explained in no uncertain terms that "[r]edistricting is primarily the duty and responsibility of the State," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and "[t]he decision to include or exclude" noncitizens and other non-voting persons "involves *choices* about the nature of representation with which we have been shown no constitutionally founded reason to interfere," *Burns v. Richardson*, 384 U.S. 73, 92 (1966) (emphasis added). The possibility that "*States* may draw districts to equalize voter-eligible population rather than total population" was explicitly left open in *Evenwel v. Abbott*, 136 S. Ct. 1120, 1133 (2016) (emphasis added). And "because eligibility to vote depends in part on citizenship, *States* could more effectively exercise this option with a more accurate and complete count of the citizen population." E.O. 18880, 84 Fed. Reg. at 33824 (emphasis added). Nothing in either law or Plaintiffs' factual allegations supports the idea that States' redistricting methodologies are anything but their own independent decisions.⁶

^{*}It is true that traceability may be found "where the plaintiff suffers an injury that is produced by the determinative or coercive effect of the defendant's conduct upon the action of someone else." Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC, 713 F.3d 187, 197 (4th Cir. 2013) (alterations omitted). But Plaintiffs do not (and cannot) advance any allegations that Defendants' mere collection of citizenship data somehow coerces States into using that data for CVAP redistricting, or somehow makes CVAP redistricting a foregone conclusion. As Plaintiffs themselves acknowledge, States and localities expressed a desire for CVAP redistricting long before the Executive Order. See, e.g., FAC ¶87 n.42; Brief for Appellees, Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (No. 14-940) (State of Texas arguing for voter-eligible redistricting in 2015); Brief Amicus Curiae of Tennessee State Legislators and the Judicial Education Project in Support of Appellants, Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (No. 14-940) (Tennessee legislators arguing for voter-eligible redistricting in 2015).

This alone is fatal to Plaintiffs' standing. See Doe v. Obama, 631 F.3d 157, 162 (4th Cir. 2011) (stating that "a fundamental tenet of standing doctrine" is that where a third party "makes the independent decision that causes an injury, that injury is not fairly traceable" to the defendant). But even if States make the independent choice to use CVAP for redistricting, they must also make the independent choice to use citizenship data provided by the Census Bureau, as opposed to other statistics like voter-registration data. See Burns, 384 U.S. at 92-93 (permitting a State to draw districts based on voterregistration data).9 So before Plaintiffs could possibly suffer "vote dilution and loss of representation in unconstitutionally overpopulated districts," States must make two independent decisions: (i) whether to "exclu[de] [] non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," and (ii) whether to use "citizenship data" provided by the Census Bureau "along with the total population tabulations in the P.L. 94-171 Redistricting Data File." FAC ¶ 87.

That is also why a favorable decision in this case would do nothing to relieve Plaintiffs' theoretical "injury." *Lujan*, 504 U.S. at 560. Plaintiffs seek to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31.

⁹ More broadly, States make the independent choice to use any Census Bureau data, even total population figures, for redistricting. *See Burns*, 384 U.S. at 91 ("[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.").

But even if they are granted this relief, States may nonetheless choose to use CVAP for redistricting based on either voter-registration data or the Census Bureau's ACS-based citizenship data.¹⁰ The reverse is also true. Even if this Court declines Plaintiffs' requested injunction, it is entirely possible that States—or at least Arizona, Texas, and Washington, where Plaintiffs reside—may choose *not* to use CVAP for redistricting. In either case, Plaintiffs lack standing because "[f]ederal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical state of facts." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (alterations and citations omitted).

Plaintiffs' quarrel lies with their respective States, not the President, the Secretary of Commerce, or the Census Bureau. Merely collecting citizenship data and potentially providing it to the States cannot have the challenged effect on redistricting unless *States* decide to use CVAP for redistricting. And if they do so for discriminatory purposes, Plaintiffs could sue their respective States (or the relevant State officials). *See Davidson v. City of Cranston*, 837 F.3d 135, 142–43 (1st Cir. 2016); *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015); *Terrebonne Par. NAACP v. Jindal*, 154 F. Supp. 3d 354, 363 (M.D. La. 2015); *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 267 (D.D.C. 2002); *Common Cause S. Christian*

¹⁰ As experienced demographers told the Supreme Court in 2015, "ACS data more than suffices as the raw material for building districts of 'substantially equal' numbers of eligible voters." Brief of Demographers Peter A. Morrison, et al. as Amici Curiae in Support of Appellants, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

Leadership Conference of Greater L.A. v. Jones, 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001). In the meantime, Plaintiffs may seek relief through the political process—not the courts—if they dislike the collection of citizenship data through administrative records.

B. Plaintiffs' purported harm is far from certainly impending.

Plaintiffs also fail the injury-in-fact inquiry because no one is injured by the Defendants' mere collection of citizenship data; Plaintiffs' hypothetical injury could only occur, if ever, after a series of speculative events. "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548. The purpose of the imminence requirement "is to ensure that the alleged injury is not too speculative for Article III purposes." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). So the "threatened injury must be *certainly impending* to constitute injury in fact, and allegations of *possible* future injury are not sufficient." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 207–08 (4th Cir. 2017) (alterations omitted) (quoting *Clapper*, 568 U.S. at 409). Plaintiffs have alleged just such a "possible future injury" here.

Plaintiffs claim that if the Census Bureau "provides th[eir] states with citizenship data," state and local officials may exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," purportedly resulting in Plaintiffs' "vote dilution and loss of representation in unconstitutionally

overpopulated districts." FAC ¶ 87. So Plaintiffs will not suffer any harm unless (1) Defendants collect more administrative records under the Executive Order, *id.* ¶¶ 59–62; (2) the Census Bureau is able to "produce citizenship population tabulations" using these additional administrative records, *id.* ¶¶ 96, 101, 103, 108, 112; (3) the Census Bureau provides "[S]tates with citizenship data" based on administrative records, *id.* ¶ 87; (4) States choose to "use CVAP as a population base for drawing congressional and state legislative redistricting plans in 2021," *id.*; and (5) States choose to use the Census Bureau's administrative-record data to do so. The result is a "highly attenuated chain of possibilities," which "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410.

First, until the Census Bureau is able to obtain administrative records under the Executive Order, the precise effect of additional records remains unknown. As the Executive Order itself notes, Defendants already had administrative records to "determine citizenship status for approximately 90 percent of the population," but "remain[ed] in negotiations to" access "several additional important sets of records with critical information on citizenship" from other federal agencies. E.O. 13880, 84 Fed. Reg. at 33821–22. The acquisition of administrative records from federal agencies is a complicated process. It requires extensive negotiation of a lengthy agreement, including how the data will be transferred, how the data may be used, how the data must be protected, how long the Census Bureau may retain the data, and how much the data will

cost. And this says nothing about Defendants' acquisition of *state* administrative records, which are comparably more difficult to obtain because they not only require the same extensive negotiation as federal agreements, but require these negotiations with each separate State (and sometimes multiple state agencies with the same State). Plaintiffs seek to enjoin only the speculative acquisition of administrative records obtained under the Executive Order, not any preexisting administrative records. *See* FAC at 31 (seeking to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380").¹¹

Second, even if additional administrative records are acquired, they may be too unreliable to aid production of "citizenship population tabulations" by April 2021. *See id.* ¶¶ 87, 96, 101, 103, 108, 112. The Census Bureau can only produce these tabulations—including the number and location of citizens and noncitizens—when administrative records and their connections to census data are both of "high quality." *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 587–88 (S.D.N.Y.) (noting that administrative

¹¹ Although Plaintiffs seemingly seek a declaratory judgment "that production of citizenship data for use along with the P.L. 94-171 Redistricting Data File and population tabulations, or including citizenship data in the File, violates the Equal Protection guarantee of the Fifth Amendment," FAC at 31, they nowhere allege facts supporting the unprecedented relief of declaring that all citizenship data—not just citizenship data collected under the Executive Order—is invalid on equal protection grounds. In fact, the only allegations of discriminatory intent (necessary for an equal protection violation) focus on the Secretary's previous attempt to include a citizenship question on the census and the subsequent Executive Order, not any preexisting animus somehow infecting administrative records collected years ago. *See id.* ¶¶ 73–84. In any event, Plaintiffs claims are both unreviewable and meritless, as discussed above and below.

records "will be used to enumerate only a limited number of those households for which there is high quality administrative data about the household," and that "[n]oncitizen and Hispanic households are less likely to be accurately represented in quality administrative records than other groups"), aff'd in part, rev'd in part 139 S. Ct. 2551 (2019). Plaintiffs themselves fully acknowledge the possibility of gaps in administrative records. See FAC ¶¶ 66–72 (cataloguing shortcomings of administrative records and noting that the Census Bureau "will most likely never possess a fully adequate truth deck" for citizenship). So the usability of any administrative records collected under the Executive Order is still unknown. 12

Third, even if the Census Bureau is able to gather administrative records under the Executive Order, and even if they prove reliable enough to "produce citizenship population tabulations," the methodology used to produce any citizenship data provided to States is still undetermined.¹³

¹² The usability and completeness of citizenship data in Defendants' administrative records is currently being litigated. *See* Defendant-Interveners' Cross Claim, *Alabama v. U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Oct. 1, 2019), ECF No. 119 at ¶¶ 42–51 (contesting the use of "data collected under EO 13880" for congressional apportionment because it "is not an enumeration of individuals, and specifically is not an enumeration of undocumented immigrants, in the U.S.").

¹³ U.S. Census Bureau, *Update on Disclosure Avoidance and Administrative Data* (Sept. 13, 2019), at 13, https://www2.census.gov/cac/sac/meetings/2019-09/update-disclosure-avoidance-administrative-data.pdf? ("No final decisions have been made regarding the methodology and format of the block-level CVAP data.").

Fourth and fifth, it is anyone's guess as to whether state and local officials will make the independent decisions to both use CVAP for redistricting and use the Census Bureau's (as-yet-unknown) data in the process. As explained above, it is entirely possible that Plaintiffs' States and localities may choose to redistrict using total population, or to use voter-registration data for CVAP redistricting.

Plaintiffs build speculation on top of speculation in a feeble attempt to manufacture a redistricting injury from Defendants' mere collection of administrative records. The result is a "highly attenuated chain of possibilities," which "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410. No redistricting harm may ever befall Plaintiffs, let alone redistricting harm traceable to Defendants' conduct and redressable by the Court.

C. Plaintiffs will suffer no injury to a legally protected interest.

Plaintiffs' sole alleged redistricting injury is that they will suffer "vote dilution and loss of representation in unconstitutionally overpopulated districts" if state and local officials exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts." FAC ¶ 87. But standing requires Plaintiffs to show that they will suffer "an invasion of a *legally protected* interest." Wikimedia, 857 F.3d at 207–08 (emphasis added) (quoting *Spokeo*, 136 S.Ct. at 1548). And despite Plaintiffs' cursory assertion that CVAP redistricting is itself "unconstitutional[]," that is simply not true under current law. FAC ¶ 87.

The Supreme Court explicitly left open the possibility for States to "draw districts to equalize voter-eligible population rather than total population," and it has suggested that States may constitutionally redistrict on either basis. *Evenwel*, 136 S. Ct. at 1126–32 (total population); *Burns*, 384 U.S. at 90 (registered-voter population). Indeed, "[i]t has long been constitutionally acceptable, but by no means required, to exclude non-voting persons . . . from the apportionment base, so long as the apportionment scheme does not involve invidious discrimination." *Davidson*, 837 F.3d at 143 (quoting *Burns*, 384 U.S. at 92); *Kaplan v. Cty. of Sullivan*, 74 F.3d 398, 401 (2d Cir. 1996) (same). So the mere use of CVAP in redistricting does not cause "vote dilution and loss of representation in unconstitutionally overpopulated districts." FAC ¶ 87.14 It is only when Plaintiffs' state and local officials choose to use CVAP *with discriminatory intent* that Plaintiffs will suffer

¹⁴ Plaintiffs also point out that "[e]xclusion of non-citizens from the population count used for [congressional] apportionment creates a significant risk that states in which large numbers of non-citizens reside, including Texas and Arizona, will suffer a reduction in the number of congressional seats that would otherwise be apportioned to them." FAC ¶ 86. But Defendants do not understand Plaintiffs to be asserting an injury on this basis because they advance no allegation, nor could they, that Defendants will use citizenship data collected under the Executive Order to exclude noncitizens in congressional apportionment. If Plaintiffs were to rely on that theory for standing, however, Defendants would likely seek to transfer venue to the Northern District of Alabama where that issue is currently being litigated. See First Am. Compl., Alabama v. *U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Sept. 10, 2019), ECF No. 112 at ¶¶ 1–4 that inclusion of noncitizens in congressional apportionment unconstitutional); Defendant-Interveners' Cross Claim, Alabama v. U.S. Dep't of Commerce, No. 18-cv-0772 (N.D. Ala. Oct. 1, 2019), ECF No. 119 at ¶¶ 50—56 (alleging that exclusion of noncitizens in congressional apportionment based on administrative records is unconstitutional).

a legally cognizable injury. *Davidson*, 837 F.3d at 143; *Kaplan*, 74 F.3d at 401. And, as explained above, Plaintiffs may attempt to enjoin such conduct by suing their state and local officials, not Defendants who merely tabulated citizenship data.

D. <u>Organizational Plaintiffs lack standing.</u>

In addition the infirmities identified above, the Organizational Plaintiffs have other standing problems: suing on behalf of their members or on their own behalves.

An organization does not have Article III standing to sue on behalf of its members unless "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 343 (1977). A general reference to unidentified members is insufficient for organizational standing. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 487 n.23 (1982); *see also Am. Chemistry Council v. Dep't of Transp.,* 468 F.3d 810, 820 (D.C. Cir. 2006). Here, Promise Arizona (PAZ) does not identify a single member who may suffer an injury. *See* FAC ¶¶ 6–14. And although La Unión del Pueblo Entero (LUPE) identifies one member (Plaintiff Juanita Valdez-Cox) who may hypothetically suffer an injury, she—and therefore LUPE—still lack standing for the reasons explained above. *Id.*

When an organization sues on its own behalf (rather than on behalf of its members), it must satisfy the same Article III standing requirements that apply to individuals. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). But Organizational Plaintiffs do not even attempt to allege any injuries distinct from their

members, like a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." *Id.* at 379.

