

United States District Court
Northern District of California

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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

Case No. 20-CV-05799-LHK

**ORDER RE: CLARIFICATION OF
STAY AND PRELIMINARY
INJUNCTION**

Re: Dkt. No. 279

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

Before the Court are two motions: (1) Plaintiffs’ motion to compel and for sanctions

United States District Court
Northern District of California

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

(“motion to compel”); and (2) Plaintiffs’ motion for temporary restraining order pending ruling on Plaintiffs’ motion to compel and for sanctions (“second TRO motion”). Having considered the parties’ submissions on the motion to compel and the second TRO motion; the parties’ arguments at the September 28 and 29, 2020 case management conferences; many briefs and court proceedings discussing Defendants’ alleged violations of the Temporary Restraining Order and the Court’s Order Granting Plaintiffs’ Motion for Stay and Preliminary Injunction (“Injunction Order,” ECF No. 208); the relevant law; and the record in this case, the Court:

- CLARIFIES the scope of the Court’s Injunction Order;
- ORDERS Defendants 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. On October 2, 2020, after the text message is sent, Defendants shall file a copy of the text message with the Court;
- ORDERS Census Bureau Director Steven Dillingham to file, by Monday, October 5, 2020 at 2 p.m. Pacific Time, a declaration under penalty of perjury that unequivocally confirms Defendants’ ongoing compliance with the Injunction Order and details the steps Defendants have taken to prevent future violations of the Injunction Order; and
- DENIES AS MOOT Plaintiffs’ motion to compel and second TRO motion.

I. BACKGROUND

On Thursday, September 24, 2020, the Court issued an Order Granting Plaintiffs’ Motion for Stay and Preliminary Injunction (“Injunction Order”), ECF No. 208. In the Injunction Order, the Court detailed how Defendants had violated the APA by adopting the “Replan”: a schedule for the 2020 Census that accelerated the deadlines for Census self-responses, non-response follow-up, data processing, and reports to the President and the states. Although the Census Bureau had taken most of a decade to develop the December 2018 Operational Plan Version 4.0 for the 2020 Census, the Bureau developed the Replan in the span of four or five days.

The Court found that Defendants had acted arbitrarily and capriciously in five independent ways: (1) Defendants failed to consider important aspects of the problem, including their constitutional and statutory obligations to produce an accurate census; (2) Defendants offered an

1 explanation that runs counter to the evidence before them; (3) Defendants failed to consider an
 2 alternative; (4) Defendants failed to articulate a satisfactory explanation for the Replan; and
 3 (5) Defendants failed to consider reliance interests. *Id.* at 44–74. Although any one of the five
 4 reasons would have supported a preliminary injunction, the Court found for Plaintiffs on all five.¹

5 The Court also found that Plaintiffs would suffer irreparable injury; that the balance of
 6 hardships tipped sharply in Plaintiffs’ favor; and that a preliminary injunction would serve the
 7 public interest. *Id.* at 74–75. Accordingly, the Court ordered that, effective as of Thursday,
 8 September 24, 2020:

9 The U.S. Census Bureau’s August 3, 2020 Replan’s September 30, 2020 deadline
 10 for the completion of data collection and December 31, 2020 deadline for reporting
 11 the tabulation of the total population to the President are stayed pursuant to 5
 12 U.S.C. § 705; and Defendants Commerce Secretary Wilbur L. Ross, Jr.; the U.S.
 13 Department of Commerce; the Director of the U.S. Census Bureau Steven
 14 Dillingham, and the U.S. Census Bureau are enjoined from implementing these two
 15 deadlines.

16 *Id.* at 78.

17 **II. DISCUSSION**

18 Below, the Court describes (1) the effect of the Injunction Order; (2) Defendants’ repeated
 19 violations of the Injunction Order; and (3) the further relief needed to ensure Defendants’
 20 compliance with the Injunction Order. Given the Bureau’s announcement that it will end field
 21 operations on Monday, October 5, 2020, time is of the essence.

