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

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

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

Defendants.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR STAY AND FOR PRELIMINARY INJUNCTION

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

On September 20 and September 21, 2020 Defendants disclosed to Plaintiffs, via FTP transfer, a number of Administrative Record ("AR") documents which had been initially redacted or entirely withheld on assertions of attorney client and/or deliberative process privilege. Although the number of unique documents is relatively small, given duplication (or near-duplication) in the documents produced, it is nevertheless telling. And it explains why Defendants have devoted so little time and space to defending their actions on the merits. The materials confirm what Plaintiffs have long argued: the Census Bureau was forced to scrap a decade of detailed planning and testing for a retrofitted and truncated "Replan" that they knew was impossible to do right. The decision to abandon the COVID-19 Plan did not come from the Bureau. The decision did not acknowledge, let alone explain, the radical departure from the factual findings underlying the COVID-19 Plan—it simply ignored those contrary facts and the serious reliance interests engendered thereby. The decision was not driven by a (mistaken) belief that adherence to the COVID-19 Plan would be unlawful because of the statutory deadline. And the decision cannot be said to have a "reasonable relationship" to an actual enumeration when the Bureau itself said it did not.

The recently released Office of Inspector General for the U.S. Department of Commerce publicly released a report titled *The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census* ("OIG Report") further confirms what the existing AR shows. This is not surprising, given that the AR is largely a product of the OIG Documents. In that report, dated September 18, 2020 and first provided to the Department of Commerce on or about that date, the Inspector General made two primary findings: (1) "[t]he decision to accelerate the Census schedule was not made by the Census Bureau," and (2) "[t]he accelerated schedule increases the risks to obtaining a complete and accurate 2020 Census."

Plaintiffs have written at length about all of these matters, and look forward to discussing them in detail at the September 22 preliminary injunction hearing. For purposes of this submission, Plaintiffs will allow a small but illuminating subset of these new AR materials—set forth below, along with other evidence the Court has seen and the OIG Report—to speak with their own voice (with attribution left off of the selected images, due to Defendants not yet

providing Plaintiffs with PII-redacted materials). In addition, as requested, Plaintiffs attach as Exhibit A a short timeline of when and how the Replan was created and adopted and when and how the agency considered the statutory deadlines for the COVID-19 Plan and the Replan.

A. The Decision To Truncate The Census Timeline Was Not Made By The Census Bureau And Was Made Shortly After The President's July 21, 2020 Apportionment Exclusion Order

As the OIG Report found, the decision to cut the census timeline nearly in half was not made by the Census Bureau and was made shortly after the President's July 21, 2020 Apportionment Exclusion Order. Exhibit A goes into the timeline in detail. Below are key excerpts from the AR that speak to that finding.

- **July 23, 2020,** "2020 updated for Soft Launch at DOC" email chain between Bureau employees (KD40[1]; DOC-7737-39):

> We need to sound the alarm to realities on the ground - people are afraid to work for us and it is reflected in the numbers 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.

> Agree that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about.

- **July 29, 2020.** According to Mr. Fontenot (Sep. 4, 2020, Fontenot Dec. ¶ 81), on July 29, several days before the Replan announcement on August 3, 2020, the Secretary of Commerce "directed" the Bureau to "present a plan" to "accelerate the remaining operations" to meet the December 31 deadline.

- **August 1, 2020,** ""Draft Replan Deck for Review" email chain between Bureau employees (KD88, DOC_10183):

> **Subject:** Re: Draft Replan Deck for Review
> **Date:** Saturday, August 01, 2020 9:13:20 PM
>
> I REALLY think we need to say something on page 2 that this is what we've been directed to do or that we are presenting these in response to their direction/request. This is not our idea and we shouldn't have to own it.

[1] "KD1" is a cross reference to Plaintiffs' final Key Document submission to this Court. Plaintiffs use that protocol throughout this filing for ease of reference.

- **August 1, 2020**, ""Draft Replan Deck for Review" follow-up email chain between Bureau employees, (KD95, DOC_10940):

Question - "your" or "Department of Commerce request"

Subject: Re: Draft Replan Deck for Review
Date: Saturday, August 01, 2020 10:55:00 PM

I would say your is more accurate, but your call.

