same closeout procedure that they would have followed had the
 26 COVID-19 Plan remained in place. It does not provide details about what qualifies as "complete,"
 27 or why San Diego already has a predetermined date for shutting down operations. Nor does it
 28 answer many of the other questions this Court posed to Defendants. But Mr. Fontenot's declaration

1 does make one overarching point clear: that an immediate TRO is vital. As the Court may recall,
 2 on July 8, Mr. Fontenot stated that the Bureau was “past the window of being able to get those
 3 counts by those [December 31] dates.” *See* Dkt. 36 at 10:19-22. Through Mr. Fontenot, we now
 4 have heard for the first time that for the Bureau’s nonresponse follow up (NRFU) operation, (1) as
 5 of September 3, 2020 roughly only **11%** of CFS [Census Field Supervisor] areas nationwide were
 6 eligible for the closeout phase, which happens when a CFS area crosses the 85% completion mark,
 7 yet (2) **all** CFS areas will become eligible for closeout procedures on September 11, regardless of
 8 completion rate, at which time each regional director can unilaterally decide to move the area into
 9 closeout to meet the September 30 deadline. Dkt. 81-1, Fontenot Decl. ¶ 95. When Defendants
 10 said that “closeout for a particular area thus means that a census count in that area is complete—
 11 not that the count is being foreshortened,” Plaintiffs were right to worry, because as of September
 12 11, for what may be a vast majority of CFU areas, “complete” means whatever a regional director
 13 may decide, in light of the mandate to have all field operations cease by September 30. Deemed
 14 “complete” precisely *because* the time, and therefore count, *has* been foreshortened.

15 Furthermore, what constitutes “complete” for a given household remains unexplained. The
 16 internal Census Bureau document, only touched on by Mr. Fontenot enough to suggest it came
 17 from him, *see* Fontenot Decl. ¶ 81, indicates that the Replan has increased reliance on
 18 administrative records, and reductions in quality assurance operations during NRFU. *See* Dkt. 66-
 19 3 at 23-24. But use of administrative records or proxies is less accurate than direct enumeration,
 20 particularly so for immigrants and racial and ethnic minorities. *See* Dkt. 36-2, Thompson Decl. ¶¶
 21 20-23; Dkt. 36-3, Hillygus Decl. ¶¶ 19-29. Defendants provide no explanation as to what degree
 22 of accuracy has been sacrificed by the Replan, and Plaintiffs’ experts and the Bureau’s own
 23 documents make clear that inaccuracies will hit immigrants and racial and ethnic minorities the
 24 hardest.

25 Mr. Fontenot’s declaration also discusses a number of additional topics reaffirming
 26 Plaintiffs’ allegations in the Complaint, and therefore likelihood of success on the merits, such as:

- 27 • the well-funded status of the Bureau (¶¶ 15-18);
- 28 • the extended work that went into the original Census operational plan (¶¶ 9-71);

- 1 • the necessity of the extended COVID-19 Plan (¶¶ 77-80);
- 2 • the fact that the Bureau was operating under the COVID-19 Plan for many months (¶¶ 80-81);
- 3 • the critical importance of nonprofit organizations and other actors in assisting the
- 4 Bureau with implementing its timeline and counts, including some of the Plaintiffs
- 5 here by name (¶¶ 40-42);
- 6 • the sudden truncation of everything in late July 2020, when Mr. Fontenot was
- 7 forced to prepare and present a “Replan” over a **4-day** period (¶ 81); and
- 8 • the fact that the Replan does compromise the quality of the Census (albeit to an
- 9 unidentified degree) (¶ 82).

10 Yet perhaps most importantly for the instant motion is Mr. Fontenot’s candid assessment

11 regarding the importance and status of Census field workers:

12 Lack of field staff would be a barrier to reverting to the COVID Schedule were

13 the Court to rule later in September. The Census Bureau begins terminating staff

14 as operations wind down, even prior to closeout. Based on progress to date, as is

15 standard in prior censuses, we have already begun terminating some of our

16 temporary field staff in areas that have completed their work. It is difficult to

17 bring back field staff once we have terminated their employment. Were the Court

18 to enjoin us tomorrow we would be able to keep more staff on board than were

19 the Court to enjoin us on September 29, at which point we will have terminated

20 many more employees.