22 **A. The Injunction Order enjoined Defendants from implementing the Replan’s 23 deadlines and reinstated the COVID-19 Plan’s deadlines.**

24 The effect of staying the two Replan deadlines was to reinstate the rule previously in force.
 25 *See, e.g., Dep’t of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1916
 26 & n.7 (2020) (affirming judgment vacating recession and restoring Deferred Action for Childhood
 27 Arrivals (“DACA”) program); *Organized Village of Kake v. USDA*, 795 F.3d 956, 970 (9th Cir.

28 ¹ Before reaching the merits, the Court found that Plaintiffs’ claims are reviewable. *See* Injunction
 Order at 21–44. The Court’s Injunction Order is incorporated herein by reference.

1 2015) (en banc) (“The effect of invalidating an agency rule is to reinstate the rule previously in
2 force.” (quoting *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005))).

3 The rule previously in force was the COVID-19 Plan—specifically, the COVID-19 Plan’s
4 deadline of October 31, 2020 for data collection (self-responses and non-response follow-up
5 (“NRFU”)) and deadline of April 30, 2021 for reporting the tabulation of total population to the
6 President. *See, e.g.*, Injunction Order at 6–9 (discussing COVID-19 Plan); 29–32 (discussing the
7 broad scope of a “rule” under the APA). The injunction’s effect was to require Defendants to cure
8 the legal defects identified in the Injunction Order if Defendants were to insist on implementing
9 the two Replan deadlines. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66
10 (2010) (“If a less drastic remedy (such as partial or complete vacatur of [the agency’s] decision)
11 was sufficient to redress [] injury, no recourse to the additional and extraordinary relief of an
12 injunction was warranted.”); *New York v. United States Dep’t of Commerce*, 351 F. Supp. 3d 502,
13 676–78, 679 (S.D.N.Y.) (analyzing *Monsanto* and enjoining Secretary Ross until he cured the legal
14 defects identified in opinion), *aff’d in part, rev’d in part and remanded sub nom. Dep’t of*
15 *Commerce v. New York*, 139 S. Ct. 2551 (2019). Until those legal defects are cured, the two
16 COVID-19 Plan deadlines remain in force.

17 **B. Defendants violated the Injunction Order by implementing the Replan deadlines.**

18 Despite the Injunction Order, Defendants continued to implement the Replan’s September
19 30, 2020 deadline for data collection. For instance, as recently as Monday, September 28, 2020,
20 four days after the Injunction Order, the Census Bureau’s website, which is updated daily, declared
21 that the “2020 Census will conclude data collection on September 30, 2020.” ECF No. 243
22 (attaching screenshot of [https://2020census.gov/content/dam/2020census/news/daily-nrfu-](https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-28.pdf)
23 [rates/nrfu-rates-report-09-28.pdf](https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-28.pdf)). Only after Plaintiffs raised this issue with the Court during the
24 September 28, 2020 case management conference did the Census Bureau finally remove the
25 erroneous statement from the Census Bureau’s website.

1 As another example, on Saturday, September 26, 2020, a Census Bureau enumerator²
 2 forwarded to the Court a text from the Census Bureau's Regional Director in Dallas, Texas stating:

3 Team,

4 Even though the courts have made a decision; nothing has changed. Our deadline to
 5 count everyone is still September 30, 2020. I will keep everyone as updated as
 6 possible. DO NOT SPREAD RUMORS, OR MAKE ASSUMPTIONS. STICK TO
 7 THE FACTS! The facts are, we are still moving forward with original plan to finish
 8 by September 30, 2020.

9 ECF No. 214 at 4. Defendants responded to this text by confessing error: the Regional Director in
 10 Dallas had in fact sent that text message to staff despite the Injunction Order. ECF No. 219-1
 11 (Christy Decl. ¶ 6). According to James T. Christy, the Bureau's Assistant Director for Field
 12 Operations, the information in that text message was "not consistent with [his] understanding of
 13 what field offices should be doing." *Id.* ¶ 5.