- **August 2, 2020** email between top Census Bureau employees, (DOC_13150), in a meeting set up to discuss what the Census Bureau had been directed to do:

Subject: Fw: brute force method - meeting info in this message
Date: Sunday, August 02, 2020 10:46:23 AM
Attachments: Operational and Processing Options to meet September 30 Final.pdf

- **September 18, 2020**. And here's what the OIG found, after an investigation into this very issue:

Findings and Conclusion

I. The Decision to Accelerate the Census Schedule Was Not Made by the Census Bureau

On August 3, 2020, the Bureau issued a press release announcing the decision "to accelerate" the 2020 Census.[22] The schedule change was not the Bureau's decision, nor was it the first time the 2020 Census schedule had been changed. Senior officials at the Bureau, including the Director, did not know who ultimately made the decision to accelerate the Census schedule. As a consequence, this management alert does not identify the decision maker. Some Bureau officials speculated the decision came from the Department, while others thought the decision likely came from the White House. However, Bureau officials confirmed that the decision was not the Bureau's.

B. The Replan's Truncated-Census Directive Was Made Without Consultation With Bureau Officials, With No Analysis Of The Statutory Deadline or Effects on Accuracy, and Without Considering All Relevant Issues

As set forth above, and previously discussed in Plaintiffs' filings, the undisputed record establishes that Bureau officials were given no more than a few days to determine how best to

implement a directive previously made, *without any apparent deliberation at all.* This decision-making process was backwards: the Secretary directed the Bureau to revise the timeline to meet the deadline without considering important factors that would bear on that, and then directed Bureau experts to, effectively, make it happen, regardless of what the open issues or problems were, what had been studied or analyzed (or not), and so on. By way of just a few examples:

- **July 31, 2020**, "5:00 Process Planning Meeting" email chain between Census employees

> Should we mention any global risks, such as the following:
>
> -- 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
>
> <value><item>DOC_0009073</item></value>
>
> 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.

- **July 31, 2020**, email between Bureau employees responding to the "new revised schedule" shown to them (KD67; DOC_9242):

> Thanks Christine! Jason will you take the lead with Christine to polish what we will send to Tori? We want to emphasize what will not get done for each file review and apportionment - considering the Clark revised schedule. We also want toEmphasize the risk involved. I would also focus on the total pop review as well as the characteristics review. It is not clear if the demo characteristics will be on this initial version of the CUF - and we don't want anyone trying to cut our days because they think we have less review to do.

- **July 31, 2020**, "2020 Census Response Processing Review," (KD68, DOC_9245), details various potential issues from the shortened schedule, including "inaccurate counts of the total population and characteristics" and differentials between states:

> With the current proposed schedule, we plan to conduct the activities listed below; however, there will be limitations in how in-depth we can complete the reasonableness review listed in activity six. We will also focus our review on the first four to ten states produced by DITD; later states will undergo a more cursory review. Finally, with this reduced schedule, the time available to review any reruns will be limited.

- **July 31, 2020**, "Backend Processing Options," (KD69, DOC_9458): Discussing significant risks with the "highly compressed schedule," including threats to the overall fitness of use of the Census

> **Backend Processing Options**
>
> This plan presents a revised and highly compressed schedule for 2020 Census post-processing that increases the likelihood of delivering apportionment counts by 12/31/20. It is based on two critical assumptions:
>
> 1. Post processing must start by **10/1/2020**, which means all Self Response and FLD collection activities close out, and data are reconciled and loaded in the Census Data Lake (CDL) by that date.
> 2. Post-processing work activities in this plan are limited to those required to produce apportionment counts, with an understanding that redistricting data products will be taken up later.
>
> All of the changes below, taken together, reduce the time required for post-processing such that, when combined with the operational changes above in this document, make it possible to deliver the apportionment package in time to meet the statutory deadline. All of these activities represent an abbreviated process that is likely to reduce the accuracy of the 2020 Census and threaten the fitness for use. Additionally, the downstream effect of separating apportionment and redistricting processing activities is not known, but presents further risk to redistricting product creation and accuracy.