21 Fontenot Decl. ¶ 98. In other words, Mr. Fontenot is telling this Court that being enjoined now

22 rather than later is necessary to keep Census field staff in place. This refreshingly candid

23 statement is a welcome contrast to Defendants’ TRO Opposition, which argued that a TRO will

24 force the Bureau “to replan a massive operation” and that having the Bureau “reshuffle its

25 operations at this late juncture would indeed risk undermining the accuracy Plaintiffs allegedly

26 seek to protect.” Dkt. 74 at 4. Mr. Fontenot also notes that “[i]f our schedule were extended, we

27 would evaluate whether to reschedule” an important quality control operation they presumably

28 removed because of the limited time remaining before September 30. *Id.* ¶ 99. In his words,

“[w]e would go through each and every aspect of remaining operations and determine how best

to use the remaining time to maximize the accuracy and completeness of the census results.” *Id.*

Thus, according to Mr. Fontenot, if the Court enjoins Defendants immediately, they will

have more employees to continue NRFU operations and could comb through operations to

maximize the accuracy of the census. Moreover, any burdens or costs seem absorbable into the

Bureau’s ample budget, which “represents enough funding to successfully complete the 2020

1 Census in virtually all possible scenarios.” *Id.* ¶ 15. And to be clear, the relief Plaintiffs are
 2 seeking is very limited. The Court would simply be ordering the Bureau not to take any actions
 3 inconsistent with the very plan Mr. Fontenot and the experts at the Bureau had themselves adopted
 4 and implemented for four months before the 4-day Replan—no more, no less—in the short time
 5 before the PI hearing.

6 With the threat of irreparable injury established—and no countervailing interest against a
 7 short TRO—Plaintiffs respectfully submit that maintaining the status quo is paramount.

8 **III. DEFENDANTS’ THRESHOLD ARGUMENTS REGARDING**
 9 **JUSTICIABILITY AND STANDING FAIL**

10 Defendants’ TRO Opposition only briefly touches on various merits-related issues,
 11 arguing that this case is essentially not justiciable, and referring the Court to Defendants’ PI
 12 Opposition. Plaintiffs will address each of these arguments in detail in their upcoming Reply in
 13 support of their PI Motion. But to the extent they factor into the Court’s views on the merits of
 14 the TRO at issue here, Plaintiffs will address them briefly here.

15 *First*, Defendants argue that their decision to promulgate the Replan was compelled by
 16 the statutory deadline. As Plaintiffs will explain more fully, it was not: The statutory deadline
 17 must, as applied in these extraordinary circumstances, bow to the constitutional duty to conduct
 18 an accurate census. More important than the deadline, “the [Census] Act imposes ‘a duty to
 19 conduct a census that is accurate and that fairly accounts for the crucial representational rights
 20 that depend on the census and the apportionment.’” *Dep’t of Com. v. New York*, 139 S. Ct. 2551,
 21 2568-69 (2019) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 819-20 (1992)); *see also Utah*
 22 *v. Evans*, 536 U.S. 452, 478 (2002) (Census Clause of the Constitution carries with it a “strong
 23 constitutional interest in accuracy”). Moreover, even if Defendants were correct, that would not
 24 free them from the duty to comply with the APA’s standards of reasoned decisionmaking. *See*
 25 *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020) (holding
 26 that although DHS rested its decision to rescind DACA “on the conclusion that DACA is
 27 unlawful,” the rescission must still be vacated under the APA for failure to consider all relevant
 28 aspects of the problem).

1 *Second*, courts have repeatedly rejected the argument that census-related decisions are
 2 beyond APA review. Indeed, in the citizenship question case, the Supreme Court stated that
 3 “[t]he taking of the census is not one of those areas traditionally committed to agency discretion”
 4 and is subject to judicial review under the APA. *Dep’t of Com. v. New York*, 139 S. Ct. 2551,
 5 2568-69 (2019). Other courts have held similarly. *See, e.g., Carey*, 637 F.2d at 838-39;
 6 *California v. Ross*, 362 F. Supp. 3d 727, 743-46 (N.D. Cal. 2018); *Kravitz v. Dep’t of Com.*, 336
 7 F. Supp. 3d 545, 567 & n.14 (D. Md. 2018) (citing cases). Defendants’ promulgation of the
 8 Replan, like the decision to add a citizenship question, is final agency action. And the political
 9 question doctrine has been rejected in previous census-related cases as well. *See, e.g., New York*
 10 *v. U.S. Dep’t of Com.*, 315 F. Supp. 3d 766, 790-91 (S.D.N.Y. 2018). As the *New York* court
 11 explained,

12 courts, including the Supreme Court and the Second Circuit, have
 13 entertained challenges to the conduct of the census for decades
 14 and, more to the point, have consistently rejected application of the
 15 political question doctrine in such cases. Those courts have
 16 acknowledged that the text of the Constitution vests Congress with
 virtually unlimited discretion in conducting the decennial actual
 Enumeration. Yet, time and again, they have recognized that the
 judiciary has at least some role to play in reviewing the conduct of
 the political branches with respect to the decennial census.