14 The level of misinformation and confusion nationwide is not surprising given that the
 15 Census Bureau's own website continued to tout the September 30, 2020 end of data collection four
 16 days after the Injunction Order. The Court has received a slew of emails from enumerators across
 17 the country that include supervisor texts with erroneous information and that express concern
 18 about the ending of field operations without adequate counts. The following are just a few
 19 examples:

- 20 • On Monday, September 28, 2020, a Census Field Supervisor stated that he "learned of this
 21 court's September 5, 2020 TRO from media reports. As a Census Field Supervisor[,] I have
 22 received zero notice from the Census Bureau about the existence of the TRO issued by this
 23 court on September 5, 2020." ECF No. 222. In response, Assistant Director Christy avers
 24 that "[t]he implementation of the Court's Temporary Restraining Order and the Preliminary
 25 Injunction involved actions by Headquarters and Regional Management Staff." ECF No.
 26 244-1 (Christy Decl. ¶ 14). In the Los Angeles Region where the complainant works, the

27 ² Enumerators are Census Bureau employees who collect data in the field. Specifically,
 28 enumerators conduct follow up with housing units that "did not self-respond to the decennial
 census questionnaire." Injunction Order at 2 (quoting Fontenot Decl. ¶ 48, ECF No. 81-1 and
 Thompson Decl. ¶ 15, ECF No. 36-2).

1 Regional Director did not email Census Field Supervisors about the TRO or Injunction
2 Order. *Id.* (Christy Decl. ¶ 16).

- 3 • On Tuesday, September 29, 2020, an individual claiming to be an attorney at the
4 Environmental Protection Agency wrote that he and his wife, who are working as
5 enumerators, have been told by their census supervisors “that we are wrapping up
6 tomorrow.” The individual attached a screenshot of text messages that show the Bureau’s
7 instructions “not to enter availability past tomorrow.” ECF No. 248.
- 8 • Again on Tuesday, September 29, 2020, an enumerator wrote that “in the last few days we
9 have been under strict instructions to close down remaining cases by whatever means
10 necessary.” ECF No. 238.

11 *See also, e.g.*, ECF Nos. 214, 224, 229, 235, 254, 257, 263, 268, 270–73, 276, 285 (other
12 allegations).

13 Perhaps the most egregious violation of the Injunction Order occurred on Monday,
14 September 28, 2020. At 1:58 p.m., two minutes before the Court’s case management conference,
15 the Census Bureau tweeted one sentence: “The Secretary of Commerce has announced a target
16 date of October 5, 2020 to conclude 2020 Census self-response and field data collection
17 operations.” @USCensusBureau,
18 <https://twitter.com/uscensusbureau/status/1310685274104569856>. Later, the Census Bureau issued
19 a one sentence press release with the exact same sentence. *See* U.S. Census Bureau, *2020 Census*
20 *Update* (Sept. 28, 2020), [https://www.census.gov/newsroom/press-releases/2020/2020-census-](https://www.census.gov/newsroom/press-releases/2020/2020-census-update.html)
21 [update.html](https://www.census.gov/newsroom/press-releases/2020/2020-census-update.html).

22 Neither the one sentence tweet nor the one sentence press release provided any explanation
23 or information. The Court thus ordered Defendants to produce the administrative record of this
24 announcement. ECF No. 225. The Court notes that Defendants deny that the October 5 end date
25 for data collection constitutes final agency action. For example, minutes after the October 5 “target
26 date” tweet during the Monday, September 28, 2020 case management conference, Defendants
27 stated that the announcement “doesn’t involve a final agency action. It is a giant endeavor with
28 constantly changing pieces. And our position is the tweet does not have an administrative record.
That is our position.” Tr. at 44, ECF No. 237.

