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

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: December 17, 2020
Time: 1:30 p.m.
Place: Courtroom 8, 4th Floor, San Jose
Judge: Hon. Lucy H. Koh

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I. INTRODUCTION

Defendants' motion to dismiss is, in fact, a motion for reconsideration. Defendants ask this Court to "revisit" its prior rejection of their "threshold" defenses and to "reevaluate" their prior arguments. Mot. to Dismiss 1, ECF No. 354 (MTD). The reason: "because the Supreme Court found that a judicially-imposed impediment to the Bureau's completion of the census was inappropriate" and because a *dissenting* judge in the Ninth Circuit thought Plaintiffs' claims were non-justiciable. *Id.* Defendants conveniently ignore that the Ninth Circuit *majority*, and a later unanimous Ninth Circuit panel, agreed with this Court; that the Supreme Court decision was a simple order with no opinion and, thus, no findings; and that Defendants did not even bother to raise most of the "threshold" issues on appeal. And they make no attempt to address or fit their motion within the heightened standards of a motion for reconsideration, or to seek leave to file such a motion as required by this Court's rules. *See* N.D. Cal. Civ. L.R. 7-9 (requiring that a motion for leave to file a motion for reconsideration show "a material difference in fact or law," the "emergence of new material facts or a change of law," or a "manifest failure by the Court to consider material facts or dispositive legal arguments," and prohibiting repetition of "any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered"); *Patten v. Kiani*, No. C 11-2057 LHK PR, 2013 WL 2558041, at *2 (N.D. Cal. June 10, 2013) (discussing standard). Defendants provide no reason for this Court to depart from its carefully reasoned prior decisions. There is none.

Defendants' arguments also fail on their own terms. They still fail to identify any case in which a court has held that the political questions doctrine bars a census challenge, or to meaningfully distinguish the many cases that have held the opposite. They still cast no doubt on Plaintiffs' detailed evidence supporting standing. And they offer nothing new in support of their argument that the Replan is not final agency action reviewable under the Administrative Procedure Act (APA).

Defendants' prudential ripeness argument is new, but that is a vice not a virtue. After three months of intense litigation, Defendants claim for the first time that the Court should await the final apportionment numbers before adjudicating Plaintiffs' claims. That is neither necessary

nor prudent. This motion will not be heard until mid-December. And the current schedule set by this Court extends into 2021. Dismissing Plaintiffs' claims for a matter of weeks or months would not benefit Defendants or this Court and would harm Plaintiffs and the public at large.

One thing has changed, though Defendants do not acknowledge it: Their arguments regarding the December 31 statutory deadline are now irrelevant. The statutory deadline featured prominently in Defendants' presentations to this Court, to the Ninth Circuit, and to the Supreme Court. And Defendants continue to rely on that deadline in their motion to dismiss. The Ninth Circuit recognized that the Census Bureau may well "miss[] the deadline," and that doing so "would likely not invalidate the tabulation of the total population reported to the President." *Nat'l Urban League v. Ross*, 977 F.3d 770, 781 (9th Cir. 2020) (*NUL II*). As to whether they will miss the deadline, which is now only a month away, Defendants have been noticeably silent. But recent reports suggest that the Bureau has encountered some reporting anomalies and that it will not be able to report the final population numbers to the President until January 26, 2021, at the earliest. Hansi Lo Wang, *Census 'Anomalies' Could Thwart Trump's Bid to Alter Next Electoral College*, NPR (Nov. 19, 2020).[1] Defendants have not yet publicly confirmed (nor denied) the revised timeline, but even Director Dillingham has acknowledged that during "post-collection processing, certain processing anomalies have been discovered." Statement from Census Bureau Director Steve Dillingham (Nov. 19, 2020).[2] If true, Defendants' favorite retort—that they are bound by the statutory deadline and this Court cannot order them to violate it—no longer has purchase (if it ever did). And regardless, under the Court's current schedule, any relief will come only *after* December 31.

This Court should (again) reject Defendants' threshold arguments and deny Defendants' motion to dismiss.

[1] https://www.npr.org/2020/11/19/936561664/anomalies-found-in-census-could-thwart-trumps-bid-to-alter-electoral-college.

[2] https://www.census.gov/newsroom/press-releases/2020/statement-post-collection-processing.html.

