20A-_____

IN THE SUPREME COURT OF THE UNITED STATES

WILBUR L. ROSS, JR., SECRETARY OF COMMERCE, ET AL., APPLICANTS

v.

NATIONAL URBAN LEAGUE, ET AL.

APPLICATION FOR A STAY PENDING APPEAL TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
AND PENDING FURTHER PROCEEDINGS IN THIS COURT AND
REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

The applicants (defendants-appellants below) are Wilbur L. Ross, Jr., in his official capacity as Secretary of Commerce; Steven Dillingham, in his official capacity as Director of the United States Census Bureau; the United States Department of Commerce; and the United States Census Bureau, an agency within the United States Department of Commerce.

The respondents (plaintiffs-appellees below) are National Urban League; League of Women Voters; Black Alliance for Just Immigration; Harris County, Texas; King County, Washington; the City of Los Angeles; the City of Salinas; the City of San Jose; Rodney Ellis; Adrian Garcia; the Navajo Nation; the National Association for the Advancement of Colored People; the City of Chicago; the County of Los Angeles; and the Gila River Indian Community.

The State of Louisiana and the State of Mississippi (putative defendants-intervenors below) moved to intervene on the side of defendants in the district court; the district court has not yet ruled on that motion.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

National Urban League v. Ross, No. 20-cv-5799 (Sept. 24, 2020)

United States Court of Appeals (9th Cir.):

National Urban League v. Ross, No. 20-16868 (application for a stay pending appeal and an immediate administrative stay filed Sept. 25, 2020; application for an administrative stay denied Sept. 30, 2020; application for a stay granted in part and denied in part Oct. 7, 2020)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of applicants Wilbur L. Ross, Jr., Secretary of Commerce, et al., respectfully applies for a stay of the preliminary injunction issued by the United States District Court for the Northern District of California, pending consideration and disposition of the government's appeal from that injunction to the United States Court of Appeals for the Ninth Circuit and, if necessary, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. In addition, the Acting Solicitor General respectfully requests an immediate administrative stay of the injunction pending the Court's consideration of this application.

Immediate relief from this Court is necessary because the district court has enjoined the Census Bureau from concluding field operations before October 31, 2020 -- as opposed to the Bureau's scheduled conclusion on October 5 -- which will prevent the Secretary from reporting to the President by December 31, 2020, a statutory deadline that the district court also enjoined. In addition to disregarding the statutory deadline, the district court disregarded the Bureau's successful efforts to ensure that the 2020 census will reach levels of accuracy and completeness comparable to other recent censuses while still meeting the deadline. In response to that extraordinary injunction, the government sought a stay and administrative stay from the court of appeals on September 25, less than 24 hours after the injunction issued. On September 30, a divided panel of the Ninth Circuit denied an administrative stay and set a briefing schedule on the stay motion that did not conclude until October 3. A separate panel, after hearing argument on October 5, stayed the portion of the injunction pertaining to the December 31 deadline but declined to stay the portion of the injunction that requires field operations to continue for several more weeks. As a factual matter, the partial stay will still require the government to violate the statutory deadline, and as a legal matter, it is irreconcilable with the district court's rationale for issuing any injunction in the first place.

Congress, exercising its authority to "direct" the "Manner" in which the decennial census will be conducted, U.S. Const. Art. I,

§ 2, Cl. 3, has required the Secretary to take the census "as of the first day of April" in a census year and further required that "[t]he tabulation of total population by States * * * shall be completed" and "reported by the Secretary to the President" by December 31 of that year. 13 U.S.C. 141(a) and (b). Although the 2020 census began on schedule, the Census Bureau, which assists the Secretary with the census, see 13 U.S.C. 2, 4, temporarily suspended field operations in March 2020 in response to the COVID-19 pandemic. The Department of Commerce and the Bureau initially proposed that Congress extend by four months the December 31 statutory deadline for completing the tabulation. But in late July, when it became clear that Congress was unlikely to enact an extension, the Bureau began developing a schedule -- known as the "Replan Schedule" -- that could meet the December 31 deadline with appropriate levels of completeness and accuracy. On August 3, the Bureau announced that September 30 was the target date for concluding data-gathering operations in the field, so that it could then begin the crucial phase of post-collection processing (often called "post processing"), during which the Bureau must analyze, correct, and integrate a vast array of data to produce the results that the Secretary must transmit to the President by December 31.

Respondents filed suit on August 18, 2020, alleging that the Replan Schedule violates the Enumeration Clause and the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., 701 et seq. App., infra, 1a, 15a. Respondents contended that the Bureau

had not acted "in such Manner" as directed "by Law," U.S. Const. Art. I, § 2, Cl. 3, and had acted arbitrarily by organizing census operations so as to comply with the December 31 deadline imposed by the Census Act, 13 U.S.C. 1 et seq. The district court did not question the validity of the December 31 deadline. See App., infra, 44a. It "agree[d] that the Census Act's statutory deadlines bind" the Bureau, id. at 68a, and it did not find that the Bureau had chosen an unreasonable means of complying with that binding deadline by dedicating two months (with increased person-hours per month) to field operations and three months to post processing.

Rather, the district court held that the Bureau had acted arbitrarily and capriciously by organizing further operations to comply with the statutory deadline. Rejecting an undisputed declaration from the Bureau, the court concluded that the census would not be sufficiently accurate (according to an undefined standard) without more-extended field operations, and it ruled that the Bureau had acted arbitrarily by declining to consider ignoring the statutory deadline in order to increase accuracy. The court then invoked its authority "to postpone the effective date of an agency action," 5 U.S.C. 705 (emphasis added), as the basis for ordering the government to disregard the congressionally specified deadline. App., infra, 78a. The court entered a preliminary injunction against "implementing" either the internal September 30 date for ending field operations or the December 31 statutory deadline. Ibid. The court later "[c]larifie[d]" that the

injunction requires the Bureau to follow the COVID Schedule, and therefore to continue field operations until October 31. D. Ct. Doc. 288, at 15 (Oct. 1, 2020) (emphasis omitted); see id. at 10.