II. Plaintiffs' Claims Are Not Ripe

Ripeness "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 199 (4th Cir. 2019) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). In that sense, "[a]nalyzing ripeness is similar to determining whether a party has standing." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (quoting *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006)). Just as Plaintiffs "cannot assert standing based on an alleged injury that lies at the end of a highly attenuated chain of possibilities," Plaintiffs' "claim is not ripe for judicial review if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* (citations omitted).

"The question of whether a claim is ripe turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (citations omitted). Neither factor favors Plaintiffs. "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller*, 462 F.3d at 319; *Johnston v. Lamone*, 401 F. Supp. 3d 598, 607 (D. Md. 2019). Here, as explained above, the action in controversy—redistricting based on CVAP—is far from final and entirely dependent on unknown facts underlying a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, including

States' independent redistricting decisions. *See Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013) ("Where an injury is contingent upon a decision to be made by a third party that has not yet acted, it is not ripe as the subject of decision in a federal court.").

"The hardship prong [of ripeness] is measured by the immediacy of the threat and the burden imposed on" Plaintiffs. Miller, 462 F.3d at 319. By Plaintiffs' own admission, the Census Bureau would not provide citizenship data to the States—whether based on administrative records or the ACS—until April 2021. See FAC ¶¶ 1, 15, 65, 87. And as explained above, it is far from certain that Plaintiffs would suffer any redistricting harm whatsoever. But perhaps more importantly, there is no burden on Plaintiffs at all. Cases have been deemed ripe where, for example, a "challenged statute imposed a continuing injury on [plaintiffs'] associational rights," Miller, 462 F.3d at 319-20, or a challenged "policy impose[d] the heavy burden of requiring a pit bull owner to either vacate his or her home or abandon a family pet," Weigel v. Maryland, 950 F. Supp. 2d 811, 830 (D. Md. 2013), or a challenged policy forced "harmful consequences [for plaintiffs] such as the cancellation and postponements of surgeries" and "the prospect of discharge [from the military] and inability to commission as an officer," Stone v. Trump, 280 F. Supp. 3d 747, 767 (D. Md. 2017). In stark contrast, Defendants' collection of administrative records, facilitated by the Executive Order, neither obligates Plaintiffs to, nor prohibits Plaintiffs from, any action. This case is not ripe and it should be dismissed.

III. Plaintiffs' APA Claims Should be Dismissed

Plaintiffs seem to target their APA claims at the Executive Order, and they challenge the Secretary's compliance with this presidential directive. FAC ¶¶ 88–109; see, e.g., id. ¶ 103 ("Defendant Ross's decision to follow EO 13380 and direct the Census Bureau to, among other things, collect citizenship data . . . violates the APA and must be set aside."). But "[i]t is firmly established that presidential action is not subject to APA review." Int'l Refugee Assistance Project v. Trump, 373 F. Supp. 3d 650, 662 (D. Md. 2019) (citing Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992)).

It is true that, in certain circumstances, courts may apply the APA to an *agency's implementation* of an executive order. *See U.S. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) ("Appellants could not possibly have relied on the APA for a cause of action prior to the Secretary's issuance of regulations implementing the Executive Order."); *Serv. Emps. Int'l Union Local* 200 v. *Trump*, 2019 WL 4877273, at *7 (W.D.N.Y. Oct. 3, 2019) (collecting cases for the proposition that "an APA challenge to an agency's implementation of an executive order (or other presidential directive) is not permissible prior to some independent, concrete action by the agency"). For at least two reasons, however, that gets Plaintiffs no closer to an actionable APA claim.

First, the Executive Order was merely a managerial tool designed "to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the [Commerce] Department." E.O. 13880, 84 Fed. Reg. at 33822. It was

not "issued pursuant to statutory mandate" or "a delegation from Congress of lawmaking authority." *U.S. Dep't of Health & Human Servs. v. Fed. Labor Relations Auth.*, 844 F.2d 1087, 1096 (4th Cir. 1988). To the contrary, it was "intended for the internal management of the President's cabinet," so neither the Executive Order nor its implementation are reviewable by courts. *Chai v. Carroll*, 48 F.3d 1331, 1339 (4th Cir. 1995); *see U.S. Dep't of Health & Human Servs.*, 844 F.2d at 1095; *Orbital ATK, Inc. v. Walker*, 2017 WL 2982010, at *9 (E.D. Va. July 12, 2017) (rejecting an APA challenge where the presidential directive at issue was "intended primarily as a managerial tool for implementing the President's personal [] policies" (quoting *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235–36 (8th Cir. 1975))).

Second, given that the Executive Order is simply managerial, it is unsurprising that Plaintiffs do not challenge a cognizable "agency action." The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. "The term 'action' as used in the APA is a term of art that does not include all conduct on the part of the government." *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019) (quoting *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013)). Cognizable "agency action" under the APA must satisfy two key criteria: it must be "circumscribed and discrete," and it must "determine rights and obligations." *Id.* at 431 (citations and alterations omitted).

The latter requirement "ensures that judicial review does not reach into the internal workings of the government, and is instead properly directed at the effect that agency conduct has on private parties." *Id.* "To meet this requirement, a party must demonstrate that the challenged act had an immediate and practical impact, or altered the legal regime in which it operates." *Id.* (citations and alterations omitted). "It is not enough for plaintiffs to simply identify a governmental action that ultimately affected them through the 'independent responses and choices of third parties,' or mere 'coercive pressures.'" *Id.* (citation omitted). The collection of administrative records fails this test.

Indeed, Plaintiffs' APA claims are the paradigmatic example of improperly "reach[ing] into the internal workings of the government." *Id.* The Executive Order simply seeks to "ensure that accurate citizenship data is compiled" from administrative records already held by federal and state agencies. *See* E.O. 13880, 84 Fed. Reg. at 33821 (ordering "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country"). It has no impact whatsoever on private parties, let alone an "immediate and practical" one. *See City of New York*, 913 F.3d at 431.

The Court need look no further than the recent challenges to the 2020 Census to understand this point. In those cases, plaintiffs challenged the Secretary's decision to include a citizenship question on the 2020 Census, arguing that it violated the

Constitution and the APA. See, e.g., La Union del Pueblo Entero v. Ross, 353 F. Supp. 3d 381 (D. Md. 2018). Moving to dismiss plaintiffs' APA claims, the government acknowledged that the Secretary's decision was "final agency action." See, e.g., New York, 351 F. Supp. 3d at 627 ("There is no dispute th[at] Secretary Ross's decision constitutes 'final agency action' reviewable under the APA."). That was because the Secretary's decision imposed an obligation on private parties—i.e., U.S. residents—to truthfully answer the citizenship question in 2020. See 13 U.S.C. § 221. Here, in contrast, Defendants' collection of administrative records from other federal and state agencies do not obligate private parties to do anything. See NAACP v. Bureau of the Census, 399 F. Supp. 3d 406, 425 (D. Md. 2019) (rejecting APA challenges to the Census Bureau's plans to conduct the 2020 Census because they did not determine rights and obligations of private parties).

It also cannot be said that the Executive Order "alter[s] the legal regime in which it operates." *City of New York*, 913 F.3d at 431 (citations omitted). It neither dictates how the Census Bureau must use the administrative records once they are collected, nor is anyone exposed to civil or criminal penalties for failing to follow it. *Cf. Bennett v. Spear*, 520 U.S. 154, 178 (1997) (holding that the legal regime is altered by one agency's determination when the action agency would expose itself to civil and criminal penalties if it disregarded that determination); *see Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 861 (4th Cir. 2002) (holding that an EPA Report did not alter the legal regime because "no statutory scheme triggers potential civil or criminal penalties for

failing to adhere to the Report's recommendations"). Beyond ordering "all executive departments and agencies"—not private parties—to "provide the [Commerce] Department the maximum assistance permissible," see E.O. 13880, 84 Fed. Reg. at 33821 (emphasis added), the Executive Order in no way "determine[s] rights and obligations" for the Department of Commerce, the Census Bureau, other federal agencies, Plaintiffs, or anyone else.

The Supreme Court's decision in *Franklin v. Massachusetts* alone resolves this case. 505 U.S. 788 (1992). There, plaintiffs challenged the Secretary's use of administrative records to count federal employees serving overseas, arguing that the Secretary's tabulation of census results violated the APA. Id. at 794–96 (explaining that the Census Bureau used the "home of record" in the Department of Defense's personnel files to allocate individuals). Strikingly, the Supreme Court held that the Secretary's final report to the President conveying the census results did not constitute "final agency action" because "the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President." Id. at 797. So if the Secretary's tabulation of final census results—including administrative records—is not "final agency action" under the APA, then the mere gathering of administrative records parallel to the census cannot constitute "final agency action" either.

Fourth Circuit law reinforces this point, consistently rejecting APA claims like those at issue here. City of New York, 913 F.3d at 434–35 (holding that the Department of Defense's compliance with statutory requirements was not "agency action" under the APA because it did not "in any way determine [the plaintiffs'] rights and obligations"); Bald Head Island, 714 F.3d at 188-93 (finding no "agency action" where plaintiffs "commenced [the] action to challenge the adequacy of [a project's] performance and to require the [Army Corps of Engineers] to do what it had undertaken to do when approving the project," which was not a "determination of rights and obligations"); Golden & Zimmerman, LLC v. Domenech, 599 F.3d 426, 427-28 (4th Cir. 2010) (discussed below); Invention Submission Corp. v. Rogan, 357 F.3d 452, 459 (4th Cir. 2004) (holding that the Patent and Trademark Office's advertising campaign was not "final agency action" because it "was not the consummation of any decisionmaking process that determined rights or obligations or from which legal consequences flowed"); Flue-Cured Tobacco, 313 F.3d at 861 (holding that publication of an EPA report that classified environmental tobacco smoke as a potentially harmful human carcinogen was not an "agency action" reviewable under the APA).

In Golden & Zimmerman, LLC v. Domenech, for example, the plaintiffs challenged the "Federal Firearms Regulations Reference Guide 2005," which [was] published by the Bureau of Alcohol, Tobacco, Firearms and Explosives ('ATF') to provide information designed to help licensees comply with all of the laws and regulations governing the

manufacture, importation, and distribution of firearms and ammunition." 599 F.3d at 427–28 (alterations omitted). The court rejected this challenge because, although the Reference Guide "inform[ed] the regulated community of what violates the law," it did "not itself *determine* the law or the consequences of not following it." *Id.* at 432–33. Notably, the court explained, "if the ATF had never published the Reference Guide . . . the ATF would still have had the authority to prosecute licensees for engaging in the conduct described in [it] because legal consequences do not emanate from [the Reference Guide] but from the Gun Control Act and its implementing regulations." *Id.* at 433.

The Executive Order here is even further removed from "determin[ing] the law" than the Reference Guide in Golden & Zimmerman: it provides no information to "the regulated community of what violates the law," id. at 432–33, but merely functions as an internal guide for "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country." See E.O. 13880, 84 Fed. Reg. at 33821. Surely, if a Reference Guide explaining the law to regulated parties does not "determine rights and obligations," then neither does the President's managerial decision. And, like the Reference Guide in Golden & Zimmerman, Defendants can, and have, gathered administrative records without the President's recent directive. See id. 33821–22 (noting that the Census Bureau already had administrative records to "determine citizenship status for approximately 90 percent of the population"). Their

authority to do so derives from the Census Act, not a recent directive "to eliminate delays and uncertainty" in the process. *See* 13 U.S.C. § 6(a) ("The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government . . . for information pertinent to the work provided for in this title."); E.O. 13880, 84 Fed. Reg. at 33821–22 ("[T]o to eliminate delays and uncertainty . . . I am hereby ordering all agencies to share information requested by the Department to the maximum extent permissible under law.").

Plaintiffs are clearly concerned about the conduct of States and localities when they receive citizenship data from the Census Bureau in 2021. *See* FAC ¶¶ 1, 15, 65, 87. But the APA "does not provide judicial review for everything done by an administrative agency," *Invention Submission Corp.*, 357 F.3d at 459 (citation omitted), and "[i]t is not enough for plaintiffs to simply identify a governmental action that ultimately affected them through the independent responses and choices of third parties," *City of New York*, 913 F.3d at 431 (citations omitted). Managerial "policy statements," like the Executive Order, "are properly challenged through the political process and not the courts." *Invention Submission Corp.*, 357 F.3d at 459.

IV. Plaintiffs' Equal Protection Claim Should be Dismissed

Plaintiffs' equal protection claim alleges that "[t]he collection of citizenship data and the production of citizenship population tabulations for use along with the P.L. 94-171 Redistricting Data File violates the equal protection guarantee of the Fifth

Amendment because it is motivated by racial animus towards Latinos, and animus towards non-U.S. citizens and foreign-born persons." FAC ¶ 112. To state an equal protection claim, ¹⁵ Plaintiffs must plausibly allege that the decision at issue has an adverse effect on a protected group and was motivated by discriminatory animus. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *La Union del Pueblo Entero*, 353 F. Supp. 3d at 393. They fail both prongs.

As explained above, the mere collection of administrative records does not impact anyone, let alone disparately impact Plaintiffs. *See* Argument Section I., *supra*. The Executive Order is even explicit that its goal is to "mak[e] available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population," citizens and noncitizens alike. E.O. 13880, 84 Fed. Reg. at 33822. It is only when States and localities use citizenship data produced by the Census Bureau (sometime after April 2021, if ever) that Plaintiffs would be impacted. That alone resolves their equal protection claim. *See Feeney*, 442 U.S. at 272.

But even if Plaintiffs somehow alleged an adverse effect from the collection of administrative records, they fail to allege facts plausibly suggesting discriminatory intent for this collection. *Id.* at 274. Put simply, Plaintiffs have not met their burden of plausibly

¹⁵ "Although the Fourteenth Amendment's Equal Protection Clause does not apply to the federal government, the Fifth Amendment's Due Process Clause contains an equal protection component." *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 233 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 374 (2016).

alleging that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.