II. DISCUSSION

A. Defendants Offer No Reason For This Court To Reconsider Its Holding That Plaintiffs' Claims Do Not Present A Non-Justiciable Political Question

Defendants begin by asserting that Plaintiffs' claims are barred by the political question doctrine. This Court already rejected that argument with respect to Plaintiffs' APA claim. PI Order 21-23. And Defendants did not even bother to challenge that holding on appeal to the Ninth Circuit or the Supreme Court. Defendants ignore all of that. They simply recycle and repeat the same rejected and abandoned arguments—which fare no better today, and certainly provide no grounds for reconsideration. *See* N.D. Cal. Civ. L.R. 7-9(b); *Patten*, 2013 WL 2558041, at *2 ("To seek reconsideration of an interlocutory order … Defendants had to comply with Local Rule 7-9(a)" and show "a material difference in fact or law," the "emergence of new material facts or a change of law," or a "manifest failure by the Court to consider material facts").

Defendants still "fail to offer a case that finds that the political question doctrine bars review of decisions regarding the administration of the census." PI Order 21, ECF No. 208. As this Court explained, the "Supreme Court and lower courts have repeatedly rejected the argument that the political question doctrine bars review of census-related decisionmaking." *Id.* at 22 (collecting cases). And "the Supreme Court" recently "rejected Defendants' claim that there is 'no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 23 (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019)). The standard "is provided by the Census Act, the Constitution, and [the] APA." *Id.* Which is why Defendants "do not" and cannot cite "a case in which the political question doctrine barred judicial review of census-related decisionmaking." *Id.* That should be the end of the matter.

Defendants' continued insistence that this case is somehow different from all that came before is meritless. Defendants contend that all of the other cases entertained challenges to "discrete policy choice[s] that could be juxtaposed against an alternative." MTD 8. The same is true here. Defendants decided to accelerate the census timeline in the Replan; the "alternative" was to adhere to the timeline in the COVID-19 Plan they previously adopted and had been implementing. Defendants also decided to sacrifice accuracy and completeness in order to report

out "99%" completion statistics; the "alternative" was to adhere to the detailed metrics adopted in the 2018 Operational Plan (and included in the COVID-19 Plan). There are no abstract questions in this case about how much "time, staff, [or] money" would produce the most accurate count. MTD 9. And nobody is arguing that the Enumeration Clause "demands accuracy at all costs." *Id.* Hyperbole aside, Plaintiffs are merely asking this Court to apply familiar legal standards—whether Defendants engaged in reasoned decisionmaking (under the APA), and whether their decisions bear a "reasonable relationship to the accomplishment of an actual enumeration of the population" (under the Enumeration Clause), *Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996). There is nothing unique or non-justiciable about Plaintiffs' claims—then or now.

B. Defendants Offer No Reason For This Court To Reconsider Its Holding That Plaintiffs Have Standing

Defendants next argue that Plaintiffs lack standing. This Court already rejected that argument too (PI Order 23-29), and Defendants did not challenge that holding on appeal either. This Court got it right the first time, and nothing has changed to warrant a different result.

1. Plaintiffs' Injuries Are Still Not Speculative

This Court previously held that Plaintiffs have standing because the Replan (1) will likely cause Plaintiffs to lose federal funds; (2) will likely deprive Plaintiffs of political representation; (3) will degrade the census data on which Plaintiffs rely for necessary functions; and (4) has already required Plaintiffs to divert resources to mitigate the undercounts caused by truncating the 2020 Census. PI Order 23-28. Defendants provide no reason to alter that ruling.

Plaintiffs have exhaustively set out, and provided expert and fact declarations supporting, the various harms that would occur if Defendants cut short the 2020 Census. *See, e.g.*, PI Mot. 26-33, ECF No. 36; PI Reply 3-6, ECF No. 130. These declarations make clear that the Replan's shortened timeline for data collection and processing will cause hard-to-count populations to be undercounted. Plaintiffs, in turn, are local governments with high proportions of hard-to-count groups as residents, organizations with members in such communities, and individuals who live there. And a differential undercount will harm Plaintiffs by causing them to lose their fair share

of federal dollars (which turn on census data[3]) and representation in the House (the primary purpose of the census). Plaintiffs' detailed declarations substantiate each link in that chain. *See* PI Reply 5-6; *see also* PI Order 23-28.