The district court's order is remarkable and unprecedented. The APA ensures that agencies do not act "unlawful[ly]" -- that is, "not in accordance with law." 5 U.S.C. 706(2). Here, the court held that the Bureau had acted arbitrarily and capriciously by attempting to comply with a statutory obligation that suffers from no constitutional defect, and the court ordered as a remedy that the Bureau must violate the governing statute. Neither respondents nor the district court identified any provision of the Census Act or Constitution that requires the Bureau to achieve a particular level of accuracy in conducting the census. As the law stands, assessing any tradeoff between speed and accuracy is a job for Congress, which set the December 31 deadline and has not extended it, and the agencies, which acted reasonably in complying with that deadline. There is no legal warrant for the district court's intervention.

Even more inexplicable is the court of appeals' partial stay, which recognized that the district court likely erred in barring compliance with the statutory deadline, but nevertheless left in place the injunction requiring continued field operations -- even though the only purported basis for that injunction was that the agency should have considered not complying with the deadline. Contrary to the court of appeals' attempted defense of this

inconsistent approach (App., infra, 173a), just as courts should not order agencies to violate statutory deadlines, courts may not order agencies to treat such deadlines as soft "aspiration[s]" rather than hard constraints when exercising reasoned decisionmaking. Requiring field operations to continue will still force the Bureau to miss the statutory deadline.

Because courts are not equipped to manage census operations, it is not surprising that the district court erred in its assessment of how accurate the census will be. The court focused on early predictions about what would be feasible after the COVID-19 delays. But once it became clear that Congress was unlikely to extend the statutory deadline, the point of the Replan Schedule was to "improve the speed of our count without sacrificing completeness," and the Bureau committed to reaching a response rate similar to previous censuses. App., infra, 117a.

Subsequent developments have borne out the reasonableness of the Bureau's judgment that field operations should conclude by September 30 or shortly thereafter. As of October 6, the Bureau had enumerated 99.7% of all households, and over 99% of households in 46 States -- a rate already comparable to the 99% rate in recent censuses, id. at 96a.[1] Indeed, relying on its updated projections, the Bureau concluded on September 25 that it could complete an

[1] See U.S. Census Bureau, U.S. Dep't of Commerce, 2020 Census Housing Unit Enumeration Progress by State (Oct. 7, 2020), https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-10-07.pdf. Changing the date in that hyperlink will display earlier or later daily figures.

accurate census by the December 31 statutory deadline if it ceased field operations by October 5 and shifted to post processing, and the Secretary announced October 5 as a revised target date for concluding field operations. D. Ct. Doc. 233, at 147-151 (Sept. 29, 2020). The Bureau concluded that shifting the target date would increase enumeration rates and that schedule modifications for post processing "would still allow the steps necessary to ensure data integrity to be completed," and allow for the submission of the Secretary's report by December 31.[2] The October 5 target date was projected to allow 40 to 49 States to reach a 99% enumeration rate (with the lowest outlier at 96.6%), id. at 150-151, and to require fewer imputed counts than in the last two censuses.[3] Those projections proved accurate. See note 1, supra.

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[2] D. Ct. Doc. 284-1, at 8 (Oct. 1, 2020). With the modification, "certain steps necessary to fully implement the Presidential Memorandum dated July 21, 2020 will not be completed until after December 31." Ibid. Questions involving that Memorandum are at issue in Trump v. New York, No. 20-366.

[3] Compare Thomas Mule, 2010 Census Coverage Measurement Estimation Report: Summary of Estimates of Coverage for Persons in the United States, U.S. Census Bureau (May 22, 2012) at 14 (noting count imputation for 0.4% of the population in the 2010 and 2000 Censuses), with D. Ct. Doc. 233-1, at 40 (Sept. 29, 2020) (September 25 spreadsheet projecting 99.7% completion by October 5, equivalent to imputation for 0.3% of households).

Respondents have speculated (C.A. Stay Opp. 4) that the reported rates reflect relaxed metrics or procedures. But, under the Replan Schedule as implemented, nearly all of the procedures for using proxies, "POP counts," and administrative records were unchanged from the COVID Schedule that respondents seek to reinstate. D. Ct. Doc. 196-1, at 2 & n.1, 3-4 (Sept. 22, 2020). At times, operations under the Replan Schedule used fewer follow-up visits for some addresses, but only for addresses that were self-

This Court should expeditiously stay the district court's injunction. First, if the court of appeals upholds the injunction on appeal, there is a reasonable probability that this Court will grant a writ of certiorari. The district court's order constitutes an unprecedented intrusion into the Executive's ability to conduct the census according to Congress's direction. Second, given the errors in the district court's analysis, there is more than a fair prospect that the Court would vacate the injunction. Third, the balance of equities favors a stay. After the Secretary announced a target date of October 5, the district court quickly responded by indicating that the injunction would not permit even proposing any such shift, and then issued an order clarifying that the injunction requires the Bureau to continue field operations through October 31 -- a prohibition that the court of appeals left standing. Although there is sworn testimony in the record -- improperly discounted by the district court and court of appeals -- of the government's ability to meet the statutory deadline on its proposed schedule, there is virtually no prospect that the Bureau will be able to comply with that statutory deadline absent a stay of the entire injunction. Conversely, there is no risk of corresponding harm to

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reported to be vacant. Id. at 6. Other minor changes -- using high-quality IRS records (rather than multiple administrative records) to supply some POP counts during closeout procedures, and making more-limited use of random reinterviews as a quality check when there are now better ways of assessing enumerators' reliability than in previous censuses -- are expected to have no negative effects on the quality of the enumerations that have been successfully completed. Id. at 4, 5-6.

respondents, because the Bureau is on track to achieve a suitably accurate census count even if it soon shifts to post processing.

The Court held in similar circumstances that a stay was warranted with respect to the 1980 census. There, a district court found that the December 31 deadline was merely "directory and not mandatory" and issued an injunction requiring the Bureau to take actions "to compensate for [a] disproportionate undercount" before reporting the tabulation of population to the President. Carey v. Klutznick, 508 F. Supp. 420, 433 (S.D.N.Y. 1980). This Court promptly stayed the injunction, Klutznick v. Carey, 449 U.S. 1068, 1068 (1980), over a dissent contending that missing the December 31 deadline was not sufficient irreparable harm, id. at 1071 (Marshall, J., dissenting). The same result is warranted here.

For similar reasons, in light of the October 5 date for ceasing field operations to enable a timely shift to post processing, an administrative stay is warranted while the Court considers this stay application. With October 5 having come and gone while the court of appeals was considering the stay application, every passing day exacerbates the serious risk that the district court's order to continue field operations and delay post processing will make it impossible for the Bureau to comply with the December 31 statutory reporting deadline.