- **July 31, 2020**, "Operational and Processing Options to Meet September 30," (KD80, DOC_9951), which lays out the "significant risk to the accuracy of the census data" from "[a]ccelerating the schedule by 30 days," *requires* that at least 99% of Housing Units in every state must be resolved, and lays out how each additional day of NRFU results in significant capacity expansion:

> **Operational and Processing Options to meet September 30**
> July 31, 2020
>
> 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, atleast 99% of Housing Units in every state must be resolved.
>
> **Nonresponse Followup Operational Options**

Option	Potential Benefits	Potential efficiency gain / applicable costs to implement
1. Early Start of NRFU operations early everywhere nationwide on 8/9 instead of 8/11 Cycle 2 Early Starts (7/30 Scheduled):	Begins data collection in advance of scheduled start date, allowing more production days.	There are currently 50 days in the production schedule for NRFU. Each additional day of production expands the capacity by 2%.

- **September 18, 2020**, the recently-released OIG Report, highlights this issue as well at pages 9-10:

> The accelerated schedule raises risk besides the potential for natural disasters. As one official explained, the Bureau "no longer [has] the runway" of time to correct discovered errors through re-enumeration, as was necessary in the field portion of the 2010 and 2000 Censuses.
>
> *The Bureau "no longer [has] the runway" of time to correct discovered errors through re-enumeration.*
>
> As described by one **senior Bureau official**
>
> Given this accelerated schedule, the Bureau views "resolving" or "completing" at least 99 percent of housing units in every state, at the end of data collection, to be an acceptable level of accuracy and completeness.[33] "Resolving" or "completing" a housing unit means determining: (1) whether it is in-fact a housing unit; (2) whether it is occupied or vacant; and (3) how many people live there and their basic census characteristics. The 99 percent resolution rate is based on the resolution rates achieved in the fieldwork of the 2010 and 2000 Censuses. Bureau officials expressed confidence that the Bureau could reach the 99 percent figure by the end of data collection.

> Senior Bureau officials do not know what will occur if the 99 percent target is not met by September 30, 2020. If the goal is not reached by that date, a decision must be made to either continue data collection to meet 99 percent completeness in every state (and achieve an acceptable level of accuracy and completeness) or cease data collection. There are risks either way. If data collection ends before 99 percent completeness is met in every state, the Bureau will not achieve what it views as an acceptable level of accuracy and completeness. But, if data collection extends beyond September 30, 2020, that will either further condense an already compressed schedule for data processing—which carries its own risks—or the Bureau will miss the December 31, 2020, statutory deadline. According to several senior Bureau officials, the Bureau will miss the December 31, 2020, deadline if data collection goes beyond September 30, 2020.
>
> *Senior Bureau officials do not know what will occur if the 99 percent target is not met by September 30, 2020. If the goal is not reached by that date, a decision must be made to either continue data collection to meet 99 percent completeness in every state (and achieve an acceptable level of accuracy and completeness) or cease data collection. There are risks either way.*

///

C. It Was Universally Understood and Undisputed That Truncating The Timeline Would Produce A Flawed and Inaccurate Census, and That It Was "Impossible" To Meet a December 31 Deadline

- **July 21, 2020**, "Census Bureau Restarts as States Re-Opens," (KD31, DOC_7086):

> **Restart Cannot Compress Timeline**
>
> The earliest field operations in the continental United States had begun by March 18, 2020. This includes efforts to count rural, remote and special populations, as well as all of the work needed to hire, process and prepare hundreds of thousands of workers needed for later operations.
>
> The original operational timetable for the census required beginning field operations on March 12, 2020, would have enabled the Census Bureau to field its peak workforce by May 15, 2020, and would have made it possible to finish collection of data by July 31, 2020. This entire sequence of dates shifted forward as the Census Bureau suspended operations per Task Force guidance. The work not done during the past eight weeks cannot be appreciably compressed.
>
> The suspension lasted across the entire country until May 4, 2020, per Task Force guidance, and is only now restarting on a phased geographic and operational basis. But even if the White House Task Force guidance permitted the Census Bureau to restart operations in every state and locality tomorrow, the Census Bureau assesses it currently cannot complete 2020 Census field operations in time to deliver apportionment counts by December 31, 2020, and redistricting data by April 1, 2021.
>
> The sequence of completing the 2020 Census is critical to its accuracy: from the creation of the address list, to the invitation to respond, managing the self-response process, the followup and data collection from the approximately 50 million households that do not self-respond, and finally the tabulation of data for state and local population counts which fuel reapportionment and redistricting. The 2020 Census operations are designed to cover specific populations for a complete count of the population. If specific operations are cut or reduced, the effect would be
>
> to miss specific parts of the population lead to an undercount of specific groups. That is why operations like update leave targeting rural populations or group quarters enumeration are critical to full coverage and need to be done in specific orders.