Defendants do not meaningfully dispute any of that. Defendants instead argue that Plaintiffs have not adequately alleged a "*differential* undercount" because, as of October 15, the Bureau ultimately "reached completion rates of greater than 99% in every State and in the District of Columbia." MTD 15. But the relief granted by this Court is the *only* reason the Bureau reached anything close to "99%." As of this Court's PI Order, only *four* states had reached 99%. PI Order 15. That means that 46 out of 50 states in the nation (plus the District of Columbia) were nowhere close to being adequately counted, one week before the September 30 field operation end date. On September 30—the date field operations would have ended but for the district court's injunction, and the date by which Associate Director Fontenot promised the Bureau would reach 99% completion in every State (Fontenot Decl. ¶ 65, ECF No. 81-1)—sixteen States and the District of Columbia were still under 99% and seven States were under 98%. *See* U.S. Census Bureau, *2020 Census Housing Unit Enumeration Progress by State* (Oct. 1, 2020 report date).[4] So Defendants' "standing" argument turns almost entirely on their assertion that the relief already ordered by this Court effectively mitigated Plaintiffs' injuries—and rendered this case moot.

That argument is flawed for several reasons. *First*, as detailed in the Second Amended Complaint, the statistics on which Defendants rely are unreliable. *See* SAC ¶¶ 27-40, 369-416, ECF No. 352. Just two weeks ago, the Associated Press reported that twelve census takers were told by supervisors to falsify data so that Defendants could meet their own shortened deadline to end field operations. *See* Mike Schneider, *Census Bureau Denies Fake Data Allegations by*

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[3] *See, e.g.*, PI Reply Ex. 16, ECF No. 131-1, Cong. Research Serv., *Community Development Block Grants and Related Programs: A Primer* 9-10 (Apr. 30, 2014) (detailing one such funding formula).

[4] https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-10-01.pdf.

Census Workers, APNews (Nov. 10, 2020).[5] Defendants may insist those claims are false or, if true, only examples of isolated bad actors. But recent reports suggest otherwise: Today, for example, the Associated Press published text messages from an Alabama supervisor—sent just a week before the Supreme Court's stay order—giving detailed instructions as to how enumerators were to falsify data, and providing "the 15 steps she said would allow the census takers to mark in their bureau-issued iPhones that only one person lived in a home without interviewing anyone about the household's demographic makeup or the number of people living there." Mike Schneider, *Texts: US Census Manager Told Counters To Use Fake Answers*, ABC News (Nov. 24, 2020).[6] The supervisor also "recommended performing the steps two to three hours after trying to interview members of a household to avoid arousing suspicions from higher-ups who could track where census takers had been through their iPhones." *Id.* How widespread any falsification was remains a matter for discovery; Defendants provide no reason to dismiss this suit at the pleading stage.

Second, even if Defendants' state-by-state metrics could withstand scrutiny, they would not undermine Plaintiffs' standing. That is because, as Defendants acknowledge, Plaintiffs' injuries are premised in large part on "a *differential* undercount." MTD 16. The limited data released by Defendants strongly suggests that a differential undercount within states has occurred. SAC ¶ 368. For example, a September 28 report showed that the tribal area of Window Rock, Arizona, which the Bureau designates as the capital of Plaintiff Navajo Nation, was 20% below targets. *See* SAC ¶ 27; ECF No. 233-2 at 2; *see also* ECF No. 330-1 at 2-3 (¶¶ 4-8) (tribal area, with a 14% self-response rate, was told by Bureau officials that it had a "completion percentage" of 101.31%, when it was "actually only 88.01%"). And as the Bureau's accompanying presentation to the Secretary explained, continuing field work was necessary to "improve enumeration of lagging sub-state areas, such as tribal areas, rural areas, and hard-to-count

[5] https://apnews.com/article/indiana-only-on-ap-census-2020-a4f3d96a3118f39774fb495b52b4b10a; *see also* Mike Schneider, *Census Takers Say They Were Told to Enter False Information*, APNews (Nov. 7, 2020), https://apnews.com/article/donald-trump-massachusetts-census-2020-98d187302fbcec5e422fa43522d51dfe.

[6] https://abcnews.go.com/Politics/wireStory/texts-us-census-manager-told-counters-fake-answers-74376974.

communities." ECF No. 233 at 148. Defendants have offered no reason to believe that the situation changed dramatically between September 28 and October 15.