STATEMENT

1. The Constitution requires that an "actual Enumeration shall be made" of the population every ten years "in such Manner as

[Congress] shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3. Congress has directed the timetable for census operations. The Census Act sets "the first day of April" as "the 'decennial census date,'" 13 U.S.C. 141(a), and prescribes that "[t]he tabulation of total population by States * * * as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States," 13 U.S.C. 141(b). Under that timetable, the 2020 enumeration must be "completed," and the Secretary must submit his report to the President, by December 31, 2020. Ibid.

After receiving the Secretary's report, the President must calculate "the number of Representatives to which each State would be entitled" and transmit that information to Congress within one week of the first day of the next Congress's first regular session. 2 U.S.C. 2a(a). The "tabulations of population" shall "be completed, reported, and transmitted to each respective State" by March 31, 2021. 13 U.S.C. 141(c); see Franklin v. Massachusetts, 505 U.S. 788, 792 (1992) (describing sequence triggered by the submission of the Secretary's report).

Beyond those deadlines, Congress has given the Secretary "broad authority" to conduct the census. Department of Commerce v. New York, 139 S. Ct. 2551, 2568 (2019); see Wisconsin v. City of New York, 517 U.S. 1, 23 (1996) (noting "the wide discretion bestowed * * * by Congress upon the Secretary").

2. The 2020 decennial census is an enormous and complex operation. Particularly relevant here are its final two phases: the "Non-Response Followup" and "post processing." As part of Non-Response Followup, the Bureau contacts non-responsive addresses up to six times. App., infra, 92a-93a. Enumerators also gather crucial geographic information that may alter the Master Address File -- the Bureau's account of every household in the country -- such as changes resulting from construction, demolition, or new uses. See id. at 84a-85a, 97a.

In post processing, the Bureau engages in a sequence of data-processing operations designed to create reliable and usable statistics. See App., infra, 96a-101a. "Post data collection processing is a particularly complex operation, and the steps of the operation generally must be performed consecutively." Id. at 96a. For example, the Bureau must confirm or correct geographic information in the Master Address File; because this address information is central to the census, other data-processing operations cannot take place "until the entire universe" of addresses nationwide is determined. Id. at 97a. Concluding field operations is thus necessary to proceed with post processing.

3. The COVID-19 pandemic forced the Bureau to adapt quickly to new challenges, and in March 2020 it suspended field operations for four weeks to protect the health and safety of its employees and the public. App., infra, 106a. On April 13, the Bureau's staff adopted the "COVID Schedule," reflecting adjustments to field

operations in light of the pandemic. Id. at 107a; see id. at 106a-107a. As part that plan, the Secretary stated that he "would seek statutory relief from Congress"; the COVID Schedule thus "assumed Congressional action" in the form of a 120-day extension of the statutory deadlines. Id. at 107a. Under that assumption, the self-response period and field operations (including the Non-Response Followup) would have continued until October 31, instead of July 31 as originally planned. Ibid.

By late July it became clear that the Bureau could not rely on a statutory amendment, and on July 29 the Secretary directed the Bureau's professional staff to develop a plan to meet the existing statutory deadlines. App., infra, 107a; cf. id. at 109a. On August 3, Bureau staff presented a revised schedule, known as the "Replan Schedule," which the Secretary approved and announced that day. Id. at 107a. A press release announcing the Replan Schedule stated that the Bureau was "updat[ing] * * * our plan * * * to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce." Id. at 117a. It emphasized that the Bureau's "operation remains adaptable and additional resources will help speed our work" and that the Bureau "will continue to analyze data and key metrics from its field work to ensure that our operations are agile and on target for meeting our statutory delivery dates." Id. at 118a.

The Replan Schedule was designed to ensure that field operations and post processing were completed in the five months remaining before the first statutory deadline. App., infra, 107a-111a. The new schedule reduced the time for field operations by one month from the COVID Schedule (concluding on September 30 instead of October 31), which was still two months after the originally planned conclusion of field operations (on July 31). The Bureau committed to "improv[ing] the speed of our count without sacrificing completeness" and to "conduct[ing] additional training sessions and provid[ing] awards to enumerators." Id. at 117a. The new schedule also took advantage of efficiencies in the Non-Response Followup process (and the census design itself), such as software that maximized enumerator effectiveness, as well as incentives to increase the number of enumerator hours worked "to get the same work hours as would have been done under the original time frame." Id. at 110a. With these alterations, the Bureau explained that it "intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities." Id. at 117a; see id. at 96a.

Similarly, to ensure expeditious and accurate post processing in the period between the conclusion of field operations and December 31, the Bureau increased its staff, adopted a seven-day workweek, and implemented other efficiencies. App., infra, 109a-110a, 118a. Despite this year's unprecedented challenges, the Bureau announced it was "confident that it can achieve a complete

and accurate census and report apportionment counts by the statutory deadline following the Replan Schedule." Id. at 111a.

4. a. Respondents are a group of local governments, Tribal nations, nonprofit organizations, and individuals who filed this suit on August 18, 2020, asserting that the Replan Schedule violates the Constitution, constitutes final agency action that is arbitrary and capricious under the APA, and violates the APA because it is pretextual. App., infra, 15a, 44a. On August 25, they moved for a preliminary injunction. See id. at 16a, 44a.

The district court first issued a temporary restraining order on September 5, barring the Bureau from "implementing" the Replan Schedule or "allowing to be implemented any actions as a result of the shortened timelines" in that Schedule, including "winding down or altering any Census field operations." D. Ct. Doc. 84, at 6-7 (Sept. 5, 2020). The court then engaged in quasi-adversarial discovery to create what it described as an "administrative record" for the Replan Schedule. App., infra, 15a. The government repeatedly explained that the Replan Schedule is not discrete and final agency action within the meaning of the APA, and accordingly there is no administrative record associated with it. See, e.g., id. at 15a-17a, 45a. The government urged that if the court nevertheless believed that it was reviewing discrete and final agency action and that the action could not be sustained on the basis of the declarations submitted by the government, it should "find against the Defendants on the likelihood of success on the

merits prong" and enter a preliminary injunction to enable sufficient time for orderly appellate review. D. Ct. Doc. 88, at 4 (Sept. 8, 2020). But the court delayed entry of an appealable order, and, over the government's repeated objections, see, e.g., D. Ct. Doc. 109, at 4 (Sept. 14, 2020), extended the temporary restraining order to permit further discovery, D. Ct. Doc. 142 (Sept. 17, 2020). The court ultimately limited the record it had constructed to documents predating the August 3 press release announcing the Replan Schedule. See App., infra, 46a; cf. D. Ct. Doc. 154-1, at 3 (Sept. 18, 2020).

b. On September 24, the district court preliminarily enjoined the government from following key components of the Replan Schedule. App., infra, 1a-78a. The court began by finding that respondents have Article III standing and that their challenge to the Replan Schedule does not raise a nonjusticiable political question. Id. at 21a-29a.