The Supreme Court and the Fourth Circuit have identified various factors that may be probative of whether a decisionmaker was motivated by discriminatory intent:

(1) evidence of a "consistent pattern" of actions by the [decisionmaker] disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the [decisionmaker] . . .; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by [the decisionmaker] on the record or in minutes of [] meetings.

Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 635 (4th Cir. 2016) (quoting Sylvia Dev. Corp. v. Calvert Cty., 48 F.3d 810, 819 (4th Cir. 1995)). None of these factors favor Plaintiffs.

First, Plaintiffs have not plausibly alleged a "consistent pattern" of actions by anyone that disparately impacted Latinos, noncitizens, and foreign-born persons. 16 They

¹⁶ Plaintiffs cannot maintain an equal protection claim based on "animus towards non-U.S. citizens and foreign-born persons," FAC ¶ 112, because they are not suspect classifications. The federal government makes many distinctions between citizens and noncitizens, both for privileges (such as voting, jury service, and eligibility for benefits) and for immigration laws. *See, e.g., Mathews v. Diaz,* 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *Lewis v. Thompson,* 252 F.3d 567, 583-84 (2d Cir. 2001); *Moving Phones P'ship L.P. v. FCC,* 998 F.2d 1051, 1055-56 (D.C. Cir. 1993). In any event, Plaintiffs have not set forth plausible allegations of discriminatory animus toward any of their named groups.

name only one incident, Defendants' failed inclusion of a citizenship question on the 2020 Census, as the touchstone of discriminatory motivation here. *See* FAC ¶¶ 73–84. But one event can hardly be called a "consistent pattern," especially because the attempt to include a citizenship question was enjoined and could not possibly have "disparately impact[ed] members of a particular class of persons." *Cent. Radio*, 811 F.3d at 635.

Regardless, even their allegations of that one incident are lacking. The proverbial smoking gun cited for discriminatory intent is a document of the late Dr. Thomas Hofeller, in which he noted inclusion of a citizenship question to "shift from redistricting based on total population to CVAP." FAC ¶ 81 ("To generate the necessary CVAP data and achieve this goal of diluting Latino representation while increasing overrepresentation of non-Latino Whites, Dr. Hofeller concluded that a citizenship question must be added to the 2020 census."). But there are no allegations that the sole decisionmaker with statutory authority to add a citizenship question—i.e., the Secretary, see~13~U.S.C.~§~141(f)(2)—ever read, received, or was even aware of Dr. Hofeller or his supposedly incendiary documents.¹⁷ And those deficient allegations are still significantly

 $^{^{17}}$ At most, Plaintiffs allege that Dr. Hofeller "drafted and gave to Commerce and DOJ officials . . . the substantive content of the December 2017 DOJ letter requesting the addition of the citizenship question." FAC ¶ 82. Their allegations say nothing about the "substantive content of the December 2017 DOJ letter" including his idea to "shift from redistricting based on total population to CVAP," id. ¶ 81, or whether the "Commerce and DOJ officials," id. ¶ 82, were even aware of Dr. Hofeller's findings, let alone that they shared Dr. Hofeller's supposed motive to use CVAP redistricting for *discriminatory* purposes.

removed from any action at issue in this case: the Secretary's collection of administrative records, and the President's facilitation of that process. So none of Plaintiffs' allegations, FAC ¶¶ 73–84, shed any light on "the decisionmaker's purposes." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

Second and relatedly, the FAC says nothing about a discriminatory historical background surrounding any action at issue in this case. Again, the FAC's equal protection claim rests solely on insufficient allegations related to a census citizenship question, not the collection of administrative records. Plaintiffs identify no "history of discrimination by the [decisionmaker]" relevant to determining "the decisionmaker's purposes" in collecting administrative records or expediting that process. *Id.* at 267; *Cent. Radio*, 811 F.3d at 635.

Third, Plaintiffs fail to plausibly allege any departures from normal procedures such that discriminatory intent could be inferred. As explained above, the Secretary of Commerce has the statutory authority to collect data from other agencies. *See* 13 U.S.C. § 6(a). Secretaries of Commerce have long exercised this statutory authority to gather administrative records, including those on citizenship. And by the time of the Executive Order, Defendants *already had* administrative records to "determine citizenship status for approximately 90 percent of the population." E.O. 13880, 84 Fed. Reg. at 33821–22. While Plaintiffs make oblique references to generally applicable standards of Office of Management and Budget Policy Directives, the Paperwork Reduction Act, and the

Information Quality Act, *see* FAC ¶¶ 26–31, they nowehere explain how those guidelines apply to the collection of administrative records, how this collection violated any of those guidelines, or how the Secretary's current collection of administrative data differs from the procedures used for the last century.

Fourth, Plaintiffs do not advance any plausible allegations of "contemporary statements by [the decisionmaker]" from which discriminatory intent could be inferred. Cent. Radio, 811 F.3d at 635. For example, Plaintiffs cite the President's statements that the Executive Order will help "generate[] an accurate count of how many citizens, noncitizens, and illegal aliens are in the United States of America," and that citizenship data may be used by some States who "may want to draw state and local legislative districts based upon the voter-eligible population." FAC ¶¶ 62–63. Both of those sentiments were clearly expressed in the text of the Executive Order. See E.O. 13880, 84 Fed. Reg. at 33821– 22 (noting the goal of "making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population"); id. at 33823 (noting that citizenship data may allow "States to design State and local legislative districts based on the population of voter-eligible citizens"). And a discriminatory purpose cannot be inferred from either. Again, Secretaries of Commerce have long collected administrative records, including those on citizenship. And the Supreme Court explicitly left open the possibility for States to "draw districts to equalize voter-eligible population rather than total population." Evenwel, 136 S. Ct. at 1133. As the Executive Order explains, "because

eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population." E.O. 13880, 84 Fed. Reg. at 33823. So, again, none of Plaintiffs' allegations raise a plausible inference of discriminatory motive to collect administrative records—a collection that some of these Plaintiffs previously advocated.

Whether examined individually or collectively, through the lens of the Fourth Circuit's factors or not, the FAC contains no facts plausibly suggesting that discriminatory intent motivated any action at issue. Plaintiffs' equal protection claim should be summarily rejected.

V. Plaintiffs' 42 U.S.C. § 1985(3) Claim Should be Dismissed

Plaintiffs also advance a claim under 42 U.S.C. § 1985(3), alleging that "President Trump, Defendant Ross, Defendant Dillingham, John Gore, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to collect citizenship data and produce citizenship data for use along with the P.L. 94-171 Redistricting Data File so that states can use CVAP data to apportion state and local districts." FAC ¶ 115. This official-capacity claim fails on multiple threshold grounds and, in any event, fails to state a claim.

A. Section 1985 does not authorize courts to award injunctive relief.

Plaintiffs' conspiracy claim fails at the outset because § 1985 only authorizes courts to award damages, not the injunctive relief Plaintiffs seek here. *See id.* at 31–32 (prayer for relief). By its terms, § 1985(3) provides only that a plaintiff "may have an action *for*

the recovery of damages . . . against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis added). The statute says nothing about injunctive relief. In stark contrast, § 1985(3)'s companion provision, also enacted as part of the Ku Klux Klan Act of 1871, authorizes "action[s] at law, suit[s] in equity, or other proper proceeding[s] for redress." 42 U.S.C. § 1983 (emphasis added). As this comparison reveals, Congress both considered and authorized differing remedies under two statutory provisions of the same act: a violation of § 1983 may incur damages or injunction relief, while a violation of § 1985(3) can incur only damages. And "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983).

The Court should therefore conclude that "the statutory relief available under § 1985 'is limited to the recovery of damages'" and that, in requesting only injunctive relief, Plaintiffs' claim fails. *Tufano v. One Toms Point Lane Corp.*, 64 F. Supp. 2d 119, 133 (E.D.N.Y. 1999) (quoting *Cuban v. Kapoor Bros., Inc.*, 653 F. Supp. 1025, 1033 (E.D.N.Y. 1986), *aff'd*, 229 F.3d 1136 (2d Cir. 2000). 18

¹⁸ Neither the Supreme Court nor the Fourth Circuit have decided whether § 1985(3) authorizes injunctive relief. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 n.16 (1993). Two other circuits have indicated that injunctive relief is available under § 1985(3). *See Action v. Gannon*, 450 F.2d 1227, 1237–38 (8th Cir. 1971) (en banc); *Mizell v. N. Broward Hosp. Dist.*, 427 F.2d 468, 473 (5th Cir. 1970). Neither case is persuasive. *Action* simply relied on *Mizell*. And *Mizell* relied on dicta in *Jones v. Alfred H.*

B. Plaintiffs' § 1985(3) claim is barred by sovereign immunity.

Plaintiffs' § 1985(3) claim also fails because it is barred by sovereign immunity. Sovereign immunity prohibits cases against the federal government unless Congress has unequivocally consented to suit. *United States v. Testan,* 424 U.S. 392, 399 (1976). Sovereign immunity is not limited to cases naming the United States as a defendant; it also bars cases against federal officials in their official capacities because the relief requested would run against the federal government. *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949). Civil rights statutes like 42 U.S.C. § 1985(3) do not waive the federal government's sovereign immunity. *Unimex, Inc. v. Dep't of Housing & Urban Dev.,* 594 F.2d 1060, 1061 (5th Cir. 1979). Sovereign immunity thus "bars []§ 1985(3) . . . suits brought against the United States and its officers acting in their official capacity." *Davis v. U.S. Dep't of Justice,* 204 F.3d 723, 726 (7th Cir. 2000); *accord Affiliated Prof'l Home Health Care Agency v. Shalala,* 164 F.3d 282, 286 (5th Cir. 1999).

While a § 1985(3) suit against federal officers in their *individual capacities* might be permissible if Plaintiffs alleged that the officers acted beyond their statutory powers and that the powers themselves, or their exercise, were constitutionally void, *see Dugan v*.

Mayer Co., 392 U.S. 409, 414 (1968), and on Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238–40 (1969), both of which interpreted a statute (42 U.S.C. § 1982) that—unlike § 1985(3)—confers substantive rights without specifying a remedy. By contrast, § 1985(3) is solely remedial, see United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 833 (1983), and that remedy is limited to damages.

Rank, 372 U.S. 609, 621 (1963), Plaintiffs have sued Defendants only in their official capacities, FAC ¶¶ 15–16. So their § 1985(3) claim is barred by sovereign immunity.

C. Plaintiffs fail to state a claim under § 1985(3).

Even if Plaintiffs' § 1985(3) claim were viable, their allegations are entirely conclusory and fail to state a claim. To state an actionable conspiracy under § 1985(3), Plaintiffs must allege non-conclusory facts plausibly showing:

(1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995) (citation omitted). Plaintiffs also must adequately allege "an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights"—that is, a "joint plan[] to deprive [the plaintiff] of his constitutional rights." Id. at 1377. In applying these "very high" standards, Brissett v. Paul, 141 F.3d 1157 (4th Cir. 1998) (unpublished), the Fourth Circuit "has rarely, if ever, found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy," Simmons, 47 F.3d at 1377. No such "sufficient facts" can be found in the FAC.

As noted above, Plaintiffs' theory seems to be, in essence, that various individuals with discriminatory animus conspired to include a citizenship question on the 2020 Census. FAC ¶¶ 73–84. The purported proof of this conspiracy is a document of the late Dr. Thomas Hofeller, in which he noted inclusion of a citizenship question to "shift from

redistricting based on total population to CVAP." *Id.* ¶¶ 81, 83. Plaintiffs simply state that "[t]he same discriminatory motivation behind adding the citizenship question motivated Defendants" to seek citizenship information through administrative records. *Id.* ¶ 84. This does not come close to plausibly alleging a civil conspiracy under § 1985(3).

To begin, Plaintiffs have not alleged "an overt act committed by the defendants in connection with the conspiracy" that "results in injury to" them. *Simmons*, 47 F.3d at 1376. The only overt act Plaintiffs arguably allege is the Executive Order's facilitation of collecting citizenship data through administrative records. *Cf.* FAC ¶¶ 58, 84. But, as explained above, the mere collection of administrative records causes no harm to anyone, let alone Plaintiffs. *See* Argument Section I., *supra*.

Plaintiffs also do not attempt to allege any facts from which to infer "a specific class-based, invidiously discriminatory animus to" gather administrative records. *Simmons*, 47 F.3d at 1376. Instead, their allegations of discriminatory motive focus exclusively on the 2020 Census citizenship question; they say nothing about the motives for collecting administrative records. *See* Argument Section IV., *supra*; FAC ¶¶ 73–84.

That is fatal to not only § 1985's discriminatory-animus element, but also its meeting-of-the-minds element. *Simmons*, 47 F.3d at 1376. Plaintiffs explicitly note the purported conspirators of a discriminatory plot to include a citizenship question on the census. *See* FAC ¶ 73 ("Defendant Ross, members of the Trump Administration, A. Mark Neuman, then-Kansas Secretary of State Kris Kobach, members of the DOJ . . . and

Republican strategist Dr. Thomas Hofeller conspired to add a citizenship question to the 2020 census."). And they piece together disparate actions of these individuals in a convoluted attempt to demonstrate this plot and its underlying motivations. *See id.* ¶¶ 73–83 (alleging, for example, that "Defendant Ross . . . coordinated with AG Sessions, other members of the DOJ, and the White House to fabricate a 'need' for the citizenship question"). But setting aside the sufficiency of those allegations on their own terms, the FAC is utterly devoid of facts demonstrating that purported conspirators reached "an agreement" or a "meeting of the minds" on a "joint plan" to gather administrative records in order to deprive Plaintiffs of their constitutional rights. *Simmons*, 47 F.3d at 1376–77.