Third, Defendants largely ignore the harms caused by severely curtailed data-processing activities. SAC ¶¶ 417-22. That is remarkable, given that the Bureau itself warned that "[a]ny effort to concatenate or eliminate processing and review steps to reduce the timeframes will significantly reduce the accuracy of the apportionment counts and the redistricting data products." PI Order 58 (quoting DOC_8337). Experts agree. As Dr. Louis, the former chief data scientist for the Bureau explained, "[i]nevitably, streamlining will degrade quality, because the systems and procedures that have been developed and tested over the decade are designed to be both necessary and sufficient." Louis Decl. ¶ 32, ECF No. 36-4. And Dr. Hillygus explained that "compressed time frame for Quality Control and data processing" will lead to an "even larger overcount of the White population." Hillygus Decl. ¶ 20, ECF No. 36-3. To take just one example, college students tend to be overcounted by potentially being counted both at their university address and at their parents' homes, *id.* ¶ 23, and this has to be fixed in the data-processing phase through de-duplication. SAC ¶¶ 269-71. The Bureau's own Census Scientific Advisory Committee (CSAC) recently echoed the same concern: that "due to pandemic conditions … adequate de-duplication procedures for college students, retirees, and others require additional time, not less." Memorandum from Allison Plyer, Chair, Census Sci. Advisory Comm. to Steven Dillingham, Dir., U.S. Census Bureau, *Recommendations and Comments to the Census Bureau* at 3 (Nov. 12, 2020).[7] Failure to provide that time will lead to overcounts of these groups—which, in turn, will lead to relative undercounts of the hard-to-count groups that make up a disproportionate share of Plaintiffs' residents and members. *See* Louis Decl. ¶¶ 30-34.

Fourth, as Defendants recognize (MTD 17), the purported completion rates have nothing to do with this Court's separate ruling that the "degradation of data" is an "informational injury analogous to those that have supported Article III standing." PI Order 26-27 (collecting cases).

[7] https://assets.documentcloud.org/documents/20404686/recommendations-and-comments-to-the-census-bureau-from-the-census-scientific-advisory-committee-tabled-from-the-fall-2020-meeting-on-september-17-18-2020.pdf.

But Defendants (again) simply ignore this Court's holding and the actual allegations in this case—which do not challenge just "*any*" inaccuracy nor "every detail of census operations that could conceivably affect accuracy." MTD 17 (emphasis added). The unrebutted evidence in this case shows that the "truncation of the time for field operations and data curation, especially in the midst of the COVID-19 pandemic, will *severely* compromise the quality of the census data," Louis Decl. ¶ 44 (emphasis added), will have "grave and material consequences for the 2020 Census," Thompson Decl. ¶ 5, ECF No. 36-2, and will, as the Bureau itself recognized, "significantly reduce the accuracy" of the census data on which Plaintiffs rely, PI Order 58 (quoting DOC_8337).

At an absolute minimum, Defendants have not made the kind of showing necessary to justify dismissal at the pleading stage. To the extent that Defendants are presenting a "facial attack" on this Court's jurisdiction, the Court would resolve it "as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Defendants' arguments cannot possibly succeed under that standard. *See, e.g.*, SAC ¶¶ 27-40, 423-59. And to the extent that Defendants seek to mount a "factual attack" by "disput[ing] the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction," Defendants' cry of "speculative" (MTD 17) cannot defeat Plaintiffs' highly detailed allegations, expert declarations, and prior statements by Bureau officials. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Moreover, the Ninth Circuit has cautioned that "jurisdictional finding of genuinely disputed facts is inappropriate" where, as here, "'the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits' of an action." *Id.* (citation and alteration omitted). Although Plaintiffs look forward to demonstrating in detail the many flaws in Defendants' claims of completeness and accuracy, this Court need not resolve these issues today.

2. Plaintiffs' Injuries Are Still Traceable And Redressable

Defendants' traceability and redressability arguments are familiar too. Defendants

contend that the statutory deadline is the real cause of Plaintiffs' harms, and this Court cannot provide a remedy. That argument was flawed then and is even more untenable now. *See* N.D. Cal. Civ. L.R. 7-9(b).

As Plaintiffs previously explained, whether the statutory deadline compelled or justified Defendants' actions goes to the merits, not to Plaintiffs' Article III standing. *See Cath. League for Religious & Civ. Rights v. City of S.F.*, 624 F.3d 1043, 1049 (9th Cir. 2010) ("Nor can standing analysis, which prevents a claim from being adjudicated for lack of jurisdiction, be used to disguise merits analysis …."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96 (1998); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 680-81 (9th Cir. 2007); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267-68 (9th Cir. 1982). Defendants rely heavily on "three" "decisions" by the Supreme Court which, they say, "illustrate that the deadlines Congress has established to govern completion of the census and transmission of the results to Congress cannot be overridden by a judicial remedy." MTD 12. But none of the three decisions say anything about standing. In fact, none say anything at all. They are all orders granting stays without any opinion or reasoning.