The district court held that the Replan Schedule constitutes final agency action. App., infra, 29a-44a. The court rejected the government's argument that this suit is a "programmatic attack on the Bureau's efforts to conduct the 2020 Census," id. at 29a, concluding instead that "the Replan is a circumscribed, discrete agency action," because the government "named it the 'Replan'" and summarized it in a PowerPoint, and because "[t]he Secretary directed the Bureau to develop the Replan" and adopted it, id. at 31a. The court concluded that, as of August 3, "[t]he Bureau ha[d]

implemented the Replan" and "[n]o further agency decisionmaking [would] be conducted on the Replan." Id. at 33a-34a.

The district court found that respondents are likely to succeed on the merits of their claim that the Replan Schedule is arbitrary and capricious and thus violates the APA. App., infra, 44a-73a. When considering the APA claim, the court purported to rely solely on the "administrative record" that it had ordered compiled and had limited to documents created on or before August 3; the court declined, for example, to consider a September 5 declaration submitted by Albert E. Fontenot Jr., the Associate Director for Decennial Census Programs, because it believed the declaration to be a post hoc rationalization for final agency action. Id. at 46a, 54a n.11.

The district court found that the Replan Schedule was likely arbitrary and capricious for five closely related reasons. App., infra, 46a. First, the court found that the government "failed to consider important aspects" of the census because it "adopted the Replan to further one alleged goal alone: meeting the Census Act's statutory deadline of December 31," while "fail[ing] to consider how" to fulfill "statutory and constitutional duties to accomplish an accurate count on such an abbreviated timeline." Id. at 47a (emphasis omitted). The court relied on predictions by Bureau employees (made before the Replan Schedule) "that the Bureau could not meet the December 31, 2020 statutory deadline," id. at 59a, and on a few more recent statements expressing doubt about being able

to meet the September 30 deadline for completing fieldwork because of natural disasters and other issues, id. at 61a. Second, the court reasoned that the rationale for adopting the Replan Schedule -- seeking to satisfy the December 31 deadline -- ran "counter to the evidence before the agency," because the President and employees of the Department and the Bureau had previously stated that they would not be able to satisfy the December 31 deadline. Id. at 59a (emphasis omitted); see id. at 59a-60a. Third, the court found that the government "failed to consider an alternative" and did not "'appreciate the full scope of [its] discretion'" -- again, because the court thought that the government had given insufficient consideration to missing the December 31 deadline. Id. at 64a (citation omitted). Fourth, the court concluded that the government "failed to articulate a satisfactory explanation for its decision to adopt the Replan," id. at 68a, because its August 3 press release "never explain[ed] why Defendants are 'required by law' to follow a statutory deadline that would sacrifice constitutionally and statutorily required interests in accuracy," id. at 70a. Fifth, the court found that the government improperly "failed to consider the reliance interests of their own partners, who relied on the October 31 deadline and publicized it to their communities." Id. at 71a.

Turning to the remaining preliminary-injunction factors, the district court found that respondents likely would suffer irreparable harm without an injunction because an inaccurate census

possibly will cause a loss of federal funds and incorrect apportionment; respondents will need to expend resources to respond to the Replan Schedule; and local-government respondents will face increased costs because they "rely on accurate granular census data to deploy services and allocate capital." App., infra, 74a. And the court concluded that the balance of the hardships and the public interest tipped in respondents' favor because "missing a statutory deadline [that the government] had expected to miss anyway[] would be significantly less than the hardship on [respondents]." Id. at 75a.

The district court's preliminary injunction "stayed" the "September 30, 2020 deadline for the completion of data collection and December 31, 2020 deadline for reporting the tabulation of the total population to the President," and it further enjoined the government "from implementing these two deadlines." App., infra, 78a. The preliminary injunction was based solely on respondents' arbitrary-and-capricious APA claim; the court declined to reach the Enumeration Clause and APA pretext claims. Id. at 44a-45a. The court also denied the government's request for a stay pending appeal. Id. at 120a.

c. On September 28, the Secretary announced that October 5 was the revised target date for concluding field operations. U.S. Census Bureau, 2020 Census Update (Sept. 28, 2020), https://go.usa.gov/xGf58. In the Bureau's estimation, that schedule would allow 40 to 49 States to reach a 99% enumeration rate (with the

rest at 96.6% or higher), while also allowing the Secretary to submit the tabulation of population to the President on December 31. See D. Ct. Doc. 233, at 147-151 (Sept. 29, 2020); pp. 6-7, supra. Later on September 28, the district court opined at a hearing that it is "a violation of the [injunction] to propose a new data collection schedule that is predicated on an enjoined December 31st date." C.A. Doc. 26-2, at 20 (Sept. 30, 2020) (emphasis added); see id. at 30-31. Following the production of a new "administrative record" about the revised target date and further briefing, the court entered an order clarifying that its injunction requires "immediate reinstatement of the * * * deadlines of October 31, 2020 for data collection and April 30, 2021 for reporting the tabulation of total population to the President." D. Ct. Doc. 288, at 10 (Oct. 1, 2020). The court also ordered the Bureau "to issue on October 2, 2020 a new text message to all Census Bureau employees notifying them of the Court's Injunction Order, stating that the October 5, 2020 'target date' is not operative, and stating that data collection operations will continue through October 31, 2020." Id. at 15.

d. On September 25, less than 24 hours after the district court entered the preliminary injunction, the government filed a notice of appeal and moved for a stay pending appeal and an administrative stay in the Ninth Circuit. See D. Ct. Doc. 210 (Sept. 25, 2020); C.A. Doc. 4 (Sept. 25, 2020). On September 30, a panel of the court of appeals denied the motion for an

administrative stay in a 33-page published order, including a lengthy dissent by Judge Bumatay. App., infra, 121a-153a. That panel called for a response to the government's stay motion by October 2 and a reply by October 3. Id. at 130a.

e. On October 7, a different panel of the court of appeals stayed the portion of the preliminary injunction that expressly orders the government to violate the December 31 statutory deadline, but declined to stay the rest of the injunction -- thus requiring the Bureau to continue field operations through October 31. App., infra, 154a-174a. Although it recognized that the district court likely erred in ordering the agencies not to comply with the statutory deadline and did not seriously dispute its validity, the court of appeals found that respondents are likely to succeed on their APA claim that the agencies failed to consider disregarding that deadline in pursuit of increased accuracy. Id. at 164a-168a. Even so, the court "le[ft] the December 31, 2020 date in place as an aspiration." Id. at 173a.