Similarly, the next day, at the September 29, 2020 case management conference, the Court

1 asked whether Defendants had produced the full record of the October 5 “target date” tweet. Tr. at
 2 7, ECF No. 259. Defendants responded in the affirmative, “[s]ubject to not calling it a record
 3 because in our view it is not a record.” *Id.* When asked about the Secretary’s approval of the
 4 October 5 “target date,” Defendants stated: “[e]ven to call it a decision is perhaps to endow it with
 5 significance that it otherwise does not have.” *Id.*

6 Even though the Census is a \$15.6 billion dollar operation that took nearly a decade to
 7 plan, Defendants’ production showed that the Census Bureau developed the October 5 “target
 8 date” in the span of four days with the same legal defects as the Replan. For example, Census
 9 Bureau Deputy Director Ron Jarmin presented to Secretary Ross two “Proposed Options for
 10 Completion of Enumeration”—both of which focused on the December 31, 2020 deadline that the
 11 Court had stayed and enjoined Defendants from implementing:

12 **Option 1:** Conclude field work by October 5, 2020 *in order to meet apportionment*
 13 *delivery date of December 31, 2020.*

14 **Option 2:** Continue field work beyond October 5, 2020 in order to increase state
 15 completion rates to 99% and to continue to improve enumeration of lagging sub-
 16 state areas, such as tribal areas, rural areas, and hard-to-count communities.
However, this would not allow for delivery of state counts for apportionment by
December 31, 2020.

17 ECF No. 233 at 148 (italics added). As Deputy Director Jarmin explained to Director Dillingham
 18 and other senior officials, Option 2 “would preclude meeting the 12/31 date, *but furthers the goal*
 19 *of a complete and accurate 2020 Census.*” *Id.* at 130 (emphasis added). Option 1, by contrast,
 20 would not further that goal.

21 Option 1’s data processing, like the Replan’s data processing, focuses solely on
 22 congressional apportionment and leaves redistricting data for another day. *See id.* at 148
 23 (Presentation to Secretary Ross highlighting “streamlined post data collection processing and
 24 focusing only on state counts for apportionment”). This bifurcation of data processing is
 25 unprecedented. As the Census Bureau found when considering the Replan, “the downstream effect
 26 of separating apportionment and redistricting processing activities could not be assessed. This
 27 results in additional risk to the delivery of the redistricting products in order to meet the statutory
 28

1 deadline and will have a negative impact on the accuracy of the redistricting data.” *E.g.*, Injunction
 2 Order at 55 (quoting DOC_9496 (July 31, 2020 email chain with top Bureau officials)); *id.* at 53
 3 (quoting DOC_8019 (July 24, 2020 Apportionment Data Processing Memo)).

4 In sum, the Census Bureau repeatedly found that “[s]hortening the time period to meet the
 5 original statutory deadlines for apportionment and redistricting data will result in a census that has
 6 fatal data quality flaws that are unacceptable for a Constitutionally-mandated activity.” Injunction
 7 Order at 49 (quoting so-called “Elevator Speech” memo prepared by senior Bureau officials
 8 shared with the Government Accountability Office, DOC_8070). In the words of Timothy Olson,
 9 the Bureau’s Associate Director for Field Operations, “it is ludicrous to think we can complete
 10 100% of the nation’s data collection earlier than 10/31 and any thinking person who would believe
 11 we can deliver apportionment by 12/31 has either a mental deficiency or a political motivation.”
 12 Injunction Order at 52 (quoting DOC_7738).