Defendants also rely on the Ninth Circuit's decision in this case, but that decision too says nothing about standing. As noted above, Defendants did not even challenge standing on appeal. The "separation of powers" language Defendants quote (MTD 12) comes from a discussion of the "balancing of the equities" for the purpose of granting a stay of preliminary relief—at a time when the December 31 deadline was still "three months away." *NUL II*, 977 F.3d at 781. And the Ninth Circuit expressly recognized that "[i]f the Bureau meets the December 31 date by using procedures that violate any accuracy requirement embedded in the Enumeration Clause, or proceeds in an arbitrary and capricious manner," the Court *could* afford Plaintiffs a remedy because "existing data can be reprocessed more easily than data collection can be restarted." *Id.* The Ninth Circuit granted the stay as a matter of "judicial restraint" only "while the ability to meet or extend the deadline, and any resulting injury, is still speculative." *Id.* The statutory deadline does not render this Court powerless to grant Plaintiffs relief.

But more to the point, Defendants' arguments are dated. They do not take into account

two, critical intervening circumstances: (1) Defendants are going to miss the December 31 deadline, and (2) this Court is not going to grant relief until after December 31.

First, as the Ninth Circuit suspected, Defendants are going to miss the December 31 deadline regardless. That was preordained from the beginning and only became more certain over time. "The evidence in the administrative record uniformly showed that no matter when field operations end—whether September 30 under the Replan or October 31 under the COVID-19 Plan—the Bureau will be unable to deliver an accurate census by December 31, 2020." *Nat'l Urban League v. Ross*, 977 F.3d 698, 701 (9th Cir. 2020) (*NUL I*); App. 1-6 (compilation of key record cites). Once the Replan issued, Defendants maintained that in order to meet the statutory deadline, they would need to be out of the field no later than October 1. *See* App. 6-9. They later revised that drop-dead date to October 5, 2020. *See id.* at 10-11; SAC ¶ 419. When Defendants remained in the field until October 15, any remote chance of meeting the December 31 deadline disappeared. SAC ¶ 420.

Defendants don't deny this reality, and carefully avoid saying they will meet the December 31 deadline. *See, e.g.*, U.S. Census Bureau, *2020 Census Results: Frequently Asked Questions* ("The Census Bureau is working hard to … deliver complete and accurate state population counts *as close to the December 31, 2020 statutory deadline as possible*." (emphasis added)).[8] To the contrary, recent reports suggest that the Bureau's internal deadline for reporting final population numbers to the President is now January 26, 2021—*at the earliest*. *See* Hansi Lo Wang, *Census 'Anomalies' Could Thwart Trump's Bid to Alter Next Electoral College*, NPR (Nov. 19, 2020).[9] That alone destroys the only redressability (or traceability) argument Defendants make.

Second, the scheduling order in this case means that any remedy will not come until after the December 31 deadline has passed. The order issued after Defendants' motion to dismiss was filed, so perhaps they will now withdraw their redressability argument. But if they do not, their

[8] https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/nrfu-deadline-results-faq.pdf (last visited Nov. 24, 2020).

[9] https://www.npr.org/2020/11/19/936561664/anomalies-found-in-census-could-thwart-trumps-bid-to-alter-electoral-college.

own arguments are more than sufficient to defeat any suggestion that later relief is unavailable. *See* Joint Case Mgmt. Statement at 4, ECF No. 356 (acknowledging "lack of disagreement" that "post-census relief, if warranted, is available"); *see also* MTD 19.

C. This Suit Is Ripe

Defendants also argue that this suit is not ripe "for adjudication before the 2020 Census has been completed and its results reported." MTD 17. That argument, unlike the others, is new. Which is itself telling: After several months of intense litigation, as well as decisions by the Ninth Circuit and the Supreme Court, Defendants have suddenly concluded that the claims in this case are not ripe for adjudication. Defendants are wrong.

As Defendants acknowledge (at 18), their argument about constitutional ripeness rests on the premise that there is no injury-in-fact—and fails for the same reasons. The only distinct argument is one of prudential ripeness. Given the current schedule, Defendants are essentially asking the Court to dismiss this case in December only to have it refiled a month or so later. The two reasons Defendants offer for this perverse result provide no support.