- **April 17, 2020**, "High Level Talking Points" (KR2, DOC_265):

> **Why does post processing take so long?**
> As is evident from the description above, post processing activities must, by their nature, occur in a consecutive sequence, and quality assurance needs to be performed at each step of the process. Subject matter expert review is critical to ensuring the quality of the data during this iterative process. It is important to note post processing cannot begin in earnest until all in-field work is completed. We have examined our schedule and compressed it as much as we can without risking significant impacts on data quality. Given the important uses of census data collection processing, it is vital that we not short cut these efforts or quality assurance steps.

- **May 8, 2020**, "Operational Timeline V5 Clean," (KR17, DOC_2287)—showing that the Bureau could not meet the statutory deadline as far back as May, given the COVID-19 delays—and that it was fully funded for the extension it sought:

> - **If Census Bureau could fully restart today, under ideal conditions:** As a rough calculation: If today, May 8, the Census Bureau could restart Update Leave and NRFU Enumerator Onboarding in every state and locality, which it cannot, NRFU Enumerator on boarding could finish on June 3. However, Update Leave would finish on June 8, so the earliest you could field NRFU enumerators to begin that operation would be the following week, June 15. This means 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.**
>
> - **Reality of Phased Restarting:** While the Census Bureau is looking to complete field operations as quickly as possible, the reality of the phased, rolling reopening of states is that it will be difficult to expect to start Update Leave and NRFU Enumerator Onboarding in the states that are furthest behind until the middle of June. This puts the Census Bureau closer to the second week of August before NRFU can fully begin.
>
> - If NRFU begins in its last location by August 14, 2020, it can finish by October 31, 2020. If NRFU is completed by October 31, 2020, apportionment counts can be delivered by April 1, 2021. Redistricting information could be delivered by July 1, 2021. This would require a 90-day extension of the existing statutory deadlines for producing this data.
>
> - **Due to the unpredictable nature of the COVID-19 pandemic, as well as increased risks of hurricanes affecting the Southeast during NRFU, the Census Bureau in consultation with the Secretary of Commerce proposed a 120-day extension of the statutory deadline, to mitigate this risk and in order to make one single request of Congress and not need to come back for an additional extension.**
>
> - The Secretary of Commerce and Census Bureau leadership have been conducting considerable outreach to state and local elected officials to promote 2020 Census participation. Multiple Governors have communicated with the Census Bureau or made public statements supporting an extension, including Governor Kay Ivey of Alabama. The Secretary has been calling local elected officials for low responding districts, and has found unanimous support for an extension.
>
> - Finally, all of this extension is fully covered by the Census Bureau's already appropriated contingency budget.

- **July 23, 2020**, "Elevator Speech" (KR43, DOC_8021-24; *see also* July 21 version, KR36, DOC_7323-26) (Shared with GAO, see DOC_0008025-28).

Draft 7-23-2020 v4

Elevator Speech

High Level Message: 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 national activity.

I. **Shortening field data collection operations will diminish data quality and introduce risk.**

a. COVID-19 presents an unprecedented challenge to field data collection. While starting NRFU early in select ACOs is a good idea and has provided the Census Bureau a short window to work out any kinks with our systems, the Census Bureau will likely need to conduct staggered operations all over the country from July until the end of October in order to conduct the most complete NRFU possible. 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.

b. The Census Bureau is adapting NRFU for the COVID environment, including development of systems for an outbound telephone operation,increased use of administrative records (is this last one true?), and significantly increasing selections for field positions to compensate for a much higher dropout rate from enumerator training to field deployment. These adaptations are designed to adapt NRFU operations to the COVID environment, not to shorten the operation.

c. NRFU is not the only challenge; the Census Bureau is also adapting its operations for counting the group quarters population, college students and the homeless.

d. 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.