ARGUMENT

Under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court may stay a district-court order pending appeal to a court of appeals. See, e.g., Trump v. International Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curiam); see also San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (stay factors). Here, all of the relevant factors

favor a stay. First, this Court likely would grant a writ of certiorari if the court of appeals were to affirm the district court's injunction against compliance with the statutory deadline for submitting a tabulation of the population to the President (which, for practical purposes, remains in place despite the court of appeals' partial stay, which still requires extended field operations that would prevent the Bureau from meeting the statutory deadline). Second, there is a fair prospect that the Court would vacate the injunction, which orders the government to violate the statute governing the census. And third, there is direct and irreparable injury to the interests of the government and the public, but not to respondents. Because the Bureau's most recent calculations were that field operations would need to end on October 5 to preserve the Secretary's ability to meet the statutory deadline, an interim administrative stay while this application is pending also is warranted.

1. At the outset, we note that the court of appeals' partial stay does not obviate the need for immediate relief from this Court. All evidence indicates that continuing field operations through October 31 would make it impossible to conclude post processing by the statutory deadline, as the court of appeals conceded. Indeed, the court said that it was "leaving the December 31, 2020 date in place as an aspiration," and recognized that, "as a practical matter," the deadline would be missed; but the court was somehow reassured by the notion that, with the partial stay, it

could claim that missing the deadline was not formally "required by a court." App., infra, 173a (emphasis added).

Moreover, the partial stay is irreconcilable with the legal rationale for the portion of the preliminary injunction that remains in force. The sole basis for requiring continued field operations was the district court's holding that it was arbitrary and capricious for the agencies not to consider flouting the December 31 deadline for the alleged benefit of increased accuracy. But neither the courts below nor respondents have disputed that if the statutory deadline is binding, then the agencies acted reasonably for APA purposes by seeking to end field operations in early October. The partial stay is thus internally inconsistent because if the December 31 deadline is lawful, there is no legal basis for the remainder of the injunction. And by purporting to reinstate a fig-leaf version of the December 31 deadline but ensuring insufficient time to conduct post processing before then, the court of appeals has not only made it impossible to comply with the deadline but also invited the Bureau to conduct a less accurate census than it would under an immediate stay from this Court.

2. The first stay factor is met because, if the court of appeals were to affirm the district court's injunction on appeal, at least "four Justices" would likely "vote to grant certiorari." San Diegans, 548 U.S. at 1302 (Kennedy, J., in chambers) (citation omitted). The injunction bars the government from complying with the valid statutory deadline -- a deadline that reflects Congress's

judgment about when to complete census operations and enables Congress to comply with its constitutional mandate to ensure that the census is conducted every ten years. The ability of the Bureau to comply with that statutory requirement is important, as the December 31 deadline is tied to other statutory deadlines. See p. 10, supra. The longer the court's order remains in effect, the more it could interfere with the ability of Congress and the States to take countless significant actions -- especially those dealing with apportionment and redistricting. See Louisiana & Mississippi C.A. Amici Br. 1 (Sept. 28, 2020) (contending that "24 states have state statutory or constitutional deadlines tied to the census that are imperiled" by the district court's order); D. Ct. Doc. 204-7, at 3-9 (Sept. 23, 2020) (laying out those deadlines).

This Court has repeatedly granted a writ of certiorari, or given plenary consideration to appeals, in cases involving census-related issues. See Department of Commerce v. New York, 139 S. Ct. 2551 (2019); Utah v. Evans, 536 U.S. 452 (2002); Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999); Wisconsin v. City of New York, 517 U.S. 1 (1996); Franklin v. Massachusetts, 505 U.S. 788 (1992); United States Dep't of Commerce v. Montana, 503 U.S. 442 (1992); Karcher v. Daggett, 462 U.S. 725 (1983). This case is an even more compelling candidate for review, because the question here is not whether the government has complied with the Census Act -- but whether it may be ordered

to violate that Act. An order requiring the Executive Branch to ignore an Act of Congress warrants this Court's review.

3. The second stay factor is met because there is at least a "fair prospect" that this Court would vacate the injunction. Lucas v. Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). The injunction lacks any basis in the census statutory scheme, the APA, or this Court's case law.

a. Most obviously, the district court erred in holding that it was arbitrary and capricious for the agency to seek to comply with the December 31 statutory deadline.

i. The Constitution provides that Congress shall direct the manner in which the decennial census is taken, and Congress in turn has largely delegated the operations of the census to the Executive Branch. See pp. 9-10, supra. In so doing, Congress has not required the census to achieve any particular level of accuracy. But Congress has expressly prescribed when the census must be completed, which prevents the Bureau from taking as long as might be needed to achieve maximum accuracy.

The district court "agree[d] that the Census Act's statutory deadlines bind Defendants," App., infra, 68a, and did not find that statutory scheme unconstitutional. The court did not hold that, if the Bureau had to finish the census by year's end, the Replan Schedule was an impermissible way to meet Congress's deadline. Rather, the court held that the government acted arbitrarily and capriciously by adopting the Replan Schedule to "meet[] the Census

Act's statutory deadline." Id. at 47a. In the court's view (which disregarded the evidence of the Bureau's successful efforts to ensure accuracy and completeness under the Replan Schedule), the Bureau should have considered whether conducting a more accurate census was more important than complying with the statutory deadline. Ibid. The court therefore invoked a statutory power "to postpone the effective date of an agency action," 5 U.S.C. 705 (emphasis added), as its ground for ordering the agency to violate a congressionally specified deadline. App., infra, 78a.