Defendants first contend this case is not "fit for judicial decision" because "the existence or extent of any purported undercount" is "unknowable until, at the earliest apportionment data have been finalized and published." MTD 18. But the Supreme Court has already rejected the argument that plaintiffs must wait until after the census has been completed to consider such suits, holding that a challenge to the Bureau's plans to conduct the 2000 Census was "ripe for review" even though filed two years before that census concluded. *See Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 329 (1999). Similarly, the Supreme Court adjudicated the citizenship question case without waiting for the harms—as set forth in expert testimony and the Bureau's own past statements regarding the likely differential undercounts that would be caused by the Secretary's decision—to be realized. *See New York*, 139 S. Ct. at 2565-66. And a three-judge panel of this Court recently rejected similar attempts to argue that the harm from the challenged Presidential Memorandum was unrealized and not yet certain, holding that it was enough that there was "a substantial risk that Plaintiffs will suffer the apportionment and census degradation injuries," particularly given "the failure of Defendants to contest the Plaintiffs' declarations" on

those injuries. *City of San Jose v. Trump*, No. 20-CV-05167-RRC-LHK-EMC et al., 2020 WL 6253433, at *22 (N.D. Cal. Oct. 22, 2020). This case is no different.

Defendants are also wrong to suggest that there is "no conceivable hardship" from "withholding consideration" until final apportionment numbers have been released. MTD 18. True, the Court could "provide relief after the fact by, for example, ordering some appropriate measure of corrective data processing." *Id.* at 19. The current scheduling order accounts for that possibility. But the timing still matters. Corrective data processing should be done as soon as possible in order to provide states, localities, and other entities with critical census data for apportionment, redistricting, and all the many other needs that governments and businesses have for that data. And any limited additional data collection should be done as close in time as possible to April 1, 2020. Even under the current schedule set by this Court, a hearing on summary judgment will not occur until February 18, and any trial will not occur until March 11. By that time, the results of the count will presumably have been revealed, and an order to redo portions of data processing or engage in targeted fixes of data collection will be urgent but not yet too late. Defendants have no basis to assert that the proper remedy is instead to dismiss this suit entirely.

D. Defendants Offer No Reason For This Court To Reconsider Its Holding That The Replan Is Final Agency Action Reviewable Under the APA

This Court and the Ninth Circuit have already held that the Replan is final agency action subject to judicial review. *See* PI Order 29-42; AR Order 14-17, ECF No. 96; *NUL II*, 977 F.3d at 776-77. Defendants have offered no persuasive reason for the Court to reconsider its prior decisions, and have certainly pointed to no material change in fact or law (or manifest failure by this Court to consider material facts) that would warrant such a reversal. *Patten*, 2013 WL 2558041, at *2 (discussing requirements of N.D. Cal. Civ. L.R. 7-9(b)).

1. The Replan Is Still Agency Action

As this Court previously recognized, "[t]he bite in the phrase 'final action' … is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power." PI Order 29 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478

(2001) (ellipsis in original)). Defendants nevertheless continue to insist (at 20-22) that Plaintiffs' claims are barred by *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (*SUWA*), which held that "a claim under § 706(1) can proceed only where … an agency failed to take a *discrete* agency action that it is *required to take*." As Plaintiffs have explained, *SUWA*'s "discreteness" requirement has no application to this case because Plaintiffs have not brought a claim under § 706(1) to compel agency action unlawfully withheld.[10]

But even if *SUWA*'s "discreteness" requirement were applicable, "Plaintiffs here challenge a circumscribed, discrete agency action": the Bureau's decision to cut in half the time for data collection and data processing through the Replan. PI Order 32. Defendants repeat their refrain that this challenge is a "broad programmatic attack" masquerading as a discrete challenge to the Replan's deadlines. MTD 20. But Plaintiffs' statements, this Court's holdings, and Defendants' *own actions* belie that characterization. Indeed, as the Ninth Circuit recognized, the Bureau has consistently "treated the Replan as a single proposal, presented 'to the Secretary in a single slide deck' and announced in a single press release," *NUL II*, 977 F.3d at 776—or, in other words, "as a circumscribed, discrete agency action," PI Order 31.