13 Still, to pick between the two options (ending data collection by or after October 5, 2020),
 14 Secretary Ross asked which would implement the December 31, 2020 deadline. Three short
 15 emails on that enjoined topic ensued:

- 16 • On Monday, September 28, 2020 at 3:52 p.m. Eastern, Secretary Ross wrote to Deputy
 17 Director Jarmin and other senior Bureau officials: “As I prepare to make the decision, I
 18 would like to make sure that I understood correctly that your team’s opinion is that if we
 stay in the field beyond October 5, we would not be able to meet the statutory deadline of
 19 December 31.” ECF No. 256-1 at 2.
- 20 • At 4:30 p.m. Eastern, Deputy Director Jarmin responded: “Yes sir, we need to finish field
 21 work on 10/5 if we are to have enough time (and assuming all goes well) to finish the
 22 processing of the resident population, federally affiliated overseas and, if requested,
 unlawful aliens in ICE Detention Centers by 12/31. Other PM [Presidential Memorandum]
 related outputs would be pushed to 1/11/2021.” *Id.* at 1.
- 23 • At 5:12 p.m. Eastern—14 minutes *after* the Bureau’s tweet announcing the Secretary’s
 24 decision—Secretary Ross wrote back: “Thanks for the confirmation. Based on the staff
 25 recommendation I am extending the field operation to October [sic] 5.” *Id.*

26 ECF No. 256-1.

27 Thus, Defendants’ production shows three significant things: (1) Defendants set the

1 October 5 date to meet the December 31, 2020 statutory deadline, even though Defendants are
 2 “enjoined from implementing” that deadline; (2) the December 31, 2020 statutory deadline
 3 intertwined with the President’s July 21, 2020 Memorandum on Excluding Illegal Aliens from the
 4 Apportionment Base Following the 2020 Census; and (3) Secretary Ross approved the October 5
 5 date 14 minutes after the Census Bureau tweeted the October 5 date.

6 Moreover, Defendants’ claim that October 5 is merely a “target date” is belied by
 7 Defendants’ own documents, representations in federal court, and communications with Bureau
 8 enumerators:

- 9 • The “Proposed Options for Completion of Enumeration” presentation to Secretary Ross on
 10 Monday, September 28, 2020 shows that the Bureau will “[c]onclude field work by
 11 October 5, 2020 in order to meet apportionment delivery date of December 31, 2020.” ECF
 12 No. 233 at 148.
- 13 • Hours after the tweet on Monday, September 28, 2020, Assistant Director Christy
 14 “instructed staff to send a text message to all Decennial field staff (Enumerators and
 15 [Census Field Supervisor]s) that read: ‘A federal district court issued a preliminary
 16 injunction on 9/24. The Census Bureau is complying with the Court’s Order which moves
 17 the finishing date for NRFU operations after September 30. The Secretary announced
 18 today that *NRFU operations will finish on October 5*. We will post updated guidance on
 19 the content locker.’” ECF No. 234 (Christy Decl. ¶ 14) (emphasis added).
- 20 • Also on Monday, September 28, 2020, an enumerator received a text message that stated:
 21 “The Secretary announced today that NRFU operations will finish on October 5.” ECF
 22 No. 230-1. Several enumerators have alerted the Court that they have received this text
 23 message. *See, e.g.*, ECF No. 238 (“I awoke this morning to an internal message from the
 24 Bureau that Secretary Ross has ordered that the NRFU (non response follow up) cases will
 25 be terminating on October 5th.”); ECF No. 231 (text message dated September 29, 2020
 26 that “NRFU operations will finish on October 5”). Assistant Director Christy confirms that
 27 he ordered this message sent to field staff. ECF No. 234 (Christy Decl. ¶ 14).
- 28 • The Government has represented to a three-judge court of the United States District Court
 for the District of Columbia that field operations “are set to conclude” on October 5.
 Rough Tr. of Oral Argument at 8, *Common Cause v. Trump*, No. 20-cv-02023-CRC-GGK-
 DLF (D.D.C. Sept. 29, 2020).

If that were not enough, Defendants’ clear, fast, and concerted advertising of the October 5
 date stands in stark contrast with Defendants’ chaotic, dilatory, and incomplete compliance with

1 the Injunction Order. As recounted above, Defendants have violated the Injunction Order in
 2 several ways. A flood of emails to the Court and the parties suggests ongoing non-compliance in
 3 the field.