- **July 27, 2020**, Presentation titled "House Committee on Oversight and Reform – Decennial Hearing Prep Materials" (KD 45; DOC_0008148-58 at 58). As late as a July 27, 2020 hearing before the House Committee on Oversight and Reform, the Bureau's line was still that the statutory deadlines could not be reached:

Post Processing

The current methodology that has been researched, developed and tested over the decade based on proven processes used in prior Census' and upgraded with improved current technology and processes will not enable us to meet the statutory deadlines based on projected current field completion dates.

D. The Replan's "Truncated-Census" Directive Was Based on a Contrived Justification Incongruous with the Record, Because Officials Never Considered The Legality Of The COVID-19 Plan To Mandate A Flawed, Erroneous Census

- **April 19, 2020**, "Talking Points Re: 2020 Census Extension & Shift in Field Operations" (KR11, DOC_1687), shows that, in fact, the Census Bureau recognized that the statutory deadline must yield to accuracy and reality:

> **Are there constitutional concerns with delaying the delivery of the apportionment counts?**
>
> - We are dealing an unprecedented situation.
> - The reality is that we can't make the deadline as of right now.
> - We carefully reviewed the proposal and it went through inter-agency review, including review by the Department of Justice.
> - Their view is that there is not a constitutional issue with the proposal.
> - We can get back to you with more on those considerations [To my knowledge, we do not have a copy of DOJ comments].
> - [NOTE – written prospectively assuming the proposed language is cleared and that any concerns raised were addressed]

- **April 23, 2020**, edited version of talking points, (KR12, DOC_1973):

> **Are there constitutional concerns with delaying the delivery of the apportionment counts?**
>
> - The proposal complies with the Constitution and will assist the Census Bureau in fulfilling its constitutional requirement to conduct an enumeration. [This sentence is suggested by OGC.]

- **April 28, 2020,** call notes/agenda for "Call with Representative Jamie Raskin," (KD15, DOC_2222-2230):

> **Is delaying the apportionment data constitutional?**
>
> - The 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.
> - The 12/31 deadline is in statute.
> - In history, especially for the many of the earlier censuses, data collection and reporting the counts shifted beyond the zero year.

- **August 2, 2020**, "Slides" email between Bureau personnel, showing that implementation of the July 21, 2020 PM was a priority while the Bureau struggled to truncate overall Census operations. (KD104, **DOC-0013288-920**):

> A team has been established and is tasked with deriving the best feasible methodology (in both terms of statistical methods and operational feasibility) to achieve the goals of directives from Secretary Ross regarding implementation of the PM.

- **No documents**: Plaintiffs also must briefly note the absence of any documents in one key respect: no documentary evidence showing any belief, or even discussion, that the Bureau was compelled to produce an inaccurate or erroneous Census, solely in order to meet any statutory deadline. There was similarly no evidence that the preexisting COVID-19 Plan would somehow become unlawful and must be halted if the statutory deadline were not extended.

Dated: September 22, 2020

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Dated: September 22, 2020

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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 22, 2020

LATHAM & WATKINS LLP

By: */s/ Sadik Huseny*
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ATTACHMENT

April 13, 2020 – Mid-July 2020

- In this time period, the Bureau operated under the COVID-19 Plan, planning to conduct data collecting field operations through October 31, 2020. During this time, the Bureau also noted that the statutory deadlines for delivering apportionment and redistricting information would need to be extended and assumed that would happen. *See, e.g.*, DOC_0000222 (from April 13, 2020 according to privilege log). In late March, the Bureau began to consider "[r]equesting relief" from the Census Act's "unforgiving deadline of December 31, 2020" to account for COVID-19-related delays. DOC_0001175.

- The COVID-19 plan allowed the Bureau to keep the original, pre-COVID timelines for the various phases of field operations and backend processing in place. *See, e.g.*, DOC_0000222 (table comparing original "Planned Schedule" and the COVID-19 "NEW SCHEDULE").