Defendants rehash their discredited analogy to *NAACP v. Bureau of Census*, 945 F.3d 183 (4th Cir. 2019). MTD 21. But that comparison has been rejected three times over. "Unlike in *NAACP*," "Plaintiffs challenge the decisionmaking process that went into the decision in the Replan to greatly accelerate the census process over the COVID-19 Plan, not specific 'design choices' within that plan." *NUL II*, 977 F.3d at 776 (quoting *NAACP*, 945 F.3d at 188); *see* PI Order 30-31; AR Order 16-17.

Defendants also resurrect their argument that granting relief requires "'hands-on' management of the Census Bureau's operations." MTD 21 (quoting *NAACP*, 945 F.3d at 191). But this Court's experience demonstrates otherwise. The Court has not become mired in the day-to-day management of the Census Bureau, and there is no reason to believe that will change now. To the extent the Court has had to engage in any "monitoring of the Bureau's efforts" (*id.*), that

[10] *See Salazar v. King*, 822 F.3d 61, 82 n.13 (2d Cir. 2016); *Valentini v. Shinseki*, 860 F. Supp. 2d 1079, 1096-97 (C.D. Cal. 2012) (citing *Nw. Envtl. Def. Ctr.*, 477 F.3d at 681 n.10).

was a direct result of Defendants' persistent refusal to follow this Court's orders. *See* Clarification Order at 4-10, ECF No. 288; Pls.' Mot. to Compel at 2-6, ECF No. 265. Defendants fundamentally misunderstand the difference between "reaching into an agency of the executive branch and dictating the details of its internal operations," MTD 21 (quoting *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 506 (9th Cir. 1997)), and ensuring that Defendants are following the Bureau's *own* COVID-19 Plan.

Defendants claim that the Supreme Court's stay of the PI Order "suggests" that such relief is "unavailab[le] as a matter of law." MTD 21. But as this Court has recognized, "the Supreme Court opinion was not actually an opinion, there were no reasons stated." H'rg Tr. 14:1-2 (Nov. 13, 2020). That unexplained order provides no reason to revisit the well-reasoned holdings of this Court and the Ninth Circuit that the Replan is "agency action."

2. The Replan Is Still Final

Two conditions must be met for agency action to be final. PI Order 32. First, "the action 'must mark the consummation of the agency's decisionmaking process'" and, second, "the action 'must be one by which "rights or obligations have been determined," or from which legal consequences will flow.'" *Id.* at 32-33 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)); *see also Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (applying this test in a census case). As this Court and the Ninth Circuit already held, the Replan is *final* agency action because both conditions are met here. *See NUL II*, 977 F.3d at 776-77; PI Order 32-41; AR Order 14-16.

First, the Replan marks the consummation of the Bureau's decisionmaking process. The Bureau's highest official, the Secretary, adopted the Replan, and his decision was "not subject to further agency review." *Sackett v. EPA*, 566 U.S. 120, 127 (2012); *see also Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 984-85 (9th Cir. 2006).

Here too, Defendants' motion to dismiss covers no new ground. Defendants once again argue that the Replan is not final because, "in *Franklin*, the Supreme Court held that the Secretary's transmission of a final census report to the President" was "not final agency action." MTD 22. Putting aside the fact that Defendants abandoned their *Franklin* argument before the Ninth Circuit and the Supreme Court, *Franklin* does not aid Defendants. As this Court previously

held, that decision actually "underscores why the Replan constitutes final agency action." PI Order 40. Unlike the report in *Franklin*, "[t]he Replan is neither a 'tentative recommendation' nor a decision that will be reviewed by a higher official." *Id.* (citation omitted). And the Replan "has 'direct consequences for the apportionment'" because it "determines when data collection will end." *Id.* (citation omitted). Defendants' argument that the "Bureau's antecedent operations" preceding the transmission of the Secretary's report are not reviewable (at 22) stands in stark contrast to the Department of Justice's concession just last year that the addition of a citizenship question to the census constituted final agency action. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 645 (S.D.N.Y. 2019); *Kravitz v. Dep't of Commerce*, 336 F. Supp. 3d 545, 566 n.13 (D. Md. 2018); *see also New York*, 139 S. Ct. at 2567-76 (reviewing this decision under the APA). And Defendants' reliance (at 22) on the Ninth Circuit's holding that "day-to-day operations that merely implement operational plans" are not reviewable final agency actions, *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 801 (9th Cir. 2013), only underscores the obvious: The operational plans that dictate those day-to-day operations, such as the Replan, *are* reviewable.