4 Even today, in response to Plaintiffs' second TRO motion, Associate Director Fontenot
 5 again failed to acknowledge the COVID-19 Plan dates that the Injunction Order reinstated. *See*
 6 ECF No. 284-1 (comparing December 2018 Operational Plan Version 4.0, the Replan, and
 7 "clos[ing] field data collection on October 5, 2020 and submit[ting] apportionment counts by the
 8 statutory deadline, December 31, 2020"); ECF No. 81-1 ¶ 69 (comparing dates under the
 9 December 2018 Operational Plan Version 4.0 and the Replan). At no point have Defendants
 10 unambiguously communicated to all field staff what the Injunction Order requires: immediate
 11 reinstatement of the COVID-19 Plan's deadlines of October 31, 2020 for data collection and April
 12 30, 2021 for reporting the tabulation of total population to the President.

13 **C. The Ninth Circuit has denied Defendants' request to stay the Injunction Order.**

14 On September 30, 2020, the Court of Appeals for the Ninth Circuit denied Defendants'
 15 motion for an administrative stay of the Injunction Order. ECF No. 277. The Ninth Circuit held in
 16 its published opinion that, among other things, this Court's "September 5 temporary restraining
 17 order and September 24 preliminary injunction preserve the status quo because they maintain the
 18 Bureau's data-collection apparatus." *Id.* at 5.

19 The Ninth Circuit also held that:

20 Given the extraordinary importance of the census, it is imperative that the Bureau
 21 conduct the census in a manner that is most likely to produce a workable report in
 22 which the public can have confidence. The Bureau must account for its competing
 23 constitutional and statutory obligation to produce a fair and accurate census report.
 24 The hasty and unexplained changes to the Bureau's operations contained in the
 25 Replan, created in just 4 to 5 days, risks undermining the Bureau's mission.

26 *Id.* at 7–8. Despite the Ninth Circuit's ruling, the Bureau is still "conclud[ing] field work by
 27 October 5, 2020 in order to meet [the] apportionment delivery date of December 31, 2020." ECF
 28 No. 233 at 148.

Like the Replan, the decision to end data collection on October 5 is a hasty and

1 unexplained change to the Bureau’s operations that was created in 4 days. The decision also risks
 2 further undermining trust in the Bureau and its partners, sowing more confusion, and depressing
 3 Census participation. Consider, for instance, the whiplash inflicted on the Bureau’s partners by the
 4 Bureau’s rapid changes in deadlines. The Bureau recognized its “extensive partnerships” with
 5 organizations such as Plaintiff National Urban League. Injunction Order at 72 (quoting Fontenot
 6 Decl. ¶¶ 28, 41). Before the Replan’s adoption, those partners advertised the COVID-19 Plan’s
 7 October 31, 2020 data collection deadline for four months. After the Replan’s adoption, partners
 8 diverted significant resources to mitigate the widely advertised October 31 deadline:

- 9 • The City of Salinas already promoted the October 31 deadline “on social media and in
 10 thousands of paper flyers.” Gurmilan Decl. ¶¶ 11–12. Thus, “some residents who received
 11 the City’s messaging will fail to respond before the R[eplan] deadline because the City has
 12 limited remaining resources to correct what is now misinformation.” *Id.* ¶ 12. Moreover,
 13 the City “is still advertising for census enumerator job listings because traditional applicant
 14 groups like senior citizens have concerns about the risk of catching COVID-19. With fewer
 15 enumerators working, every extra day the City has to use [] existing staff to support the
 16 count” *Id.* ¶ 13.
- 17 • Harris County “participated in over 150 events,” including “food distribution events,”
 18 during which it “announced the October 31, 2020 deadline for the 2020 Census.” Briggs
 19 Decl. ¶ 12. Consequently, “Harris County will be forced to expend additional resources to
 20 clear confusion about the last date for self-response during the Census, to ensure that
 21 people who have not responded are counted in time.” *Id.* ¶ 16.
- 22 • The Black Alliance for Just Immigration already “publicized the October 31 deadline for
 23 self-response during digital events between April and July” and is diverting resources to
 24 publicize the new September 30 deadline. Gyamfi Decl. ¶¶ 13–14.
- 25 • The League of Women Voters “has already had to spend time and financial resources”
 26 developing and distributing public education materials on the Replan timeline. Stewart
 27 Decl. ¶ 12.
- 28 • The National Urban League has similarly had “to divert resources from other programs and
 projects” to “alleviate the confusion” about the change in deadlines. Green Decl. ¶ 15.

29 *See, e.g., id.* at 27–28, 37. Yet on Monday, September 28, 2020, the Bureau announced it will end
 30 field operations by October 5, 2020 in order to meet the December 31, 2020 deadline. This
 31 announcement gives the Bureau’s partners just one week to advertise yet another accelerated
 32 deadline.

1 Moreover, Defendants’ sole witness in this case, Associate Director Fontenot, swore under
2 penalty of perjury that the Census Bureau could not meet the December 31, 2020 statutory
3 deadline if data collection were to extend past September 30, 2020. Specifically, Associate
4 Director Fontenot declared under oath that:

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

17 Letter Order, *La Union Del Pueblo Entero, et al. v. Trump, et al.*, 19-cv-02710-PX-PAH-ELH (D.
18 Md. Oct. 1, 2020) (three-judge court), ECF No. 125 (emphasis in original) (quoting ECF No. 117-
19 1 ¶ 107). As a result of this blatant contradiction, the three-judge court in the District of Maryland
20 ordered Defendants to explain how the Census Bureau would “accomplish an accurate final
21 enumeration given that the post-data processing phase has been shortened further.” *Id.* at 2.

22 **D. The Court clarifies the Injunction Order and orders tailored relief to ensure
23 compliance.**

24 Defendants’ dissemination of erroneous information; lurching from one hasty, unexplained
25 plan to the next; and unlawful sacrifices of completeness and accuracy of the 2020 Census are
26 upending the status quo, violating the Injunction Order, and undermining the credibility of the
27 Census Bureau and the 2020 Census. This must stop.

28 Time is of the essence. Every day that passes, the Bureau winds down field operations in
order to end data collection by Monday, October 5, 2020 and start data processing. Once field
operations are terminated, they are difficult to resume; and once data processing begins, no more
data can be added for processing. *See* ECF No. 81-1 (Fontenot Decl. at ¶¶ 67–68) (“[P]ost data

1 collection activities are like building a house There is an order of steps that must be
 2 maintained. . . . [T]here is no opportunity to begin the post data collection processing until data
 3 collection operations close everywhere.”).

4 As Associate Director Fontenot stated on September 5, 2020 in opposition to the motion
 5 for stay and preliminary injunction, the sooner the Court enjoins Defendants, the fewer field staff
 6 Defendants would terminate and not be able to rehire:

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

16 *Id.* (Fontenot Decl. at ¶ 98).

17 The Court thus exercises its authority to enforce compliance with its orders. *See, e.g., Int’l*
 18 *Ladies’ Garment Workers’ Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984) (per curiam)
 19 (holding that “the District Court certainly was empowered to protect” “the interest of the judicial
 20 branch in seeing that an unambiguous mandate is not blatantly disregarded by parties to a court
 21 proceeding”).³

22 Pursuant to that authority, the Court clarifies⁴ that until Defendants cure all the legal

23 ³ Defendants argue that the Court lacks jurisdiction to “radically modify the preliminary
 24 injunction” now that the Injunction Order is on appeal. ECF No. 284 at 3. Defendants’ argument
 25 misses the point. Far from “radically modifying” the Injunction Order, the Court simply enforces
 26 the Injunction Order to halt Defendants’ repeated violations. In any event, even the case that
 27 Defendants cite holds that a district court may modify an injunction “to maintain the status quo
 28 among the parties.” *Id.* (quoting *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204
 F.3d 867, 880 (9th Cir. 2000)). Defendants are upending the status quo here.