Plaintiffs do not even plausibly allege the *members* of the purported conspiracy. They claim that "President Trump, Defendant Ross, Defendant Dillingham, John Gore, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to . . . produce citizenship data for use along with the P.L. 94-171 Redistricting Data File." FAC ¶ 115. But Plaintiffs own allegations make clear that then-Attorney General Sessions, then-Assistant Attorney General Gore, then-Kansas Secretary of State Kris Kobach, and then-White House adviser Stephen Bannon were only involved, if at all, with the inclusion of a citizenship question. *See, e.g., id.* ¶¶ 74–75. None of these individuals are alleged to have been involved in the decision to collect citizenship information through administrative records. That makes sense because three of the four—Messrs. Sessions, Kobach, and Bannon—left their respective positions long before the President issued his

Executive Order, while Mr. Gore left his position shortly thereafter.¹⁹ And Dr. Hofeller—the author of documents at the heart of the "conspiracy" that allegedly evinced discriminatory animus—had been deceased for almost a year when the President issued his Executive Order.²⁰

Plaintiffs' allegations about the remaining "conspirators"—President Trump, Defendant Ross, and Defendant Dillingham—are perfunctory, at best. Dr. Dillingham, for example, appears only in the FAC's caption, its description of parties and venue, and its conclusory causes of action. *See id.* ¶¶ 16, 20, 115–16. But no matter. As Executive Branch officials, the President, the Secretary of Commerce, and the Director of the Census Bureau are legally incapable of a § 1985(3) conspiracy. The intracorporate-conspiracy doctrine applies to § 1985(3) claims, *Buschi v. Kirven*, 775 F.2d 1240, 1251–52 (4th Cir. 1985),

¹⁹ Devlin Barrett, et al., *Jeff Sessions forced out as attorney general*, Washington Post (Nov. 7, 2018), https://www.washingtonpost.com/world/national-security/attorneygeneral-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2cb31dcd53ca6b_story.html; Associated Press, Kobach says he's seriously considering US Senate bid in 2020 (Jan. 19, 2019), https://apnews.com/9de85ad8578243e3aa7 fbbcab28e5de0; Sam Levine, DOJ Official Who Played Big Role In Push For Citizenship **Ouestion** To Leave Trump Admin, Huffington 2019), Post (Aug. 9, https://www.huffpost.com/entry/john-gore-leaving-doj_n_5d4d8fa0e4b09e7297459561; Andrew Rafferty, et al., Steve Bannon Out as White House Chief Strategist, NBC News (Aug. 18, 2017), https://www.nbcnews.com/politics/politics-news/steve-bannon-out-whitehouse-chief-strategist-n793921.

²⁰ Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, New York Times (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html.

and dictates that "there is no unlawful conspiracy when officers within a single corporate entity consult among themselves and then adopt a policy for the entity," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). The rationale for this doctrine is that "[c]onspiracy requires an agreement . . . between or among two or more separate persons," but "[w]hen two agents of the same legal entity make an agreement in the course of their official duties . . . their acts are attributed to [the] principal," so "there has not been an agreement between two or more separate people." *Id.* Because the President, the Secretary of Commerce, and the Census Bureau's Director are all Executive Branch officers, they cannot conspire for purposes of § 1985(3). *See Ziglar*, 137 S. Ct. at 1867; *Buschi*, 775 F.2d at 1251–52.

At bottom, Plaintiffs' § 1985(3) claim "amounts to nothing more than rank speculation and conjecture." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 422 (4th Cir. 1996). Their allegations, to the extent there are any, are implausible, incomplete, and insufficient to satisfy their "weighty burden" of "establish[ing] a civil rights conspiracy." *Id.* at 421.

D. <u>If Plaintiffs' § 1985(3) claim is viable, their APA claims should be dismissed.</u>

If Plaintiffs may pursue an official-capacity § 1985(3) claim, then their claims under the APA must be dismissed because they have an adequate alternative remedy. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704; see Garcia v. Vilsack, 563 F.3d 519, 522 (D.C. Cir. 2009). Here, Plaintiffs seek nearly the same relief under the APA and § 1985(3): an order declaring illegal "Secretary

Ross's decision to follow EO 13380" and "[e]njoin[ing] Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31; see id. ¶¶ 88–117. If the Court allows Plaintiffs' § 1985(3) claim to proceed, and the Court has not already dismissed Plaintiffs' APA claims for the reasons explained above, then the Court should dismiss Plaintiffs' APA claims because Plaintiffs would have an "other adequate remedy in a court." 5 U.S.C. § 704.

CONCLUSION

The Court should dismiss Plaintiffs' FAC for the reasons explained above.

DATED: December 18, 2019 Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, PROMISE ARIZONA, LYDIA CAMARILLO, JUANITA VALDEZ-COX, ROGENE GEE CALVERT; ZEENAT NISHA HASAN; CANDY L. GUTIERREZ; EUGENE WU, DEBORAH CHEN, ORGANIZATION OF CHINESE AMERICANS-GREATER HOUSTON. DAVID CHIU, PHILLIP TING, ALBERT MURATSUCHI, KENNY CHU, YICHENG WU, CYNTHIA CHOI, VINCENT PAN, JOHN PARK, JEFFREY D. HSI, JACINTA TITIALII ABBOTT, VENGHAN TANG, RAJ MUKHERJI, SHARON TOMIKO SANTOS, MIA GREGERSON, JENNIFER REYES, RAYMOND SANCHEZ, MARICELA LECHUGA, MARTY RAMIREZ, FELIPE CRUZ, ALEXANDRA ROSY PALOMO-PUJOL, MARCO ABARCA, COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES, RALPH CARMONA, and JAVIER GASTON-GREENBERG,

Plaintiffs,

v.

DONALD J. TRUMP, sued in his official capacity as President of the United States,

WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce,

STEVEN DILLINGHAM, sued in his official capacity as Director of the U.S. Census Bureau,

U.S. DEPARTMENT OF COMMERCE, and

U.S. CENSUS BUREAU,

Defendants.

Civil Action No. 8:19-CV-02710-PX

SWORN EXPERT DECLARATION OF JOHN THOMPSON

I. Introduction

- 1. On April 13, 2020 the Secretary of Commerce, Wilbur Ross, and the Director of the Census Bureau, Dr. Steven Dillingham, issued a statement on 2020 Census operational adjustments due to the COVID-19 pandemic. This statement concluded that "[u]nder this plan, the Census Bureau would extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021, and redistricting data to be delivered to the states no later than July 31, 2021."
- 2. On August 3, 2020 the Director of the Census Bureau, Dr. Steven Dillingham, issued a statement announcing that the Census Bureau would "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." Based on my experience and expertise, I am extremely concerned that this August 3 decision will adversely affect the quality and accuracy of the 2020 Census.
- 3. The 2020 Census results will be of great importance to our nation. The Constitution requires that the census be used for reapportioning the House of Representatives and the Electoral College. The 2020 Census will also be used for numerous other functions to support good policymaking and economic growth including: redrawing congressional and state legislative voting districts; allocating over \$1.5 trillion of federal funds annually; informing

¹ U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19, April 13, 2020.

² Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count, August 3, 2017.

sound policy development; providing critical information for state, local and tribal government planning; and supplying important data to large and small businesses to generate growth and job creation. Inaccuracies or errors in the 2020 Census will have grave consequences on these uses for the subsequent 10-year period.

4. I have carefully reviewed the 2020 Census Operational Plans as well as the documentation that the Census Bureau has issued describing the actions it is taking in response to the COVID-19 pandemic and its recently issued documentation regarding its plans to conclude data collection by September 30, 2020. Based on my experience and expertise, I am concerned that reducing the time for data collection at this late date will have serious consequences for the 2020 Census, because: (1) the time constraints will force the Census Bureau to modify the plans for their data collection operations; (2) these modifications will significantly increase the risk of larger total and differential undercounts for the hard-to-count populations, as well as increase the levels of erroneous enumerations and reduce the overall quality of this census, relative to previous censuses; (3) the Census Bureau's new push to adhere to a truncated schedule reduces not only data collection time frames, but drastically reduces time frames for necessary post data collection processes that ensure an accurate and complete count; and (4) the Census Bureau is not providing timely measures that will allow stakeholders to assess whether the 2020 Census is succeeding in carrying out a fair and accurate enumeration under the limitations imposed by the new push to adhere to a truncated schedule.

II. Qualifications

5. Below I briefly describe specific aspects of my qualifications and work experience that establish my credentials as an accomplished statistician and an expert on the Census Bureau and Decennial Census. I have also attached a copy of my CV to this declaration.

- 6. I have served both as the Director of the U.S. Census Bureau and as the career senior executive in charge of management of all aspects of the 2000 Decennial Census. I am also a distinguished professional in the areas of statistics and survey design. I have a deep understanding of the processes that are necessary to achieve a complete and highly accurate Decennial Census.
- 7. I served as the Director of the U.S. Census Bureau from August 2013 to June 2017. Prior to becoming Director, I worked at the Census Bureau for 27 years (from 1975 to 2002). I started my career as a mathematical statistician in 1975. I spent the majority of my employment at the Census Bureau focused on the Decennial Census and ultimately served as the Associate Director for the 2000 Decennial Census, with management responsibility for all phases of the 2000 Decennial Census.
- 8. The Census Bureau is the country's largest Statistical Agency and produces a wide range of demographic and economic statistics including: the Decennial Census; the American Community Survey; the Current Population Survey; the National Crime Victimization Survey; the National Health Interview Survey; the Economic Census; 13 principal key economic indicators released on a monthly or quarterly basis; and about 100 additional surveys. The Director of the Census Bureau is appointed by the President and confirmed by the Senate.
- 9. My responsibilities as Director of the Census Bureau included overseeing the research and testing that produced the design for the 2020 Census. During my tenure, the original operational plan for conducting the 2020 Census was released, as was an updated version 2.0 of this plan.³ In addition, major field tests were conducted in 2013, 2014, 2015 and

³ U.S. Census Bureau, 2020 Census Operational Plan, A New Design for the 21st Century, version 2.0 issued September 2016.

- 2016. The results of these tests informed the final 2020 Census Design that was tested in the 2018 end-to-end test. This was the final large-scale test in advance of the 2020 Census. It combined the results of all previous tests and could be viewed as a dress rehearsal for the 2020 Census.
- 10. Prior to being appointed Director of the Census Bureau, I was at National Opinion Research Center (NORC) at the University of Chicago, serving as Executive Vice President from 2002 to 2008 and President from 2008 to 2013. NORC is an objective, non-partisan independent research institution that delivers reliable data and rigorous analysis to guide critical programmatic, business, and policy decisions. Clients include government, corporate, and nonprofit organizations around the world who partner with NORC to transform increasingly complex information into useful knowledge. NORC conducts research in five main areas: Economics, Markets, and the Workforce; Education, Training, and Learning; Global Development; Health and Well-Being; and Society, Media, and Public Affairs. NORC services include designing and conducting surveys (telephone, internet, and in-person), as well as analytical studies.
- of Professional Associations on Federal Statistics (COPAFS). COPAFS is an organization with a membership consisting of professional associations and research organizations that depend on and support high quality federal statistics. The Executive Director of COPAFS must have a deep understanding of the Federal Statistical System and the wide range of data products that are produced. Serving as the Executive Director of COPAFS reinforced my appreciation of the importance of high-quality Decennial Census data to the entire Federal Statistical System.

12. In addition to the work experience described above, I am an elected Fellow of the American Statistical Association and was selected to serve on the National Academies of Science, Engineering, and Medicine Committee on National Statistics.

III. Concerns

A. Background on the Decennial Census

- for all components of our democracy and economy, including: the constitutionally required reapportionment of the House of Representatives; redrawing congressional and state legislative voting districts; allocating over \$1.5 trillion in federal funds annually; supporting evidence-based policy making by state, local and tribal governments; and allowing informed decisions by large and small businesses to generate economic growth and job creation. The Census results are also carried forward throughout the decade in the form of population estimates⁴ that are used for a number of purposes including ensuring that most public and private household surveys are fully representative of all population groups.⁵ Any undercounts in the Census would be carried forward in the population estimates and reflected in the surveys. Inaccuracies or undercounts in Decennial Census data will result in under-representation of the affected population groups not just in the immediate term, but for ten subsequent years until the next Decennial Census results are available.
- 14. As I discussed above, the Census Bureau spent much of this decade conducting testing and research in order to develop the plans and procedures to be used in the 2020 Census.

⁴ U.S. Census Bureau, https://www.census.gov/programs-surveys/popest.html.

⁵ There are many important surveys that provide information that is goes beyond the uses of the Decennial Census that I described above. For example, the Current Population Survey provides measures of unemployment, income and poverty; and the Health Interview Survey tracks health status, health care access, and progress in achieving national health objectives.

The plans for the 2020 Census include a number of operations and programs that are important to achieve a fair and accurate enumeration. I will briefly describe four of these here for background purposes and then discuss the impact of the COVID-19 pandemic and other issues relating to a fair and accurate enumeration in subsequent portions of this declaration. The four operations or programs are as follows:

- Developing a comprehensive address list The Census Bureau worked this decade to continuously update the address list that supported the 2010 Census. Input is continuously received from sources such as the United States Postal Service and local governments. The Census Bureau also conducted an "address canvassing" operation that concluded in 2019. Address canvassing used field or office workers to find and include additional addresses that may not have been provided from other input sources. The address list is critical because it serves as the control file for most 2020 Census operations including data collection.
- Self-response Most housing units on the address list received an invitiation to self-respond to the 2020 Census in March 2020. Responses could be submitted by Internet, completing and mailing back a paper questionnaire, or over the telephone.
- Nonresponse Followup Not all households provide self-responses, requiring the Census Bureau to conduct an operation to collect information from these self-nonresponding housing units. The Census Bureau refers to this operation as "Nonresponse Followup" or NRFU.

 NRFU requires recruiting and hiring a large staff of enumerators to visit the nonresponding housing units and obtain a response and is the most expensive and labor-intensive operation that the 2020 Census will carry out. As of August 16, the national self-response rate was 63.8 percent, which meant that over 36 percent—or over 50 million housing units and their

occupants must still be enumerated.⁶ Prior to the COVID-19 pandemic, the Census Bureau estimated that it would need to deploy at least 260,000 enumerators to conduct NRFU for a workload of this size.⁷ As I will discuss below, the hard-to-count populations are disproportionately represented in the nonresponse universe. Hard-to-count populations include young children, minorities, immigrants, low income renters, limited English speakers, residents of hard to reach rural areas; these include Asians and Latinos, and American Indian Reservations or Alaska Native Villages. A failure to obtain a complete enumeration in NRFU would result in disproportionate undercounts of these populations. Therefore, I view a successful NRFU as one of the most important census operations to ensuring a fair and accurate count.