17 *Id.* at 791 (internal citations to numerous cases and quotations omitted).

18 *Third*, the harms that Plaintiffs have alleged and described in their PI Motion have been
 19 firmly upheld as conferring standing in a case like this. *See* Dkt. 36 at 28-33.

20 At bottom, it is telling that Defendants’ primary arguments here are based on threshold
 21 issues and not the Bureau’s action itself.

22 **IV. CONCLUSION**

23 For the reasons set forth above, and in their motion for a temporary restraining order, in
 24 the motion for a preliminary injunction and all supporting documents, and at hearing before the
 25 Court, Plaintiffs request that the Court enter a TRO in accordance with Plaintiffs’ Proposed
 26 Order, enjoining Defendants from implementing or allowing to be implemented any actions as a
 27 result of the shortened timelines in the Bureau’s Replan, including but not limited to winding
 28 down or altering any Census field operations.

1 Dated: September 5, 2020

LATHAM & WATKINS LLP

2 By: /s/ Sadik Huseny
3 Sadik Huseny

4 Steven M. Bauer (Bar No. 135067)
5 steven.bauer@lw.com
6 Sadik Huseny (Bar No. 224659)
7 sadik.huseny@lw.com
8 Amit Makker (Bar No. 280747)
9 amit.makker@lw.com
10 Shannon D. Lankenau (Bar. No. 294263)
11 shannon.lankenau@lw.com
12 **LATHAM & WATKINS LLP**
13 505 Montgomery Street, Suite 2000
14 San Francisco, CA 94111
15 Telephone: 415.391.0600
16 Facsimile: 415.395.8095

17 Richard P. Bress (admitted *pro hac vice*)
18 rick.bress@lw.com
19 Melissa Arbus Sherry (admitted *pro hac vice*)
20 melissa.sherry@lw.com
21 Anne W. Robinson (admitted *pro hac vice*)
22 anne.robinson@lw.com
23 Tyce R. Walters (admitted *pro hac vice*)
24 tyce.walters@lw.com
25 Genevieve P. Hoffman (admitted *pro hac vice*)
26 genevieve.hoffman@lw.com
27 Gemma Donofrio (admitted *pro hac vice*)
28 gemma.donofrio@lw.com
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, D.C. 20004
Telephone: 202.637.2200
Facsimile: 202.637.2201

*Attorneys for Plaintiffs National Urban League;
League of Women Voters; Black Alliance for
Just Immigration; Harris County, Texas; King
County, Washington; City of San Jose,
California; Rodney Ellis; Adrian Garcia; and
the NAACP*

23 Dated: September 5, 2020

24 By: /s/ Jon M. Greenbaum
25 Kristen Clarke (*pro hac vice* forthcoming)
26 kclarke@lawyerscommittee.org
27 Jon M. Greenbaum (Bar No. 166733)
28 jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (admitted *pro hac vice*)
erosenberg@lawyerscommittee.org
Dorian L. Spence (*pro hac vice* forthcoming)
dspence@lawyerscommittee.org
Maryum Jordan (*pro hac vice* forthcoming)

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18
19
20
21
22
23
24
25
26
27
28

mjordan@lawyerscommittee.org
Ajay Saini (admitted *pro hac vice*)
asaini@lawyerscommittee.org
Pooja Chaudhuri (Bar No. 314847)
pchaudhuri@lawyerscommittee.org
**LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW**
1500 K Street NW, Suite 900
Washington, DC 20005
Telephone: 202.662.8600
Facsimile: 202.783.0857

*Attorneys for Plaintiffs National Urban League;
City of San Jose, California; Harris County,
Texas; League of Women Voters; King County,
Washington; Black Alliance for Just
Immigration; Rodney Ellis; Adrian Garcia; the
NAACP; and Navajo Nation*