- President Trump stated, at the outset, that he did not think statutory deadlines mattered vis-à-vis the Census Bureau doing its job: "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." PI Reply Ex. 30 at 3.

- The longer the Bureau operated under the COVID-19 Plan in this time period, the more the Bureau recognized it could not adhere to statutory deadlines. The Bureau continually noted during this timeframe how necessary it was to extend data collection to October 31, 2020 and to extend data processing out beyond the December 31, 2020 deadline to ensure the completeness and accuracy of the 2020 Census, without regard for meeting the statutory deadlines because those deadlines already could not be met.

    - In preparing talking points regarding data processing activities and timelines on April 17, the Bureau noted only that it "will produce apportionment counts by 4/30/2021 and the redistricting data by 7/31/2021," without reference to the statutory deadlines. DOC_0001603. The Bureau also noted that, under the COVID-19 Plan, the Bureau had already compressed the data processing schedule "as much as we can without risking significant impacts on data quality." *Id.*

    - Preparing similar talking points on April 18 and 19 for an upcoming briefing with the House Oversight and Reform Committee to discuss the COVID-19 Plan and statutory extension (*see* DOC_0001685, DOC_0001605), the Bureau noted that "[t]he reality is that we can't make the deadline as of right now." DOC_0001687 at 92. "Based on the shift in field operations to when they can be conducted safely, the Census Bureau will need an extension of the deadline to deliver apportionment data and redistricting data." *Id.* at 87.

        - By this point, the Bureau had been told by the Department of Justice "that there is not a constitutional issue with the [COVID-19] proposal" with respect to delaying delivery of apportionment counts. *Id.* at 92. In similar talking points, the Bureau noted that historically, "data collection and

reporting the counts shifted beyond the zero year," meaning past the December 31, 2020 deadline for this census, but recognizing "[t]he 12/31 deadlines is in statute." DOC_0002224 at 28.

- On May 8, in preparing an explanation of the operational timeline for members of Congress, Bureau staff stated that even if they "could snap restart everywhere," which was not possible due to COVID-19 closures in various states, the Bureau "would still need a legislative fix." DOC_0000365; *see also* DOC_0000364.

- Bullet points shared with Secretary Ross on May 8 (*see* DOC_0002286) noted that "legislation extending certain deadlines is still necessary given the sequential nature of the decennial operations" because even if the Bureau could restart operations on May 8, "which it cannot," "apportionment counts could not be delivered until January 31, 2021." DOC_0002287.

- On May 26, Timothy Olson, Associate Director for Field Operations at the Census Bureau, stated "[W]e have passed the point where we could even meet the current legislative requirement of December 31. We can't do that anymore." PI Reply Ex. 29 at 3.

- As indicated in preparation materials for a July 8, 2020 Operational Press Briefing, the Bureau was still operating under the COVID-19 Plan without regard for statutory deadlines. *See* DOC_0006282 at 86 (noting October 31 end of NRFU and self-response), 88 (noting April 30, 2021 delivery of apportionment counts without reference to statutory deadlines).

Mid-July – July 28, 2020

- "By mid-July 2020, several events occurred that led Bureau officials to believe that executive and legislative branch support for a statutory extension may be in doubt. First, the Department began asking Bureau personnel questions about speeding up field operations …. Second, the Bureau did not see continued movement in Congress to extend the statutory deadline. Third, the Office of Management and Budget (OMB) informed the Bureau that OMB was requesting supplemental appropriations from Congress for the Bureau, in part to 'maintain timely delivery.' Fourth, the President issued 'Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census' on July 21, 2020." OIG Report at 6-7, ECF 189 at 18-19.

- On July 15, Secretary Ross made a "vague and urgent" ask to the Bureau staff for information about NRFU. DOC_0006664. And on July 16, Jarmin sent an email to Bureau officials with the subject "2020 processing acceleration," noting, "We're being asked again." DOC_0006742.