The district court's ruling turned APA review on its head, finding something that no court (to the government's knowledge) has ever found before: that it was arbitrary and capricious for an agency to protect its ability to comply with a valid statutory deadline. The court compounded that error by ordering the agency to violate a deadline set by Congress -- a deadline that has roots in the Constitution, which requires a census every ten years. While the court gave five reasons that the agencies acted in an arbitrary and capricious manner, App., infra, 46a, each rationale was premised on the court's mistaken view that a court may properly review and invalidate agency action solely because the agency was insufficiently attentive to the possibility of disregarding Congress's plain instructions. See, e.g., id. at 47a (in adopting the Replan Schedule to "meet[] the Census Act's statutory deadline," the agency "failed to consider how Defendants would fulfill their statutory and constitutional duties to accomplish an

accurate count on such an abbreviated timeline"); id. at 64a (finding that the agency acted arbitrarily and capriciously by "sacrific[ing] adequate accuracy for an uncertain likelihood of meeting one statutory deadline").

ii. The district court relied on numerous cases involving missed deadlines, see App., infra, 64a-66a, but none supports the proposition that a court may order an agency to violate a valid statutory deadline. Some of the cases held that an agency does not necessarily lose authority to implement a statute after it exceeds a deadline. See Barnhart v. Peabody Coal Co., 537 U.S. 149, 152 (2003) (finding that the Commissioner of Social Security had authority to assign retirees for the purposes of retiree benefits after the statutory deadline); Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1304-1305 (D.C. Cir. 1991) (finding that the EPA could add hazardous waste sites to the National Priority List after a statutory deadline); Newton Cnty. Wildlife Ass'n v. United States Forest Serv., 113 F.3d 110, 112 (8th Cir. 1997) (finding that the Forest Service was not required to suspend implementation of timber sales when it failed to complete a related task by the statutory deadline). Other cases reviewed and found reasonable an agency's failure to abide by a statutory deadline after the deadline had passed. See National Cong. of Hispanic Am. Citizens v. Marshall, 626 F.2d 882, 884, 888 (D.C. Cir. 1979) (reviewing, after the fact, OSHA's failure to comply with a statutory timeline for completing an agency rulemaking once it had commenced entirely on the

Secretary's initiative). And the remaining cases involved court-imposed deadlines set after agencies missed statutory deadlines. See, e.g., Environmental Def. Fund v. EPA, 852 F.2d 1316, 1331 (D.C. Cir. 1988).

As those cases hold, there may be instances in which an agency is permitted or even required to take certain acts after failing to meet a deadline. In other situations, it may be permissible for a court to review an agency's failure to meet a deadline after the fact. But none of the cases suggests either that an agency acts arbitrarily and capriciously by insisting upon compliance with an upcoming statutory deadline, or that a court may order an agency to not comply with such a deadline. Neither the courts below nor respondents have pointed to any case holding that it is unlawful for an agency to adhere to a statutory deadline that is clear and valid on account of competing interests that are not enacted in concrete statutory standards.

The district court's reliance on historical examples is similarly flawed. The court identified some censuses in the early nineteenth century that missed statutory deadlines. See App., infra, 67a. But Congress itself retroactively modified the deadlines. Nothing in the early history of the census indicates that the Bureau may consider disregarding a deadline mandated by Congress if it wishes to pursue a level of accuracy not mandated by Congress. In so holding, the district court committed error that this Court would likely reverse on the merits.

b. Far from being arbitrary or capricious, it was inherently reasonable for the government to adopt a plan to meet the statutory deadline -- a critical part of the framework established by the Census Act that fulfills the constitutional mandate for a census every ten years. In any event, it is clear that, in response to unprecedented challenges posed by the COVID-19 pandemic and recent natural disasters, the Bureau has appropriately sought not only to comply with the deadline but also to achieve accuracy and completeness comparable to recent censuses.

i. As an initial matter, the district court was incorrect to find that the agency "adopted the Replan to further one alleged goal alone: meeting the Census Act's statutory deadline of December 31." App., infra, 47a. The August 3 press release demonstrates that the government was also considering accuracy, working to identify concrete ways to "improve the speed of our count without sacrificing completeness," and committing to reach response rates comparable to those of other recent censuses. Id. at 117a-118a. Indeed, the Bureau "evaluated the risks and quality implications of each suggested time-saving measure and selected those that [it] believed presented the best combination of changes to allow [it] to meet the statutory deadline without compromising quality to an undue degree." Id. at 107a; see id. at 107a-111a.

ii. The district court further erred in concluding that the Replan Schedule did not adequately take account of accuracy. See, e.g., App., infra, 48a-59a. The court too readily assumed that the

2020 census would be inadequate on the basis of documents that failed to anticipate changes made under the Replan Schedule. Later developments -- which the court expressly declined to consider, see pp. 34-35, infra -- show that the Bureau is successfully working toward a complete and accurate count in line with other recent censuses. For example, on September 5 Associate Director Fontenot stated that "current progress indicates that we will nonetheless be able to complete [Non-Response Followup] before September 30." App., infra, 105a. Mr. Fontenot thought that possible in part because the Bureau has implemented numerous efficiencies since August 3. Despite previous concerns about being able to attract and retain enumerators, see id. at 58a, the productivity of enumerators has been significantly higher than projected, id. at 105a-106a. Similarly, as of September 4, the Bureau had already completed operations in approximately 50 area census offices where counting was complete, enabling it to reallocate "enumerator resources * * * to areas that require more work." Id. at 112a. The Bureau also expedited internal deadlines for post processing, see id. at 96a-101a, and later adopted schedule modifications for post processing that would allow field operations to continue until October 5 without sacrificing the steps necessary to ensure data integrity, see D. Ct. Doc. 284-1, at 8 (Oct. 1, 2020).

The gap between how the census is actually proceeding and the months-old statements on which the district court relied is illustrated by the sharp increase in the percentage of households

the Bureau has enumerated. While only 63% of households had responded to the census as of August 3 (when the Bureau announced the schedule adjustment), App., infra, 118a, by the end of September 24 (when the court entered the preliminary injunction), the Bureau had enumerated 97.0% of all households nationwide, U.S. Census Bureau, U.S. Dep't of Commerce, 2020 Census Housing Unit Enumeration Progress by State (Sept. 25, 2020), https://go.usa.gov/xGdZr. That figure has continued to climb every day, reaching 99.7% of all households as of October 6, with 46 States already over 99%. See note 1, supra. It is thus reaching a rate comparable to those of recent censuses. See App., infra, 96a.