Developing and deploying an integrated communications and partnership program – The Census Bureau has conducted extensive research to develop a communications program, using paid adverting and digital media, coupled with a local partnership program to encourage self-response and participation in the 2020 Census. The goal of the program is to get out messages on a local level that the 2020 Census is important to local communities, and that respondent information is completely confidential. The Census Bureau will not share identifiable information for any person to any outside entity, including law and immigration enforcement. The Census Bureau was very successful in recruiting over 300,000 national and local partners for the 2020 Census. Many of these partners planned to hold local events to promote 2020 Census self-response.

⁶ U.S. Census Bureau 2020 Census daily response rate tracker, https://2020census.gov/en/response-rates.html (last accessed August 16, 2020).

⁷ U.S. Census Bureau, 2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU), Version 2.0 Final, July 15, 2019.

- B. The requirement to end data collection by the end of September 2020 will force the Census Bureau to modify data collection procedures, resulting in a less complete enumeration compared to previous censuses.
- 15. The COVID-19 pandemic forced the delay of key 2020 Census operations out of concerns for the safety of both census workers and the general public. Of particular concern was the delay of the NRFU.
- 16. The NRFU operation had been scheduled to start on May 15, 2020 and run through July 31, 2020. However, as a result of the COVID-19 pandemic, the Census Bureau rescheduled it to start in most of the United States on August 11, 2020 and initially planned to complete it by October 31, 2020.
- 17. In order to accommodate this delay, the Census Bureau had requested, through the Department of Commerce, a four-month extension of the deadlines⁸ to deliver Apportionment and redistricting data. For apportionment, the requested extension was from the current deadline of December 31, 2020 to April 30, 2021. For redistricting, the requested extension was from March 31, 2021 to July 31, 2021.
- 18. However, the Census Bureau has now announced that the deadlines will not be extended, and that NRFU will now be completed by September 30, 2020. The Census Bureau will have to take steps to complete NRFU more rapidly than it planned, given that it has already lost over a third of the schedule that the career staff had developed under the original plan.

⁸ Title 13, US Code, Section 141, (b) and (c).

⁹ Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count, https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html, August 3, 2020.

- 19. The Census Bureau recently released a review of the 2020 Census Operational Plan Schedule¹⁰ that describes actions being taken to complete all data collection, including NRFU, by September 30, 2020. According to the review, these actions include:
 - Starting NRFU in all areas by August 9, 2020
 - Sending enumerators to make up to six visits to attempt to obtain an interview with occupied housing units
 - Offering bonuses to NRFU enumerators to maximize staff production hours
 - Making efforts at "Keeping Staff Levels Up"
 - Implementing outbound telephone calling to supplement in-person contact attempts as a means of enumerating hard-to-count populations
- 20. The review document had a serious lack of detail regarding how NRFU would be actually implemented under the revised and shortened time schedule. The Census Bureau had prepared detailed information regarding how it was going to conduct NRFU under the original schedule and time frame. For example, the Census Bureau described three NRFU phases Phase 1, Phase 2, and Closeout for the 2020 Census. 11 For each phase, criteria and dates were provided that described how each would start. There is no such discussion included in the review of the Operational Plan, nor is there even a mention as to whether there will still be three phases.
- 21. I am concerned that taking the actions described in the review of the Operational Plan will not effectively address the constraints imposed by the revised timelines for completing

¹⁰ U.S. Census Bureau, *Review of 2020 Census Operational Plan Schedule*, https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/2020-operational-plan-schedule-review.pdf, August 17, 2020.

¹¹ U.S. Census Bureau, 2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU), Version 2.0 Final, July 15, 2019.

NRFU. My concerns are informed by my experiences in managing all aspects of the 2000 Census and by directing the research and development necessary to plan the 2020 Census. My concerns are as follows:

• The staffing levels will not be adequate to complete NRFU without accepting lower quality enumerations and incompletely enumerating the traditionally hard-to-count populations. The Census Bureau has lost over 30 percent of the time that had been planned for NRFU, and my experience and knowledge lead me to conclude that the Census Bureau will need significantly more staff to complete this critical undertaking. However, the plan being put forth to end data collection by September 30 is to maintain staffing, at levels determined before the advent of the COVID-19 pandemic. The Department of Commerce Office of the Inspector (OIG) has recently reviewed the progress of staffing for the NRFU and stated:

"Bureau management have stated that their target number of enumerators, needed by the end of August 2020 to complete NRFU production, is just above 300,000. As of August 17, 2020, the Bureau has just under 220,000 enumerators trained and ready to start working on the NRFU operation that is underway—this represents approximately 73 percent of the estimated number of enumerators needed to complete NRFU production. However, 132 out of 248 total Area Census Office (ACOs) are less than 75 percent toward reaching their estimated goals; of those 132 ACOs at less than 75 percent, 37 are less than 50 percent toward reaching their goal." 12

¹² Zabarsky, Mark H, Principal Assistant Inspector General for Audit and Evaluation, 2020 Census Alert: The Census Bureau Faces Challenges in Accelerating Hiring and Minimizing Attrition Rates for Abbreviated 2020 Census Field Operations Final Memorandum No. OIG-20-041-M., Memorandum for Steven D. Dillingham, Director, U.S.. Census Bureau, August 18, 2020.

To explain briefly, the Census Bureau has established Area Census Offices (ACO) to carry out the 2020 Census field operations, including NRFU. There are 248 ACOs, each of which has a significant portion of the NRFU workload to carry out. On average, this would be about 226,000 housing units from which a self-response was not received. It is very troubling that not only is the Census Bureau falling behind in its plans for staffing NRFU, but also the hiring shortfalls for NRFU staff are not uniform. Approximately 15 percent of the NRFU workload is in areas where the Census Bureau is falling 50 percent short of hiring goals. While the Census Bureau stated in the Review of the Operational Plan Schedule that it was making efforts at "keeping staff levels up," it is falling well behind in reaching the staffing levels it had determined were necessary for NRFU. In addition the NRFU staffing levels cited by the OIG are lower than the Census Bureau projected requirements *prior* to the COVID-19 pandemic - 260,000 enumerators.¹³ I will discuss the impact of these staffing shortfalls for hard-to-count communities in more detail below.

• The self-response rates are not uniformly distributed and are disproportionally lower in areas with higher proportions of Black and Latino (referred to as Hispanic by the Census Bureau) populations, as well as in some rural areas. For example, as of August 6, 2020, there were 50.7 million people living in census tracts in the lowest fifth of self-response. The overall self-response rate for these tracts is less than 51.3 percent, compared to a national

¹³ U.S. Census Bureau, 2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU), Version 2.0 Final, July 15, 2019.

¹⁴ A census tract is a small geographic are that is similar to a neighborhood. See https://www.census.gov/programs-surveys/geography/about/glossary.html#par_textimage_13.

¹⁵ Romalewski, Steven, Mapping "Self-Response" for a Fair and Accurate Census, Center for Urban Research at the Graduate Center, City University of New York, https://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center.pdf, 2020-self-response-rates-thru-Aug-6-CUNY-Graduate-Center.pdf, August 7, 2020.

average of over 63 percent. Furthermore, while Latinos make up 18.3 percent of the U.S. population, they represent 25.8 percent of the population in these low response areas. For non-Hispanic Blacks, the corresponding rates are 12.3 and 22.2 percent, respectively. The Census Bureau also noted that, as of August 6, 2020, the self-response rate in update-leave (rural areas) was a little over 34 percent. The low update-leave self-response is also problematic for Latinos living areas such as the colonias in Texas, and for American Indian Reservations or Alaska Native Villages. As I will discuss below, the likely outcome for these areas and populations will be increased undercounts relative to previous censuses and decreased quality of the information collected.

- Given the current NRFU staffing levels, the Census Bureau will have to rely less on direct in-person contact attempts and more on the following in order to meet the new September 30, 2020 deadline with deleterious consequences for the count:
 - a. Reduced in-person contact attempts with residents of the NRFU households, leading to increased undercounts of the traditionally hard-to-count populations. While the Census Bureau is planning for up to six attempts for most NRFU households, this will not be enough to obtain complete interviews in many hard-to-count communities. The Government Accountability Office (GAO) evaluated the early testing that the Census Bureau carried out to develop the current NRFU procedures. The GAO stated:

coded as non-interviews in Harris County, Texas and 14,026 in L.A. County, California, or about 30 and 20 percent of the test workload respectively.

According to the Census Bureau, non-interviews are cases where no data or insufficient data were collected, either because enumerators made six attempted

visits without success (the maximum number the Bureau allowed) or visits were not completed due to, for example, language barriers or dangerous situations."¹⁶

The Census Bureau subsequently refined the NRFU procedures to allow for more contact attempts, as is necessary to reach higher resolution rates comparable to previous censuses.¹⁷ However, my opinion is that there is a significant risk that NFRU will not be successful in completely enumerating hard-to-count communities under the current time schedule.

Hard-to-count communities have significantly lower levels of self-response, and a corresponding larger proportion of households that fall into NRFU, making recruiting and hiring sufficient staff to achieve a complete enumeration particularly challenging. As I discussed above, the Census Bureau has identified hiring staff with relevant language skills and hiring people who live in local communities as key components of its design for achieving a complete enumeration of hard-to-count communities. Difficulties in recruiting NRFU staff with the necessary qualifications make it much harder to assign enumerators with the language skills necessary to enumerate non-English speaking local areas, and it will also require the Census Bureau to send enumerators into communities that they are not familiar with. The ultimate outcome for these hard-to-count areas will be a higher portion of incomplete responses. I am also very concerned about the proposal to use outbound telephone calling to conduct NRFU in hard-to-count communities. For example, the Pew Research Center has

¹⁶ United States Government Accountability Office, 2020 CENSUS Additional Actions Could Strengthen Field Data Collection Efforts, GAO-17-191, a report to congressional requesters, January 2017

¹⁷ US Census Bureau, 2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU), Version 2.0 Final, July 15, 2019.

documented that telephone survey rates have fallen from 36 percent in 1997 to under six percent in 2018. Achieving a complete and accurate count in the hard-to-count communities requires a lot of hard work by well-trained enumerators who are very familiar with these areas. Furthermore, the use of outbound telephone calling to conduct NRFU enumeration has not been tested, nor have methodologies to deploy inlanguage telephone enumerators. Based on my experience in planning and managing the 2000 and 2020 Censuses it is my opinion that limited staff, a shortened time frame, and the use of untested procedures will most likely result in serious increases in the undercounts for these communities relative to previous censuses.

- b. Preased proxy enumerations, resulting in increased levels of erroneous enumerations. The limited NRFU workforce combined with the shortened schedule will result in a higher level of proxy enumerations than in previous censuses. Proxy enumerations are those obtained by asking people other than the actual residents of NRFU households for information about those residents. These proxies can include neighbors, apartment managers, or other knowledgeable persons. In the 2010 Census, proxy enumerations were obtained for about 21 percent of the NRFU returns. The erroneous enumeration rate for the proxy enumeration was 6.7 percent—over twice the overall erroneous enumeration rate of 3.3 percent. 19
- c. <u>Increased reliance on administrative records to complete NRFU enumerations, leading</u> to less complete enumerations for the hard-to-count populations. The Census Bureau

¹⁸ Kennedy, Courtney and Hartig, Hannah, *Response rates in telephone surveys have resumed their decline*, Pew Research Center report, February 27, 2019.

¹⁹ P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

plans include the use of administrative records (e.g., records from the IRS, Medicare, and the Social Security Administration) to reduce the NRFU workload, where feasible, by using such records to enumerate occupied households that have failed to respond after several contact attempts.²⁰ The Census Bureau may be forced to rely more heavily on such enumerations if NRFU cannot be completed as planned. Based on the research that the Census Bureau conducted to develop the current NRFU strategy, it had planned to enumerate 12.9 percent of the occupied NRFU housing units after making one visit.²¹ Expanding the uses of administrative records to enumerate a higher portion of the NRFU occupied housing units is not supported by the research the Census Bureau has used to date, and the Census Bureau has not released additional research to support such actions. Census Bureau research has shown that the quality and completeness of administrative records is not expansive enough to replace a decennial census.²² In addition, noncitizens and Latinos are disproportionately underrepresented in administrative records. Therefore, the use of administrative records beyond the planned levels for NRFU would be less representative of the hard-to-count populations than a complete NRFU.

d. There will likely be an increased use of "whole person imputation" relative to previous censuses. Such imputations will not correct for any undercounts that have resulted from an incomplete NRFU. In conducting NRFU in previous censuses,

²⁰ Albert E. Fontenot, *Intended Administrative Data Use in the 2020 Census*, 2020 Census Program Memorandum Series: 2020.06, May 7, 2020.

²¹ U.S. Census Bureau, 2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU), Version 2.0 Final, July 15, 2019.

²² Rastogi, Sonya and Amy O'Hara, *2010 Census Match Study*, 2010 Census Planning Memorandum Series, No. 247, November 19, 2012

situations have arisen where, despite the best efforts of NRFU enumerators, either minimal or no information was obtained for some housing units by the conclusion of the NRFU. The Census Bureau uses statistical techniques, referred to as imputation, to correct for this missing data problem. The statistical processes are used to estimate—or impute—all of the characteristics of the persons in these housing units. The Census Bureau applies "Count Imputation" for situations where no information is available for a housing unit. This methodology will first estimate whether the unit is occupied, and if so, will estimate or impute a household size – meaning, the number of people in that household. The process will then use "whole person imputation" to estimate characteristics (including age, race, and ethnicity) for persons in a household of this size. The Census Bureau also uses whole person imputation in situations where only the count of people residing in a housing unit could be determined. In the 2010 Census, about 2.0 percent of the enumerations fell into the category of whole person imputation -0.4 percent were the result of count imputation and 1.6 percent resulted when only the population count was known.²³ It should be noted that of the 16.3 million persons enumerated by proxy in the 2010 Census, 23.1 percent required whole person imputation.²⁴ I am very concerned that the levels of housing units requiring whole person imputation will be much larger than in 2010, due to the reduction in time and staff limitations for NRFU enumerators to get a complete response. Unfortunately, the statistical methods that the Census Bureau uses for imputation rely on using information from the resolved housing units to estimate or

P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.
 Id.

impute for the unresolved housing units. Therefore, any undercounts that are in the resolved housing units will be carried forward in the imputation and not corrected. These undercounts would include persons omitted from housing units enumerated by both self-response and NRFU.