⁴ The Court notes that broad swaths of the public and the judiciary understood the Injunction
 Order. For instance, during oral argument in *Common Cause v. Trump*, United States Circuit Judge

1 defects identified in the Injunction Order, Defendants are enjoined from “implementing the
2 September 30, 2020 deadline for the completion of data collection and December 31, 2020
3 deadline for reporting the tabulation of the total population to the President.” Injunction Order at
4 78. In the meantime, the Court’s stay pursuant to 5 U.S.C. § 705 “postpone[s] the effective date
5 of” those two Replan deadlines and so reinstates the rule previously in force: the COVID-19 Plan
6 deadlines of October 31, 2020 for the completion of data collection and April 30, 2021 for
7 reporting the tabulation of total population to the President.

8 Moreover, to preserve the status quo, the Court orders some of the relief requested in
9 Plaintiffs’ motion to compel and second TRO motion. On October 2, 2020, Defendants shall issue
10 a text message to all the Census Bureau’s employees notifying them of the Court’s Injunction
11 Order, stating that the October 5, 2020 “target date” is not operative, and stating that data
12 collection operations will continue through October 31, 2020. On October 2, 2020, after the text
13 message is sent, Defendants shall file a copy of the text message with the Court. In addition, by
14 October 5, 2020 at 2 p.m. Pacific Time, Census Bureau Director Steven Dillingham shall file a
15 declaration under penalty of perjury that unequivocally confirms Defendants’ ongoing compliance
16 with the Injunction Order and details the steps Defendants have taken to prevent future violations
17 of the Injunction Order.

18 The Court will subject Defendants to sanctions or contempt proceedings if Defendants
19 violate the Injunction Order again.

20 The Court sets a case management conference on Tuesday, October 6, 2020 at 2 p.m.

21
22
23 _____
24 Gregory G. Katsas of the Court of Appeals for the D.C. Circuit stated that census operations
25 “would have stopped September 30, and [Judge Koh] extended it until the end of October.” Judge
26 Katsas further stated, “[a]gain, maybe I misread the Koh order, but I thought that in terms of
27 deadlines, it extended the transmittal date from December 31st to April 1st, and that’s four months
28 [sic; in fact a four-month extension but to April 30, 2021].” Rough Tr. of Oral Argument at 9, 15;
see also, e.g., Associated Press, *Federal Judge Says 2020 Census Must Continue for Another
Month*, Wall Street Journal (Sept. 25, 2020), [https://www.wsj.com/articles/federal-judge-says-
2020-census-must-continue-for-another-month-11601034711](https://www.wsj.com/articles/federal-judge-says-2020-census-must-continue-for-another-month-11601034711).

Pacific Time and vacates the Friday, October 2, 2020 hearing on the motion to compel.

III. CONCLUSION

For the foregoing reasons, the Court:

- CLARIFIES the scope of the Court’s Injunction Order;
- ORDERS Defendants 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. On October 2, 2020, after the text message is sent, Defendants shall file a copy of the text message with the Court;
- ORDERS Census Bureau Director Steven Dillingham to file, by Monday, October 5, 2020 at 2 p.m. Pacific Time, a declaration under penalty of perjury that unequivocally confirms Defendants’ ongoing compliance with the Injunction Order and details the steps Defendants have taken to prevent future violations of the Injunction Order; and
- DENIES AS MOOT Plaintiffs’ motion to compel and second TRO motion.

IT IS SO ORDERED.

Dated: October 1, 2020



LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

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