To be sure, senior Bureau employees expressed significant concerns about the year-end deadline in June and July, before the Bureau devised, the Secretary adopted, and the Bureau implemented the Replan Schedule. But the district court erred in myopically focusing on those statements and ignoring the Bureau's continued efforts to ensure accuracy in the enumeration. And in any event, given the "wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary," "the mere fact that the Secretary's decision overruled the views of some of his subordinates" should, "by itself," have been "of no moment in any judicial review of his decision." Wisconsin, 517 U.S. at 23.

The district court also misconstrued the so-called "administrative record" that it had required the government to compile and produce. For example, the court stated that "in

analyzing the COVID-19 Plan * * * the Bureau itself concluded that missing the statutory deadline was constitutional and in line with historical precedent." App., infra, 67a. But the cited document consists only of talking points for a meeting with a congressman, ibid., which noted that there would not be a constitutional problem with "the proposal" -- which was that "Congress extend" the statutory deadlines, see D. Ct. Doc. 198-5, at 88-89 (Sept. 22, 2020) (emphasis added). Acknowledging that Congress may modify the Census Act said nothing about whether the Bureau could disregard the deadline if it were not extended.

c. The district court also erred in finding that the adequacy of the Replan Schedule was even subject to APA review.

i. The district court faulted the Bureau for failing to give adequate consideration to its "statutory and constitutional duties to accomplish an accurate count," App., infra, 47a, but there is no enforceable or judicially manageable standard against which to measure census accuracy, see 5 U.S.C. 701(a)(2); Heckler v. Chaney, 470 U.S. 821, 830, (1985); cf. Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019). Neither the Constitution nor the Census Act provides such a standard. Indeed, this Court has repeatedly made clear that all census counts fall short of the ideal. "[T]he Bureau has always failed to reach -- and has thus failed to count -- a portion of the population." Department of Commerce, 525 U.S. at 322; see Wisconsin, 517 U.S. at 6 ("[N]o census is recognized as having been wholly successful in achieving th[e] goal [of actual

Enumeration]."); Karcher, 462 U.S. at 732 ("[E]ven the census data are not perfect.").

This Court has never suggested that the Constitution or the Census Act provides a standard for evaluating the likely accuracy of a particular census plan. Instead, the Court has expressly declined to infer "a requirement that the Federal Government conduct a census that is as accurate as possible," explaining that "[t]he Constitution itself provides no real instruction" on what metrics to use to measure "accuracy" in the census. Wisconsin, 517 U.S. at 17, 18. And even assuming there were some baseline requirement that could be enforced in extreme cases, it is not implicated here, where the Bureau projects an enumeration rate well in line with other recent censuses.

By contrast, in satisfying its constitutional obligation to ensure that the census is conducted every decade and its power to direct the "Manner" of that conduct, Congress has enacted an explicit and unambiguous requirement for the Secretary to present the tabulation of population to the President by December 31. The district court erred in faulting the government for seeking to satisfy that express statutory requirement while purportedly sacrificing the opportunity to achieve a sufficient level of accuracy (as gauged by the court under an undefined standard).

ii. The district court further erred in concluding (App., infra, 29a-32a) that the Replan Schedule constituted a discrete agency action reviewable under the APA. This Court has found that,

to satisfy the "agency action" requirement, 5 U.S.C. 551(13), the matter at issue must be a "circumscribed, discrete agency action[]" that exhibits a "characteristic of discreteness." Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62-63 (2004); see Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891, 893 (1990).

The Replan Schedule, like the COVID Schedule that preceded it, was not a circumscribed, discrete agency action. Rather, it was a collection of individual judgments by the Bureau, all subject to constant revision based on new data, time and resource constraints, and changes in conditions on the ground -- as the press release announcing the new schedule noted. See pp. 12-14, supra. New obstacles could be sources of additional delays, but new efficiencies could advance the timetable. The methods for ensuring that the 2020 census can be accurate and timely have been repeatedly adjusted. See pp. 6-7, 11-13, supra.

While it is true that on August 3 the Bureau announced a target date of September 30 for completing field data collection, it had by no means finalized the myriad decisions that it would make to help meet that target or the December 31 statutory deadline. The term "Replan Schedule" thus "does not refer to a single * * * order or regulation, or even to a completed universe of particular * * * orders and regulations"; it instead "refer[s] to the continuing (and thus constantly changing) operations" of the Bureau, which means that it is "no[t] * * * an identifiable 'agency action.'" Lujan, 497 U.S. at 890.

For the same reasons, there was no "final" agency action as of August 3 because the press release did not "mark the consummation of the agency's decisionmaking process"; rather, the schedule was still "tentative" and "interlocutory." Bennett v. Spear, 520 U.S. 154, 178 (1997) (citations and internal quotation marks omitted).

Accordingly, the district court erred in finding that reviewable agency action had occurred by August 3. Merely being able to "name" a schedule and summarize a shift in the course of the census in a PowerPoint deck and a press release, App., infra, 31a, did not transform the various changes -- some of which had not yet been finalized -- into a discrete agency action. Similarly, although the court insisted that adjudicating respondents' claims would not require it "to enforce free-floating standards of 'sufficiency,'" id. at 30a, that is precisely what the injunction has done: it forbids the Bureau from following the timeline of the Replan Schedule on the ground (contrary to sworn declarations) that the Bureau did not sufficiently take account of the census's accuracy, and it does so without ever specifying how accuracy is measured, what level of accuracy the court believed the Replan Schedule would be able to achieve, or what level would suffice to support bringing an end to field operations or post processing.

Because the district court found that reviewable agency action occurred by August 3, it mostly refused to consider any evidence regarding the development and implementation of the Replan Schedule after that date. App., infra, 46a. Most importantly, the court

declined to consider a September 5 declaration from Associate Director Fontenot. Id. at 54a n.11; see id. at 79a-115a. That declaration reveals the dynamic nature of census operations as implemented under the Replan Schedule; it discusses a number of adjustments that the Bureau has made to its approach to conducting the census since August 3; and it illuminates how the Bureau can provide an accurate census count by the December 31 deadline.[4] The court thus selectively blinded itself to evidence strongly supporting the conclusion that the Bureau is likely to conduct a census under the Replan Schedule with a level of accuracy and completeness comparable to recent censuses.[5]

4. The balance of harms also favors a stay because the injunction causes direct, irreparable injury to the government and the public, and there is no corresponding risk of injury to respondents. Cf. Nken v. Holder, 556 U.S. 418, 435 (2009).

a. A stay (and administrative stay) is immediately necessary to prevent irreparable harm to the conduct of the census as

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[4] The district court did selectively consider some post-August 3 evidence. It relied on a portion of a second declaration from Associate Director Fontenot submitted on September 22. While the court referenced and relied on statements in that declaration describing events after August 3 that posed new obstacles for ultimately meeting the statutory deadline, see App., infra, 13a, 61a, 75a, the court declined to consider other statements in that declaration that support the government's position.