- have unintended consequences on accuracy. The Census Bureau plans to award NRFU enumerators up to \$800 above their regular pay, if they work a minimum number of hours and complete 0.75 cases per hour. I am concerned that in order to meet production goals, particularly in areas that are difficult to enumerate, some NRFU enumerators may be tempted to falsify data for some households to meet production goals. The result would be that instead of obtaining an accurate enumeration for these households, the data would be made-up. The Census Bureau has not conducted any testing to understand the effects on quality of such awards.
- The schedule will not allow the Census Bureau the flexibility to complete NRFU in areas affected by natural disasters. We are currently in the midst of a very active hurricane season, and there are many areas in the West that are dealing with wildfires. The Census Bureau will be forced to delay NRFU in such areas until it is safe to return and resume enumeration activities. The current schedule simply does not allow enough time to carry out a thorough NRFU in areas that may be impacted by these unforeseen events.

C. The reduced schedule for NRFU will have serious accuracy and quality implications for the 2020 Census

Undercounts, particularly for traditionally hard-to-count populations, are likely to increase relative to previous censuses as a result of the Census Bureau's new, reduced schedule.

As I discussed above, the NRFU workloads will be relatively higher in areas with lower self-

response rates. The Census Bureau uses low self-response as a key measure in determining whether an area is hard-to-enumerate.²⁵ so by definition the challenge for NRFU to obtain a complete count is in these areas. In addition, these areas also contain higher proportions of Black, Latino, and immigrant populations relative to the White non-Hispanic population. The end result for these communities is likely to be incomplete NRFU enumeration due to staffing and time limitations, as well as more use of proxy enumerations and whole person imputation. This will lead to increased undercounts relative to previous censuses. For example, in the 1990 Census the undercount of the Latino population was 5.0 percent and the undercount for the Black or African American population was 4.6 percent.²⁶ It is important to understand that in 1990, the Census Bureau had the flexibility to extend the NRFU beyond its planned end date until it had reached a completion rate of over 99 percent for NRFU enumeration.²⁷ However, even with this high completion rate for 1990, serious undercounts were measured.²⁸ The Census Bureau is now being forced to stop all data collection, including NRFU as of September 30, 2020. In my opinion, there is a high risk that the measures the Census Bureau will be forced to take to complete NRFU by this new deadline (as I discussed above relying more on proxy or count-only enumerations and administrative records), even potentially falling short of the 99 percent completion goal, will likely result in undercounts that will be materially larger than were observed in the 1990 Census.

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²⁵ Response Area Outreach Mapper, Census.gov, www.census.gov/roam, (July 2018).

²⁶ P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

²⁷ U.S. Census Bureau, *1990 Census of Population and Housing – History Field Enumeration 6-36*, Report Number CPH-R-2, https://www.census.gov/library/publications/1996/dec/cph-r-2.html, 1996.

²⁸ P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

- D. The compressed schedule for post data collection processing significantly increases the risk of inaccuracies into the 2020 Census data
- 23. The initial Census Bureau schedule had NRFU ending at the end of July 2020 leaving about five months for the post data collection operations prior to the release of the Apportionment counts. In the revised schedule the Census Bureau issued in its request for an extension of the deadlines, there were six months allocated to complete the post data collection before the release of the Apportionment counts. Under the current schedule, there are only three months available for post data collection prior to release of the Apportionment counts. In the August 17, 2020 Review of the Operational Plan, the Census Bureau offered no insights into how it was going to address this shortfall. There are critical activities that must be accomplished as part of the post data collection processing, including:²⁹
 - Apply data codes to facilitate data tabulation Many of the questions included on the 2020 Census questionnaire allow respondents to write-in a response (for example the questions on Race and Ethnicity). In order to properly tabulate these responses, they must be assigned a numeric code. Coding is conducted by both automated and computer-assisted manual processes.
 - Identify potential fraudulent returns from self-responses and record final fraud investigation disposition The 2020 Census allows multiple opportunities for response. Including "non-ID" response where a respondent can go online and respond with just their address. In previous censuses respondents had to use a multi-digit identification code that uniquely identified their housing unit in order to self-respond. The non-ID process was designed to make it easier to respond to

²⁹ U.S Census Bureau, 2020 Census Operational Plan, A New Design for the 21st Century, version 4.0 issued December 2018.

the 2020 Census, but it does carry a risk that it could be misused by those who might want to introduce inaccuracies into the 2020 Census data files. To guard against such actions, the Census Bureau has developed computer algorithms to detect such fraud. It is critically important that these algorithms be run, and the results evaluated during the post data collection processing.

- Resolve potential duplicate responses Duplicate responses can occur in the conduct of a census. For example, someone could self-respond in one location and also be enumerated during NRFU in another. Given that NRFU is now taking place at a point in time that is much further from Census Day, April 1, 2020 the potential for duplicate responses is much higher since more people will have moved than the Census Bureau initially anticipated. It will be critical for the Census Bureau to have the time to identify and remove any duplicates.
- Identify the return of record for housing units with multiple returns When
 multiple opportunities for response are allowed, situations arise where more than
 one questionnaire is returned for a housing unit. In these situations, the Census
 Bureau uses a Primary Selection Algorithm is to establish the single enumeration
 record for the housing unit.
- Repair missing or conflicting data There are situations where responses to some
 of the questions are missing. The count-imputation and whole person imputation
 scenarios that I discussed above are examples of these situations. This component
 of the post data collection processing is designed to carry out these statistical
 processes.

- Provide final census results Finally, a census file must be created that combines
 the results of the steps I have outlined above so that it can provide the tabulations
 necessary for producing the Apportionment counts.
- 24. Each of the activities I described above must be carried out to ensure that the post data collection processing will generate high quality data. The Census Bureau has not stated what actions it will take to fit processes that were initially planned for five months into a three month window. Dropping or seriously curtailing any one of the above processes would have severe consequences by reducing the quality of the 2020 Census data.
- 25. The reduced time frame for post data collection processing will not allow the Census Bureau to run the computer programs that have been prepared to carry out the critical activities as had originally been planned. At a minimum the Census Bureau will have to modify or alter the sequence of these computer programs. Rushing to modify computer programs at the last minute introduces the risk of making systematic programming errors which would further erode the quality of the resulting 2020 Census data.
- 26. The initial 2020 Census schedule for post data collection is very reasonable and is consistent with the schedule for previous censuses. In both the 2000 and 2010 Censuses, NRFU was completed within the schedule originally planned for 2020 June 26, 2000 and July 9, 2010, respectively. In both of these censuses the Apportionment counts were delivered to the President in late December of 2000 and 2010 respectively. The 2020 Census schedule, as originally revised and requested by the Census Bureau, was also following this well-established time schedule.
- 27. The overall quality of the 2020 Census data will most likely be lower than in previous censuses. As I noted above, it is very likely that the Census Bureau will have to rely

more on proxy enumeration and whole person imputation that in previous censuses. While this will be a particular problem for the hard-to-count communities, these less accurate enumeration methods will also most likely be used more across the board in the 2020 Census relative to previous censuses. In addition to the increased use of proxy enumeration, as I discussed above, employing a higher level of administrative records and statistical imputation will result in lower quality than would have been achieved through direct in-person contact. Finally, the extreme truncation of time to conduct the post-data collection activities, as discussed above, will most likely lead to additional inaccuracies that will disproportionately hurt hard-to-count populations.

- 28. The impacts of undercounts and poor quality data will not just be a problem for the immediate uses of the 2020 census (e.g., apportionment and redistricting), but will remain for the 10 years until they can be corrected in the 2030 Census (e.g. federal funding).
 - E. Increased transparency is essential to assure stakeholders of the legitimacy of 2020 Census data collection
- 29. At this point, there is little information available to assess the conduct of the 2020 NRFU. The Census Bureau has been very forthcoming about the self-response phase of the 2020 Census. Very detailed and granular data have been made available to allow for public assessment of self-response for many areas, including census tracts.
- 30. The current Census Bureau plan is to release only NRFU resolution rates at the State level. These rates are not helpful in assessing the actual progress of NRFU in achieving a complete enumeration of all population groups and areas. In order to demonstrate that NRFU is meeting the goal of a complete and accurate enumeration, it is essential that the Census Bureau provide additional data beyond just the resolution rate of housing units in NRFU. These data should include information such as the rate of proxy and count only enumerations at similar

levels of geographic aggregation as the self-response data. Further, in order to ensure that the reported apportionment tabulations will be complete and accurate, the Census Bureau should also provide additional information on how it plans to conduct needed post-data collection processes without the additional time it had originally requested.

31. The Census Bureau has recently announced three new political appointees including a new Deputy Director for Policy³⁰ and a new Deputy Director for Data,³¹ raising concerns among stakeholders. Having political appointees with vague responsibilities at the Deputy Director level of the Census Bureau (which has always been a career position) is unprecedented and is raising serious concerns among stakeholders. Perceptions that the results of the 2020 Census have been manipulated for political purposes will erode public and stakeholder confidence, not only in the 2020 Census, but also in our democratic processes more generally. Therefore, it is critical that the Census Bureau release the data that I have described above to demonstrate that it is achieving a complete and fair enumeration through NRFU.

IV. Conclusion

32. It is my conclusion that the current deadlines for delivering the 2020 Census Apportionment and redistricting data place unreasonable time constraints on the Census Bureau. These constraints will not allow the Census Bureau to carry out data collection operations that will deliver high quality results. I am very concerned that these timing constraints will significantly increase the risk of much larger undercounts for the 2020 Census than measured in

³⁰ Statement from Census Bureau Director Steven Dillingham, Release Number CB20-RTQ.20

³¹ Statement from Census Bureau on Deputy Director for Data, Release Number CB20-RTQ.24, August 17, 2020

previous censuses. These undercounts will disproportionately affect the traditionally hard-tocount communities including immigrants, persons of color, and the underserved.

I declare under penalty of perjury that the foregoing is true and correct.

Jøhn Thompson

Executed on August 272020 at Bend, Oregon.

APPENDIX 1

JOHN H. THOMPSON

BRIEF CAREER HISTORY

Extensive Senior Executive leadership in the non-profit and federal sectors, with experience in social science research and statistics, congressional advocacy, building coalitions, operational management, business development, stakeholder relations, innovation, and strategic vision.

Independent Consultant, August 2018 to present

Consulting service focusing on survey methodology, executive leadership, the Federal Statistical System, and decennial census. Activities have included:

- Expert witness for the plaintiffs in two court cases opposing the addition of a citizenship question to the 2020 Census
 - o New York Immigration Coalition, et al v. United States Department of Commerce and Wilbur Ross, U.S. District Court for the Southern District of New York, and
 - o Robyn Kravitz et al., v. United States department of Commerce, et al
- Training news media journalists on the 2020 Census with Georgetown University, the Poynter Center, and the Harvard Shorenstein Center.
- Providing consultation services to NORC at the University of Chicago

Executive Director, Council of Professional Associations on Federal Statistics – July 2017 to August 2018

The Council of Professional Associations on Federal Statistics (COPAFS) was founded in 1981 to coordinate activities of a number of Associations, Organizations, and Businesses that rely on federal statistics to support good governance and economic growth. COPAFS now represents a growing body of stakeholders that support the production and use of high quality statistics. The Executive Director represents these stakeholders in realizing their mission to *Advance Excellence in Federal Statistics*. Activities include:

- Advocated on behalf of federal agencies. For example, COPAFS is a co-chair of the Friends of the Bureau of Labor Statistics, and the Friends of the National Center for Health Statistics;
- Worked with stakeholder coalitions to support proper funding for the 2020 Census and the American Community Survey;
- Ensured members of Congress, COPAFS members, and other stakeholders were informed of critical issues facing agencies that produce federal statistics;
- Alerted members and stakeholders of breaking issues that needed immediate support and attention;
- Organized and supported ongoing educational efforts for members of Congress and their staff
 on the value and importance of federal statistics both nationally and in their own states and
 districts;
- Created and joined in powerful coalitions of organizations and businesses to advocate on behalf
 of federal agencies that produce statistics, building broad support across a wide spectrum of
 data users;

- Built partnerships with foundations that help fund critical research in the statistical agencies and academia to ensure the on-going modernization of how statistical data are created and made available to the public and researchers, and to fund educational efforts;
- Worked closely with the Chief Statistician of the United States and the statistical agencies to help inform and promote modernization efforts underway and assist agencies in keeping abreast of new stakeholder data needs; and
- Hosted events to demonstrate the importance of federal statistics such as the 2018 Federal Committee on Statistical Methodology Research and Policy Conference.