Wendy R. Weiser (admitted *pro hac vice*)
weiserw@brennan.law.nyu.edu
Thomas P. Wolf (admitted *pro hac vice*)
wolf@brennan.law.nyu.edu
Kelly M. Percival (admitted *pro hac vice*)
percivalk@brennan.law.nyu.edu
BRENNAN CENTER FOR JUSTICE
120 Broadway, Suite 1750
New York, NY 10271
Telephone: 646.292.8310
Facsimile: 212.463.7308

*Attorneys for Plaintiffs National Urban League;
City of San Jose, California; Harris County,
Texas; League of Women Voters; King County,
Washington; Black Alliance for Just
Immigration; Rodney Ellis; Adrian Garcia; the
NAACP; and Navajo Nation*

Mark Rosenbaum (Bar No. 59940)
mrosenbaum@publiccounsel.org
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
Telephone: 213.385.2977
Facsimile: 213.385.9089

Attorneys for Plaintiff City of San Jose

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Doreen McPaul, Attorney General
dmcpaul@nndoj.org
Jason Searle (*pro hac vice* forthcoming)
jasearle@nndoj.org
NAVAJO NATION DEPARTMENT OF JUSTICE
P.O. Box 2010
Window Rock, AZ 86515
Telephone: (928) 871-6345

Attorneys for Navajo Nation

Dated: September 5, 2020

By: /s/ Danielle Goldstein
Michael N. Feuer (Bar No. 111529)
mike.feuer@lacity.org
Kathleen Kenealy (Bar No. 212289)
kathleen.kenealy@lacity.org
Danielle Goldstein (Bar No. 257486)
danielle.goldstein@lacity.org
Michael Dundas (Bar No. 226930)
mike.dundas@lacity.org
CITY ATTORNEY FOR THE CITY OF LOS ANGELES
200 N. Main Street, 8th Floor
Los Angeles, CA 90012
Telephone: 213.473.3231
Facsimile: 213.978.8312

Attorneys for Plaintiff City of Los Angeles

Dated: September 5, 2020

By: /s/ Michael Mutalipassi
Christopher A. Callihan (Bar No. 203010)
legalwebmail@ci.salinas.ca.us
Michael Mutalipassi (Bar No. 274858)
michaelmu@ci.salinas.ca.us
CITY OF SALINAS
200 Lincoln Avenue
Salinas, CA 93901
Telephone: 831.758.7256
Facsimile: 831.758.7257

Attorneys for Plaintiff City of Salinas

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: September 5, 2020

By: /s/ Rafey S. Balabanian
Rafey S. Balabanian (Bar No. 315962)
rbalabanian@edelson.com
Lily E. Hough (Bar No. 315277)
lthough@edelson.com
EDELSON P.C.
123 Townsend Street, Suite 100
San Francisco, CA 94107
Telephone: 415.212.9300
Facsimile: 415.373.9435

Rebecca Hirsch (*pro hac vice* forthcoming)
rebecca.hirsch2@cityofchicago.org
**CORPORATION COUNSEL FOR THE
CITY OF CHICAGO**
Mark A. Flessner
Stephen J. Kane
121 N. LaSalle Street, Room 600
Chicago, IL 60602
Telephone: (312) 744-8143
Facsimile: (312) 744-5185

Attorneys for Plaintiff City of Chicago

Dated: September 5, 2020

By: /s/ Donald R. Pongrace
Donald R. Pongrace (*pro hac vice* pending)
dpongance@akingump.com
**AKIN GUMP STRAUSS HAUER & FELD
LLP**
2001 K St., N.W.
Washington, D.C. 20006
Telephone: (202) 887-4000
Facsimile: 202-887-4288

Dario J. Frommer (Bar No. 161248)
dfrommer@akingump.com
**AKIN GUMP STRAUSS HAUER & FELD
LLP**
1999 Avenue of the Stars, Suite 600
Los Angeles, CA 90067-6022
Phone: 213.254.1270
Fax: 310.229.1001

*Attorneys for Plaintiff Gila River Indian
Community*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: September 5, 2020

By: /s/ David I. Holtzman
David I. Holtzman (Bar No. 299287)
David.Holtzman@hkllaw.com
HOLLAND & KNIGHT LLP
Daniel P. Kappes
Jacqueline N. Harvey
50 California Street, 28th Floor
San Francisco, CA 94111
Telephone: (415) 743-6970
Fax: (415) 743-6910

Attorneys for Plaintiff County of Los Angeles

ATTESTATION

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

Dated: September 5, 2020

LATHAM & WATKINS LLP

By: /s/ Sadik Huseny
Sadik Huseny