- On July 21, 2020, President Trump issued his "Presidential Memorandum" or "Apportionment Exclusion Order" seeking to exclude "illegal aliens" from the apportionment base. That same day Bureau staff had a 5:00 p.m. meeting (*see* DOC_0007320), after which they shared an "Elevator Speech" summary. *See*

DOC_0007323. The "High Level Message" from the Bureau staff was that "[c]urtailing 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." *Id.* The "Elevator Speech" warned that "[s]hortening field data collection operations will diminish data quality and introduce risk" and that "[s]hortening post processing operations will diminish data quality and introduce risk." *Id.* The "Elevator Speech" noted that "[t]he Administration already requested 120 days and Census officials have repeatedly said we need this time." *Id.* at 24.

- Around July 22, the Administration requested additional funding for the Census to "maintain timely delivery of quality data." DOC_0007335; *see also* DOC_0007334; DOC_0008037.

- On July 23, Bureau staff understood that they "need[ed] to sound the alarm to realities on the ground," which showed that "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." DOC_0007737. Bureau staff seemed to understand that there were outside "reasons we know about" that were "push[ing] to complete NRFU asap." *Id.* at 38.

- Just an hour later (*see* DOC_0007802), the "Elevator Speech" was updated to further highlight that "[s]hortening the time period to meet the original statutory deadlines for apportionment and redistricting will result in a census that has fatal data quality flaws that are unacceptable for a Constitutionally-mandated national activity." DOC_0008021.

- As late as July 26, 2020, Secretary Ross's staff proposed posts for the Census website that still contained the statement, "[t]he Census Bureau is working toward the plan to complete field data collection by October 31, 2020." DOC_0008033.

- A July 27, 2020 draft memorandum from Fontenot to Jarmin laid out how the Bureau "did a thorough review of the post data collection activities" and found that it was not possible to shorten them. DOC_0008085. That same day, in preparing for the upcoming House Oversight and Reform Committee hearing (*see* DOC_0008135), Bureau staff noted the following about "Post Processing": "The current methodology that has been researched, developed and tested over the decade based on proven processes used in prior Census' and upgraded with improved current technology and processes will not enable us to meet the statutory deadlines based on projected current field completion dates." DOC_0008148 at 58.

- Senior officials attributed the Administration's changed approach to the statutory deadline to the Presidential Memorandum. "As one senior Bureau official told [OIG], 'I think that the Presidential Memorandum had to have played some role in -- in changing … what I would say the [A]dministration's policy is … on the deadline.' Another official shared that perspective." OIG Report at 7, ECF 189 at 19.

July 29, 2020

- Internally, the Bureau was still trying to get the message out that meeting the statutory deadline had long been impossible. In another "elevator speech" (*see* DOC_0008336), Bureau staff noted that "[a]ny effort to concatenate or eliminate processing and review steps to reduce the timeframes will significantly reduce the accuracy of the apportionment counts and the redistricting data products." DOC_0008337.

- But at some point that day, the Bureau was "directed" "to present a plan . . . on Monday, August 3, 2020 to accelerate the remaining operations in order to meet the statutory apportionment deadline." Dkt. 81-1, Fontenot Decl. ¶ 81.

July 30 – August 2, 2020

- Senior career Bureau managers gathered "at 8:00 a.m. on Thursday, July 30 . . . to begin to formalize a plan to meet the statutory deadline." Fontenot Decl. ¶ 81. The Bureau senior staff "divided into various teams to brainstorm how [they] might assemble the elements of this plan, and held a series of meetings from Thursday to Sunday" August 2, 2020. *Id.*

    - By July 30, Bureau staff already recognized that the September 30 date was being mandated, that the "'acceleration' essentially has been taking place in the last 12 hours," and that the September 30 date was already "out" to Regional Directors in the field with "[d]iscussion [] taking place across HQ about a plan to finish data collection by 9/30." DOC_0011918. Thus, a decision was already made, even though "[t]he post processing side doesn't yet know if they can do it in 3 months, and the field side has more to work out before we can commit to this." *Id.*

- On July 30, one group of Bureau staff worked on how to truncate data processing. *See, e.g.*, DOC_0008683. They were working with two assumptions (1) "NRFU runs in the field through 9/30/2020, with QC ending shortly (still TBD) after" and (2) "All Self Response and FLD collected data are reconciled and loaded in CDL by 9/30/20." This group's output warned that "[a] compressed review period creates risk for serious errors not being discovered in the data – thereby significantly decreasing data quality. Additionally, serious errors discovered in the data may not be fixed – due to lack of time to research and understand the root cause or to be run and re-review one or multiple state files." DOC_0008689 at 90.