Director, United States Census Bureau – August 2013 to June 2017

Appointed by the President as Director of the largest federal statistical agency, with a staff of over 5,000 headquarters employees and approximately 10,000 to 15,000 staff spread across the United States in six regional offices and a major production facility in Indiana, with an annual budget exceeding \$1 billion. Key accomplishments include:

- Worked successfully with the executive and legislative branches of the federal government, including the White House, the Office of Management and Budget, Cabinet officials, and members of Congress and congressional staff, to accomplish a major transformation of the Census Bureau into a forward-looking 21st century statistical agency. Testified at 6 congressional hearings on the Census Bureau;
- Provided a conceptual vision and lead a redesign of the 2020 decennial census that is estimated to save \$5 billion through effective use of operations research-driven reengineering of field operations, innovative use of technology, and partnership with key stakeholders;
- Lead outreach to key stakeholders including representatives of state local and tribal governments; advocacy organizations; professional associations, business groups, various media; and academic researchers;
- Put in place a robust research program to support mission critical activities, such as linking administrative records, disclosure avoidance methods, economic studies, statistical research, survey methodology, big data, and data dissemination;
- Lead efforts to maintain congressional support and funding for the American Community Survey, a critical data asset of the federal government, including mobilizing a diverse group of key stakeholders to effectively advocate in support of the survey, personally visiting almost all of the House of Representatives and Senate members of the Census Bureau appropriations and oversight committees, and establishing a program of research directly related to the concerns that had been raised;
- Improved economic statistics through research on using alternatives to direct survey data collection to produce statistics that are timelier and have increased granularity, and carrying out three initiatives to advance the release of principal economic indicators on trade, retail sales and services, which allowed the Bureau of Economic Analysis to significantly reduce revisions to Gross Domestic Product (GDP) estimates;
- Recruited outstanding research staff including new senior leadership for Research and Methodology, the Director of a newly established big data center, and seven former Presidential Innovation Fellows; and
- Improved data dissemination to the public, including development of a platform to deliver data in ways that will meet the rapidly evolving demands of a growing body of users. In addition,

in order to meet immediate targeted demands two new tools were released: City SDK (Software Development Kit) to allow easy developer access; and Census Business Builder a tool that combines small area demographic and economic data in a way that is easily accessible for entrepreneurs and small business owners.

President and Executive Vice President, NORC at the University of Chicago – July 2002 to August 2013

NORC is a national non-profit organization that conducts high quality social science research in the public interest. As President, I had responsibility for all NORC corporate activities and for the quality of all NORC research efforts. I provided vision for NORC to establish the organization as a leader in the social science research industry. My accomplishments included:

- Strengthened the organization's high-quality, diverse staff;
- Broadened the scope of the collaborations between NORC and the University of Chicago;
- Realized nearly 50 percent growth in revenue and greatly expanding NORC's portfolio of business and research programs; and
- Provided leadership in the social science research community selected to be a Fellow of the American Statistical Association (ASA), elected to serve a term as Chair of the Social Statistics Section of the ASA, and chaired the 2009 ASA Committee on Fellows. Also elected as a member of the Committee on National Statistics, serving on two National Academy of Sciences panels addressing 2010 and 2020 Census concerns.

As Executive Vice President of Survey Operations (2002 – 2008), I provided oversight and direction to the Economics, Labor Force, and Demography Research Department, the Statistics and Methodology Department, and Survey Operations for field and telephone data collection. My major accomplishments included:

- Provided leadership and guidance for a major corporate initiative, the National Immunization Survey, which is conducted on behalf of the Centers for Disease Control and Prevention, and is the largest telephone survey in the United States conducted via random digit dialing for scientific purposes.
- Significantly increased the productivity and cost effectiveness of NORC's overall data collection activities;
- Successfully utilized skills in directing large project start-ups, and in managing large complex operations, directing the project through the completion of the first contract phase, which included the first year of data collection and the delivery of the first data set; and
- All survey operations were completed on schedule, and within budget including the delivery of an extremely complex data set, and a public use file.

Principal Associate Director and Associate Director for Decennial Census Programs, United States Census Bureau – 1997 to July 2002

Served as the senior career executive responsible for all aspects of the 2000 Decennial Census. This was the largest peacetime mobilization undertaken by the U.S. government, with a budget of \$6.5 billion, establishment of over 500 field offices, a temporary workforce that peaked at over 500,000, and establishment of telephone capacity to receive over 5 million calls over a period of one month. I was also chairman and director of the Executive Steering Committee for Accuracy & Coverage Evaluation Policy for the 2000 Census. This Committee was charged with making a recommendation as to whether or not to adjust the 2000 Census redistricting data for coverage errors, an issue fraught with political disagreement and controversy. This work was widely recognized as superb – with the Committee's recommendation supported by numerous reviews, including the National Academy of Sciences Panel on evaluating Census 2000.

EDUCATION

M.S. Virginia Polytechnic Institute and State University, 1975 Mathematics

Graduate course work in statistics - George Washington University 1977-1981

B.S. Virginia Polytechnic Institute and State University, 1973 Mathematics

PROFESSIONAL SERVICE AND ASSOCIATIONS

American Statistical Association, 1975 to Present

Chair, Social Statistics Section – 2011

Chair, ASA Committee on Fellows - 2009

National Academy of Sciences,

Member of the Committee on National Statistics – 2011 - 2013

Member of the Panel on the Design of the 2010 Census Program of Evaluations and Experiments

Member of the Panel to Review the 2010 Census

HONORS AND AWARDS

Virginia Tech College of Science Hall of Distinction inaugural class, 2013

Presidential Rank Award of Meritorious Executive, 2001

Department of Commerce, Gold Medal, U.S. Bureau of the Census, 2000

Elected Fellow of the American Statistical Association, 2000

Department of Commerce, Silver Medal, U.S. Bureau of the Census, 1998

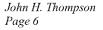
Department of Commerce, Bronze Medal, U.S. Bureau of the Census, 1988

Thompson, John H and Yablon, Robert. Issue Brief: "Preparing for the 2020 Census Considerations for State Attorneys General". American Constitution

2018

PAPERS AND PUBLICATIONS

	Society., October 10, 2018
2012	Thompson, John H. (Panel Member). "Panel Discussion: Considering Changing Sectors in the Research Industry?: Advice From Those Who Have Done It!" AAPOR 67th Annual Conference, Orlando, Florida, May 19, 2012
2012	Thompson, John H. (Discussant). "Future is Now: Realignment of Current Survey Management and Operations at the Census Bureau". Population Association of America 2012 Annual Meeting, San Francisco, California, May 4, 2012.
2012	Thompson, John H. (Discussant). "Use of Administrative Records in the 2020 Census." Federal Committee on Statistical Methodology, Washington, DC., January 10, 2012
2011	Weinberg, Daniel H. and Thompson, John H., "Organization and Administration of the 2010 U.S. Census." In Margo J. Anderson, Constance F. Citro, and Joseph J. Salvo (eds.) <i>Encyclopedia of the U.S. Census</i> , Second Edition, CQ Press., July 2011
2010	Thompson, John H., "Challenges, Innovation and Quality for the 21st Century" Keynote Speech at the 2010 FCSM Statistical Policy Seminar, Washington, DC, December 14, 2010.
2010	Thompson, John H., "The Future of Survey Research: Opportunities and Challenges" Paper presented at the Applied Demography Conference, San Antonio, Texas., January 11, 2010 and at the Population Association of America 2010 Annual meeting, Dallas, Texas, April 15, 2010.
2008	Thompson, John H. (Panel Member). "Panel Discussion: The American Community Survey: Promise, Products and Perspectives." Population Association of America Annual Meeting, New Orleans, Louisiana, April 17, 2008.
2006	Thompson, John H. (Discussant). "Census 2010: A New Census for the 21st Century." Population Association of America Annual Meeting, Los Angeles, California, March 30, 2006.
2004	Thompson, John H., "Interviewer Falsification of Survey Data." Paper presented at the Joint Meetings of the American Statistical Association, Toronto, Canada, August 11, 2004.
2003	Thompson, John H., "Is Interviewer Falsification Scientific Misconduct?" Roundtable paper presented at the American Association for Public Opinion Research 58 th Annual Conference, Nashville, Tennessee, May 16, 2003.
2002	Thompson, John H. (Discussant). "Eliminating the 2010 Census Long Form? – Current Status of the American Community Survey." Population Association of America Annual Meeting, Atlanta, Georgia, May 9, 2002.





Statistical Association, Philadelphia, Pennsylvania, August, 1984.

> 1983 Miskura, Susan M. and John H. Thompson, "1980 Census Findings and Their Implications for 1990 Census Planning." Presented at the Joint Statistical Meetings, Toronto, Canada, August, 1983.

> > Taeuber, Cynthia and John H. Thompson, "1980 Census Data: The Quality of the Data and Some Anomalies." Paper presented at the Annual Meeting of the Population Association of America, April, 1983.

1982 Fan, Milton C., John H. Thompson, Jay Kim, and Henry F. Woltman, "Sample Design, Estimation and Presentation of Sampling Errors for the 1980 Census Early Publications National Sample." Paper presented at the Annual Meetings of the American Statistical Association, Chicago, Illinois, August, 1982.

1981 Woltman, Henry F., Susan M. Miskura, John H. Thompson, and Peter A. Bounpane, "1980 Census Weighting and Variance Estimation Studies, Design and Methodology." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.

> Kim, Jay, John H. Thompson, Henry F. Woltman, and Stephen M. Vais, "Empirical Results from the 1980 Census Sample Estimation Study." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.

> Fan, Milton, C., John H. Thompson, and Susan M. Miskura, "1980 Census Variance Estimation Procedure." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.

> Thompson, John H., "Convergence Properties of the Iterative 1980 Census Estimator." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.

Thompson, John H., "The Nonhousehold Sources Program." Paper presented at the Annual Meetings of the American Statistical Association, San Diego, California, August, 1978.

1978

APPENDIX 2

Documents Relied Upon

U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19, April 13, 2020.

Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count, August 3, 2017.

U.S. Census Bureau 2020 Census daily response rate tracker, https://2020census.gov/en/response-rates.html (last accessed August 16, 2020).

U.S. Census Bureau, 2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU), Version 2.0 Final, July 15, 2019.

U.S. Census Bureau, *Review of 2020 Census Operational Plan Schedule*, https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/2020-operational-plan-schedule-review.pdf, August 17, 2020.

Zabarsky, Mark H, Principal Assistant Inspector General for Audit and Evaluation, 2020 Census Alert: The Census Bureau Faces Challenges in Accelerating Hiring and Minimizing Attrition Rates for Abbreviated 2020 Census Field Operations Final Memorandum No. OIG-20-041-M., Memorandum for Steven D. Dillingham, Director, U.S. Census Bureau, August 18, 2020.

Romalewski, Steven, Mapping "Self-Response" for a Fair and Accurate Census, Center for Urban Research at the Graduate Center, City University of New York, https://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center.pdf, August 7, 2020.

Kennedy, Courtney and Hartig, Hannah, *Response rates in telephone surveys have resumed their decline*, Pew Research Center report, February 27, 2019.

P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

Albert E. Fontenot, *Intended Administrative Data Use in the 2020 Census*, 2020 Census Program Memorandum Series: 2020.06, May 7, 2020.

Rastogi, Sonya and Amy O'Hara, 2010 Census Match Study, 2010 Census Planning Memorandum Series, No. 247, November 19, 2012

Response Area Outreach Mapper, Census.gov, www.census.gov/roam, (July 2018).

U.S. Census Bureau, 1990 Census of Population and Housing – History Field Enumeration 6-36, Report Number CPH-R-2, https://www.census.gov/library/publications/1996/dec/cph-r-2.html, 1996.

MEMORANDUM FOR: John P. Sheehan

Acting Assistant Director Prisoner Operations Division United States Marshals Service

From: Ron S. Jarmin

Deputy Director

Subject: Request for Authorized Use as Amendment #2 to May 31, 2018,

Agreement No. 0071-FY18-NFE-0010.000, "Memorandum of Understanding between The Department of Commerce, U.S. Census Bureau and The Department of Justice, United States

Marshals Service, To Support Decennial Census

Thank you for your continuing support to our data acquisition efforts pursuant to the May 31, 2018, Agreement No. 0071-FY18-NFE-0010.000, "Memorandum of Understanding between The Department of Commerce, U.S. Census Bureau and The Department of Justice, United States Marshals Service, To Support Decennial Census and subsequent addendum ("Modification 1 to the Memorandum of Understanding Through Which The U.S. Census Bureau is Acquiring Prisoner's Data From the Department of Justice, United States Marshals Service (0071-FY18-NFE-0010.001/M0001, signed September 16, 2019), to support our work under Executive Order 13880 to create estimates of citizenship status. I write to request that all United States Marshals Service data acquired under Agreement No. 0071-FY18-NFE-0010.000, and 0071-FY18-NFE-0010.001, be added as an approved use for a Census Bureau project responding to the *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

The U.S. Marshals Service's support to the citizenship project consisted of extracting and transferring to the Census Bureau two deliveries of data drawn from U.S Marshals Service component databases. Both deliveries have been received and we have since been analyzing those data. Based on that analysis, and the later introduction of the July 21, 2020 Presidential Memorandum, we recognized the value of these data to the Presidential Memorandum apportionment project.

Thank you in advance for your assistance with this request. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [HYPERLINK "mailto:michael.a.berning@census.gov"].



If U.S. Marshals Service is amenable to authorizing the use of U.S. Marshals Service data to support the July 2020 Presidential Memorandum, your signature below will signify concurrence. This will constitute Amendment #2 to the Agreement. **APPROVALS** On behalf of the Census Bureau, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein. Ron S. Jarmin (Date) **Deputy Director** U.S. Census Bureau On behalf of the U.S. Marshals Service, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein. John P. Sheehan (Date) **Acting Assistant Director Prisoner Operations Division** United States Marshals Service

Karl Mathis, Ph.D Assistant Director Information Technology Division United States Marshals Service



(Date)

More specifically, I am tasking this group to generate such a tabulation(s) so that the Secretary can deliver these estimates to the President at the same time the Census Bureau will deliver the basic tabulations of persons in each state as reported in the 2020 Census.

I am directing this team to produce such estimate of the undocumented immigrant population using methods that have been statutorily approved and judicially reviewed for apportionment. Moreover, the PM Working Group should pursue reasonable methods, which are based on generally acceptable statistical methods, in accordance to professional standards. Specifically, I am tasking this team to develop methods to:

- 1. Tabulate those persons counted in the 2020 Census that can be matched with administrative (i.e., detention centers, DACA, removal orders).
- 2. Assign an "undocumented/documented" status for all person counted in the 2020 Census by utilizing matched administrative records to produce a characteristic imputation for the entire population enumerated in the 2020 Census, consistent with existing imputation methods.
- 3. Produce state level estimates for this population based on a Residual Method.