[5] The Court may properly consider Associate Director Fontenot's September 5 declaration, which was entered on the district court docket and is included in the appendix to this application. See App., infra, 79a-115a. But even if the Court declined to consider that declaration, it still would be likely to reverse the decision below.

mandated by statute. See Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'") (citation omitted; brackets in original).

The Bureau cannot proceed with the final phase of the census until it concludes field operations. The Replan Schedule established September 30 as the target date for concluding field operations, and the Secretary recently announced that, in light of new developments and the most current information at the Bureau's disposal, October 5 was the new target date. See pp. 6-7, supra. The Replan Schedule shortened the schedule for post processing from five to three months to achieve an accurate census while meeting the statutory deadline. See App., infra, 113a. Because of that condensed schedule, the operations will require the concerted devotion of personnel and resources seven days a week throughout the entire post processing period. See id. at 110a-111a. If the statutory deadline is to be met, field operations must end and post processing must commence. Although it is impossible to predict with certainty precisely when the drop-dead date has passed, at this point in time, every day that the Bureau is barred from exercising its judgment in how to conduct the census, its ability to most efficiently allocate its resources to achieve an accurate enumeration while striving to meet the statutory deadline is put in serious jeopardy. Cf. id. at 111a-114a.

The district court failed to understand the gravity of the injury resulting from its injunction. It reasoned that its order would simply cause the government to "miss[] a statutory deadline [it] had expected to miss anyway." App., infra, 75a; see id. at 125a (court of appeals relying on similar rationale in denying the administrative stay). But the Bureau had a reasonable plan to meet the statutory deadline. See pp. 6-7, 11-14, supra. Continued interference with its implementation not only frustrates Congress's constitutionally authorized directive (itself an irreparable injury), but also threatens to disrupt countless downstream operations at all other levels of government that depend on the timely completion of the census.

The ongoing proceedings in the district court underscore the injury that the preliminary injunction continues to inflict on the government. The court enjoined the government from engaging in any contingency planning to satisfy the statutory deadline in the event that the injunction is stayed or vacated on appeal and required the Bureau to continue field operations through October 31 -- even if the Bureau will reach enumeration rates comparable to those achieved in recent censuses long before then. See pp. 6-7, supra. An immediate stay is necessary to allow the government to prepare to meet a valid statutory deadline.

b. Respondents have failed to demonstrate irreparable harm. The district court's finding to the contrary is premised on the assumption that census data will fall below some unspecified (but

binding) level of accuracy if the deadlines are not enjoined, see App., infra, 74a, but there is no basis for concluding that the census as it is currently being conducted is likely to result in an impermissibly inaccurate enumeration, see pp. 6-7, 28-31, supra. And to the extent that respondents allege possible injury related to a change in apportionment or federal funding, they can show irreparable injury only by demonstrating that (1) there likely would be inaccuracies that affect the communities they represent disproportionate to other communities in their States and across the country, and (2) such disproportionate effects are likely to have an actual impact on apportionment and federal funding. But plaintiffs have demonstrated no such likelihood and thus face only an abstract "possibility of irreparable injury," Nken, 556 U.S. at 434, which is insufficient.

Indeed, despite allegations of a possible disproportionate undercount, this Court granted a stay in Klutznick v. Carey, 449 U.S. 1068 (1980). There, a district court found that "there ha[d] been a disproportionate undercount" of the State of New York and New York City, declared the December 31 deadline to be "directory and not mandatory," and ordered the Bureau to take actions to remedy the undercount before reporting the tabulation of population to the President. Carey v. Klutznick, 508 F. Supp. 420, 432, 433 (S.D.N.Y. 1980). This Court stayed the injunction, Klutznick, 449 U.S. at 1068, over a dissent asserting "[t]he only [irreparable harm] * * * is that the Census Bureau will be unable to comply

with the December 31 deadline if the District Court's order is not stayed," id. at 1071 (Marshall, J., dissenting). As in 1980, the Court should stay the injunction below and permit the Bureau to seek to comply with the statutory deadline and therefore to conclude field operations on the schedule necessary to meet that deadline while still conducting an accurate census.

c. The need for immediate relief from this Court on an emergency basis is, in significant part, the result of the lower courts' delays. The district court's entry and extension of a temporary restraining order that lasted 19 days -- despite the government's repeated urging that it enter an immediately appealable order -- delayed its decision until shortly before the Bureau's planned transition from field operations to post processing. The court of appeals then considered the government's stay motion for twelve days -- including an entire week after one panel had produced 33 pages of contrasting opinions. These delays support staying the injunction, as this Court has repeatedly expressed disapproval of "eleventh hour injunction[s]," particularly in cases involving long-term planning and interrelated obligations. Western Airlines, Inc. v. International Bhd. of Teamsters, 480 U.S. 1301, 1308 (1987) (O'Connor, J., in chambers); see, e.g., Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) (per curiam); Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019).

5. At a minimum, the Court should grant an administrative stay immediately so that it can consider the full stay in due

course without seriously jeopardizing the Bureau's ability to complete a timely and accurate census. And importantly, unlike the consequences of failing to grant an administrative stay, granting an administrative stay would not impose irreparable harms on respondents if a full stay were ultimately denied. See App., infra, 150a-151a (Bumatay, J., dissenting). In the unlikely event that the injunction is later affirmed on appeal, the Bureau could reopen field operations for a brief period and then redo post processing. That would come at great cost, but it demonstrates that respondents' asserted harm is not irreparable. It would also delay the census, but such delay is not a cognizable harm to respondents, who have demanded that it be delayed by months. Missing the statutory deadline, by contrast, could never be remedied.

CONCLUSION

The preliminary injunction should be stayed pending appeal and, if the court of appeals affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. The injunction also should be administratively stayed during this application's pendency.

Respectfully submitted.

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