    - The Bureau staff continued to question if the assumptions were correct, noting the second one "is a real challenge." DOC_0008699. There remained unresolved issues where things were not even confirmed to be "feasible." *Id.*; *see also* DOC_0009674; DOC_0009676.

- The data processing group continued work on July 31, discussing "Data quality" throughout the day. DOC_0008740. While one Bureau staffer's head was "on the PM," the July 21 Presidential Memorandum, this staffer's message about data quality was that "[m]any of the proposed changes to field operations will have negative impacts on the

accuracy and completeness of the census" and that "[t]he changes to the schedule for data processing will have negative impacts on the accuracy of the census." *Id.* The group revised the message over the course of the day, noting that they "should be as plainspoken as possible" and not sugarcoat things with qualifiers such as "likely" hits to accuracy. *Id.* Desires to further note the "effects on data quality" and "accuracy" continued to be voiced. DOC_0009101.

- At the same time, another team was working on operational options and created a separate document. *See, e.g.*, DOC_0008750; DOC_0008779. This document repeatedly warned of compromised quality due to the suggested changes: "impacts on quality model"; "[c]ases that may have been found occupied with additional visits would be closed as vacant/delete"; "[m]ore proxy data will be collected and will be of less quality"; and "[c]ases that may have been confirmed in the field as occupied will be closed as vacant (data quality)." DOC_0008779 at 81-88.

- In the afternoon of July 31, the two working documents were merged into one. *See, e.g.*, DOC_0009463; DOC_0009465. This first draft warned that "[a]ccelerating the schedule by 30 days introduces significant risk to the accuracy of the census data" and noted that "to achieve an acceptable level of accuracy, atleast [sic] 99% of Housing Units in every state must be resolved." DOC_0009465. It also warned that all of the backend processing changes "represent an abbreviated process that is likely to reduce the accuracy of the 2020 Census and threaten the fitness for use." *Id.* at 69. These are just two examples of many warnings throughout this document. *See generally id.*

- The merged document was later reduced to a presentation deck over the weekend on August 1 and August 2. *See, e.g.*, DOC_0009915; DOC_0010066; DOC_0010183; DOC_0010275. Over the weekend, Bureau staff expressed the view that the slides should have something right up front "that this is what we've been directed to do or that we are presenting these in response to their direction/request. This is not our idea and we shouldn't have to own it." DOC_0010183; *see also* DOC_0010188; DOC_0010194. Bureau staff wanted to make sure that the detriments to quality were also clearly messaged. *See* DOC_0010183. And Bureau staff noted that the Replan would require sending "staff out to all locations (regardless of covid levels) by 8/6." DOC_0010787.

    - The documents show that the decision was Secretary Ross's, and not the Department of Commerce more generally. Given that the Replan was being presented directly to Secretary Ross (*see* Fontenot Decl. ¶ 81), Bureau staff noted that "your" request was more accurate than "Department of Commerce request." DOC_0010940.

- After Jarmin met with Commerce officials, two new slides had to be added. *See* DOC_0011918. "One would say work on the PM [July 21 Presidential Memo] and incorporating that work into the schedule continues. The other would speak to announcing the replanned operational schedule." *Id.* Jarmin also noted that "the Director and folks from DOC will be briefing the WH [White House] on this tomorrow." *Id.*

- By August 2 at the latest, Bureau staff had created a draft of Director Dillingham's statement to announce the Replan. *See, e.g.*, DOC_0013800; DOC_0013801.

August 3, 2020

- Fontenot presented the Replan to Secretary Ross. Fontenot Decl. ¶ 81; *see also* DOC_0011918; DOC_0014388; DOC_0014389.

- Bureau Director Dillingham issued a Press Release announcing the Replan "to accelerate the completion of data collection and apportionment counts," and announcing publicly—for the first time—that the Bureau "will end field data collection by September 30, 2020." DOC_0000933. The announcement also stated the Bureau "continues its work on meeting the requirements of Executive Order 13880" and the President's Apportionment Exclusion Order. *Id.*