Defendants further suggest that the Replan is not "final" because, in an attempt to circumvent this Court's orders, Defendants changed the Replan's deadlines. But "[t]he fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000). And the changes made to those deadlines did nothing to alter the fact that the Replan substantially shortened the time provided by the COVID-19 Plan—which would have extended data processing through April 2021. The accelerated timeline is and has always been the gravamen of Plaintiffs' challenge and, unless Defendants wish to tell the Court otherwise, that accelerated timeline remains in effect.

Second, legal consequences and obligations flow from the Replan. Defendants offer no persuasive rejoinder to the Ninth Circuit's conclusion that "significant legal consequences will flow from the timing and deadlines of the census, including consequences to political representation, federal and state funding, and degradation of census data," all of which "echo the consequences faced by the Plaintiffs in [*New York*]." *NUL II*, 977 F.3d at 777; *see also* PI Order

35-39. Defendants repeat their argument that the Replan does not affect anyone's "rights" and "does not require anyone to do, or not do, anything." MTD 22. But as this Court has explained time and again, that is simply not true. Not only does the Replan impose significant legal consequences for political representation and federal funding, it also set the operative deadline by which U.S. residents must respond to the census or face financial penalties for failing to do so. *See* PI Order 37-38; *see also* 13 U.S.C. § 221(a); *New York*, 139 S. Ct. at 2565-66 (noting that the government relied on private individuals' "legal duty to respond to the census" in arguing against standing). Defendants have never explained how a policy that determines a person's exposure to financial sanctions could be non-final.

Defendants note that "the data collection phase of the 2020 Census has already concluded." MTD 22. But final agency action does not become non-final simply because the legal obligations it imposes are now enforceable. In any event, the consequences to political representation, funding, and degradation of the census data do not flow from data collection alone, but from data processing as well. As Census Bureau officials themselves have recognized, "[a]ny effort to concatenate or eliminate processing and review steps to reduce the timeframes will significantly reduce the accuracy of the apportionment counts and the redistricting data products." PI Order 58 (quoting DOC_8337); *see also supra* at 7.[11]

3. The Replan Is Still Not Committed To Agency Discretion By Law

The APA creates a "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015). The APA provides one narrow exception to that presumption for actions that are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), which applies only when Congress has explicitly prohibited review or in "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Weyerhaeuser Co. v. U.S.*

[11] Defendants do not meaningfully challenge this Court's conclusions that the Replan was no mere "'preliminary step' toward deciding the Census schedule," PI Order 34; that the "termination of data collection is practically irreversible," *id.* at 35; or that the Replan would have "bar[red] people who seek to participate in the Census—such as governmental Plaintiffs' constituents and organizational Plaintiffs' members—from participating after September 30, 2020," *id.* at 36-37.

Fish & Wildlife Servs., 139 S. Ct. 361, 370 (2018) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). As this Court and numerous other courts have recognized, that narrow exception does not apply here. *See* PI Order 41-42; AR Order 17; *see also California v. Ross*, 362 F. Supp. 3d 727, 743-46 (N.D. Cal. 2018); *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 794-99 (S.D.N.Y. 2018); *Kravitz*, 336 F. Supp. 3d at 567 & n.14 (citing cases); *Dist. of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1188 n.16 (D.D.C. 1992).

The Supreme Court's recent decision in the citizenship question case makes clear that "[t]he taking of the census is not one of those areas traditionally committed to agency discretion." *New York*, 139 S. Ct. at 2568. Nor is the statute "drawn so that it furnishes no meaningful standard" of review. *Id*. That is, despite the "broad authority [conferred] on the Secretary under 13 U.S.C. § 141(a), the Act does "not leave his discretion unbounded" and "constrains" his authority in important respects." *New York*, 139 S. Ct. at 2568. Defendants' insistence that the same statutory provisions are not at issue here (MTD 24), just continues to ignore the Supreme Court's reliance on the directly applicable "duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." PI Order 48 (quoting *New York*, 139 S. Ct. at 2568-69).[12]

III. CONCLUSION

For all of the foregoing reasons, this Court should deny Defendants' motion to dismiss.

[12] Defendants' reliance (at 24) on two cases decided before controlling Supreme Court decisions, *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411 (7th Cir. 1992) and *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), only demonstrates that Defendants' position does not square with controlling law. *See California*, 362 F. Supp. 3d at 744-45 (discussing *Tucker*).

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ATTESTATION

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

Dated: November 24, 2020

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