Finally, as part of this effort, I am tasking the working group to produce indicators of quality, such as reliability or confidence intervals, as well as any other assessment, to inform the Secretary in determining the utility of these estimates.

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 30 2020

MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

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; NAVAJO NATION; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; CITY OF CHICAGO, Illinois; COUNTY OF LOS ANGELES, California; GILA RIVER INDIAN COMMUNITY,

Plaintiffs-Appellees,

V.

WILBUR L. ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF COMMERCE; STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau; UNITED STATES CENSUS BUREAU,

Defendants-Appellants,

and

STATE OF LOUISIANA; STATE OF MISSISSIPPI,

No. 20-16868

D.C. No. 5:20-cv-05799-LHK Northern District of California, San Jose

ORDER

Case: 20-16868, 09/30/2020, ID: 11842323, DktEntry: 27, Page 2 of 33

Intervenor-Defendants.

Before: RAWLINSON, CHRISTEN, and BUMATAY, Circuit Judges.

Order by Judges RAWLINSON and CHRISTEN, Dissent by Judge BUMATAY

On August 3, 2020, the United States Census Bureau (Bureau) adopted a census plan (Replan) that dramatically advanced critical deadlines for conducting the 2020 census. Appellees challenged this action pursuant to the Enumeration Clause of the United States Constitution and the Administrative Procedure Act (APA). On September 24, 2020, the district court entered a preliminary injunction staying the Replan's schedule for completion of census field operations and for reporting the census results to the President and enjoining the government from implementing these deadlines. The government has filed an emergency motion to stay the preliminary injunction pending appeal, and a request for an immediate administrative stay pending resolution of the stay motion. In this order, we consider only the request for an administrative stay.

The decennial census is an enormous and complex nationwide operation. It requires nearly a decade of planning and hundreds of thousands of dedicated workers to accomplish. In 2018, after years of planning and testing, the Bureau adopted a plan to complete the 2020 census. The plan called for an extraordinary

effort on the part of the government including hiring 340,000–500,000 field staff. For reasons stated in the record, the district court found that due to significant challenges encountered in the wake of COVID-19, the Bureau suspended field operations in March 2020. When operations resumed, the Bureau was unable to recruit sufficient numbers of field staff. In July 2020, the Bureau estimated that it only retained 38% of the field staff required to complete an accurate and timely census.

As a result of these serious challenges, the district court found that as early as April 2020, the Bureau, the Department of Commerce, and even the President had all publicly acknowledged that the December 31 deadline was no longer attainable. The Bureau adopted a new census plan in April to accommodate the delays caused by COVID-19 ("COVID-19 Plan"). The COVID-19 plan extended the deadline for each step in the process and contemplated that the Bureau would ask Congress for a 120-day extension of the December 31, 2020 delivery deadline for the completed census report. The Bureau's work proceeded according to the COVID-19 Plan until August 2020.

In early August, a "senior Department [of Commerce] official" directed the Bureau to change course and prepare a new plan for completing the census by the December 31, 2020 statutory deadline. Senior Bureau staff were given just four to five days to develop this "Replan." On August 3, 2020, the Bureau announced its

adoption of the Replan, and its central feature: accelerating the COVID-19 Plan's deadline for the completion of field work and data collection from October 31 to September 30. On September 24, the district court entered a preliminary injunction preventing the Bureau from implementing the September 30 deadline to stop field work and data collection. The government requests an immediate administrative stay of the district court's injunction.

I

The government has filed a single emergency motion seeking a stay pending appeal, and also seeking an administrative stay pending resolution of the motion for stay pending appeal. We recently established that an administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion for stay pending appeal." *Doe v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). Based on our preliminary review of the record, we conclude that the status quo would be seriously disrupted by an immediate stay of the district court's order.

As explained above, until August of this year, the Bureau had been operating for several months under the COVID-19 plan. That plan represented a revised schedule to account for the challenges caused by the COVID-19 pandemic. It included extended deadlines based on the understanding that the Bureau would

need additional time to complete the necessary field work and data processing to produce an accurate census report. The district court's September 5 temporary restraining order and September 24 preliminary injunction preserve the status quo because they maintain the Bureau's data-collection apparatus pending resolution of the appeal. By the time the district court entered its order, the Bureau had already begun winding down its field operations and terminating census field workers in anticipation of the Replan's accelerated September 30 deadline. The process of disbanding thousands of census workers will resume if an administrative stay is put in place, eliminating the Bureau's ability to conduct field work. Accordingly, on the facts of this case, staying the preliminary injunction would upend the status quo, not preserve it.

We are mindful of the potential harms faced by both parties. Here, not only would the status quo be upended by an administrative stay, the Bureau's ability to resume field operations would be left in serious doubt. Thousands of census workers currently performing field work will be terminated, and restarting these field operations and data collection efforts, which took years of planning and hiring efforts to put in place, would be difficult if not impossible to accomplish in a timely and effective manner. Granting the administrative stay thus risks rendering the plaintiff's challenge to the Replan effectively moot.

We also recognize that missing the December 31 statutory deadline risks

serious harm to the government. However, the record does not demonstrate that the Bureau's ability to meet that deadline is affected by the district court's injunction. Rather, 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. The President, senior Bureau officials, senior Department of Commerce officials, the Office of Inspector General, the Census Scientific Advisory Committee, and the Government Accountability Office have all stated that delivering a census by December 31 without compromising accuracy is practically impossible, and has been for some time. As the district court recognized, after the Bureau realized the pandemic would prevent it from adhering to its original schedule, the Bureau made two requests to Congress: first, it requested the December 31 deadline be extended to April 2021. When no final congressional action had been taken on that request in July, the Bureau requested \$443 million to cover the additional cost to complete the census by year's end. Contrary to the dissent's repeated assertion, the only undisputed fact in this sequence was that Congress has not given the Bureau the extension or the additional funding it needs to meet the statutory deadline.

The government did not counter the Appellees' showing on this point.

Citing the chorus of statements made by the Bureau and other officials, the district

court found that the Bureau could not meet the December 31 deadline. Indeed, despite the government's persistent argument in the district court and before our court that the September 30 deadline for terminating field operations is essential to meeting its December 31 statutory deadline, the administrative record compellingly supports the district court's conclusion that moving the October 31 deadline to September 30 will not allow the Bureau to complete the census on time.

Finally, we note that notwithstanding the pendency of the government's emergency request for an immediate administrative stay to allow the Replan's September 30 deadline to take effect, on September 28 the government again changed the deadline for completing field work. The government informed us in a September 28, 2020 letter, without explanation, that it now intends to end field operations on October 5, 2020. This abrupt change contradicts the government's argument that the September 30 date is vitally important to the Bureau's ability to meet its statutory reporting deadline. Our dissenting colleague cites a September 28 estimate suggesting that the census is 98% complete. This is still below the enumeration rate required by the Bureau's internal standards for generating an accurate census report. Further, the district court ruled on September 24 and found, as of that date, the Bureau had met its standard in only four states.

Given the extraordinary importance of the census, it is imperative that the

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

Our dissenting colleague makes four errors. First, the dissent applies the wrong standard for a preliminary administrative stay. In *Doe #1 v. Trump*, our circuit definitively resolved which standard applies to administrative stay motions. We are not free to depart from that standard. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (holding that a three-judge panel may not overrule a prior decision of the court). Citing the dissent from *Doe #1 v. Trump*, our colleague applies the factors used when we consider a motion for stay pending appeal. This analysis erroneously collapses the distinct legal analyses for an administrative stay and a motion for stay pending appeal. When considering the request for an administrative stay, our touchstone is the need to preserve the status quo. We defer weighing the *Nken*¹ factors until the motion for stay pending appeal is considered. *See Doe #1*, 944 F.3d at 1223.

Second, as a consequence of its threshold error, the dissent does not grapple

¹ Nken v. Holder, 556 U.S. 418, 426 (2009).

with the factor that drives the outcome of the government's motion: the Bureau's apparatus for conducting field work will be dismantled before the motion for stay pending appeal can be decided. The dissent does not dispute that issuing an administrative stay in this case would return the Bureau to the process of dismantling its data-collection infrastructure and terminating its field staff.

Third, although we need not wade into the underlying merits of the issues on appeal, we would be remiss if we did not note that the dissent hinges on the unsupported premise that the Bureau can meet the December 31 deadline if an administrative stay is issued. The dissent's assumption that the agency can still meet its deadline relies entirely upon one conclusory statement that was not in the administrative record but was instead prepared for litigation. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1908 (2020) (explaining that an agency's *post hoc* rationalizations "must be viewed critically"); *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008) (rejecting a justification for agency action that "is entirely absent from the administrative record"). Given the consistent picture painted by the administrative record, it is not surprising the district court was unpersuaded by this sole conclusory statement.

Fourth, the dissent addresses several issues that are not properly before us at the administrative stay stage. The government's emergency motion does not contest the district court's conclusion that Appellees have standing to bring their

claims. Nor does the emergency motion challenge the district court's conclusion that the Bureau's decision to adopt the Replan is an unreviewable political question. Thus, those issues are not properly before us and we do not reach them.

Because the status quo would be upended, rather than preserved, if an administrative stay is issued, the government's request for an immediate administrative stay set forth in Docket Entry No. 4 is denied.

Appellees' response to the emergency motion is due October 2, 2020.

Appellants' optional reply is due by October 3, 2020.

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FILED

National Urban League v. Ross, No. 20-16868 Bumatay, J., dissenting

SEP 30 2020

MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS

COVID-19 has wreaked an undeniable toll on the Nation. The virus has already stolen too many American lives. Even more have been hospitalized or fallen ill. And nearly every American's plans this year have been roiled by the virus. But it cannot roil the law. Contorting the Administrative Procedure Act, and liberating itself from any semblance of judicial restraint, the district court injected itself into a sensitive and politically fraught arena: the 2020 census. After the Department of Commerce adopted a plan to address census delays from the COVID-19 pandemic, plaintiffs brought suit under the APA. Upon reviewing the internal deliberative emails of the agencies, the district court decided that it knows better than the Secretary of Commerce. Based on internal discussions about the agency's ability to complete the census in a timely and accurate fashion, the district court essentially overruled the Secretary's decision to adopt the revised plan. But it is undisputed that this new plan was the only way to meet the statutory obligation to report the census results to the President by December 31, 2020. No matter for an adventurous district court: it simply cast aside the statutory deadline as part of its injunction.

Because the district court was without authority to issue its injunction, the defendants are likely to succeed on the merits, and they will be irreparably harmed

without relief, I would have granted the request for an administrative stay. Accordingly, I respectfully dissent.

T.

A census is required by our Constitution, which provides that the "actual Enumeration" of the population shall be conducted "in such Manner as [Congress] shall by Law direct." U.S. Const. Art. I, § 2, cl. 3. As should be evident from this text, besides requiring that such an enumeration shall occur, the Constitution otherwise vests "virtually unlimited discretion" with Congress. Wisconsin v. City of New York, 517 U.S. 1, 19 (1996); see also Baldrige v. Shapiro, 455 U.S. 345, 361 (1982) (recognizing Congress's broad discretion over the census). Congress, in turn, has vested substantial discretion with the Secretary of Commerce to determine how to conduct the decennial census. See 13 U.S.C. § 141(a); Wisconsin, 517 U.S. at 19 ("Through the Census Act, Congress has delegated its broad authority over the census to the Secretary."). But there's one aspect that Congress did not delegate: the date for completion of apportionment counts. 13 U.S.C. § 141(b). That deadline is etched in stone: December 31, 2020. And

¹ Congress has provided for other deadlines as well. For example, the Census Bureau must "take a decennial census of the population" starting on April 1, 2020, and report the results to the President by December 31, 2020 (the deadline primarily at issue in this case). See 13 U.S.C. § 141(a)-(b). After receiving this report, the President must calculate "the number of Representatives to which each State would be entitled" and transmit that information to Congress by January 10,

there's one branch Congress has not delegated any census decisions to: the judiciary.

Cognizant of its statutory deadlines—but unaware of the looming health crisis—the Census Bureau adopted a final operational plan for the 2020 Census in December 2018. This plan has two major phases: a data-collection phase and a data-processing phase. During the data-collection phase, field employees follow up at non-responding addresses and collect other crucial information. Only after this phase is complete can the Bureau begin processing the collected data to report to the President by the December 31 deadline.

But even the best laid plans can go awry. Just as the data collection phase was set to begin, the COVID-19 pandemic struck, forcing the Bureau to suspend its field operations for four weeks. To resume those operations, the Bureau adopted the COVID-19 Plan on April 13, 2020, which set new deadlines for the data collection and dating processing phases, on the assumption that Congress would extend the statutory deadlines by 120 days. Congress did not act, however, so the Bureau adopted the "Replan" schedule, which outlined expedited deadlines designed "to accelerate the completion of data collection [] by our statutory deadline of December 31, 2020, as required by law[.]" According to the Bureau, it was able to meet this

^{2021.} See 2 U.S.C. § 2a(a). Finally, the Bureau must report a tabulation of population for redistricting to the states by March 31, 2021. See 13 U.S.C. § 141(c).

compressed timeframe by (1) offering financial incentives to increase the number of hours each enumerator worked and achieve the "same work hours as would have been done under the original time frame"; and (2) taking advantage of updated software and processing capabilities not available during the 2010 Census in order to maximize enumerator effectiveness. An Associate Director at the Bureau attests that the agency "is confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline following the Replan Schedule." (emphasis added).² Under this plan, field operations would conclude by September 30, and data processing would begin on October 1. The Bureau asserts that it must complete the data collection phase by September 30 and turn to the data processing phase by October 1 to meet its December 31, 2020 deadline. See Motion at 1. On September 28, 2020, the Bureau extended its internal deadline slightly: setting October 5, 2020 as the target date for concluding field operations.³ As of September 28, 2020, the Bureau reports over 98% enumeration nationwide.⁴

II.

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² Inexplicably, the majority's decision simply ignores this attestation when claiming that even under the Replan, "the Bureau will be unable to deliver an accurate census by December 31, 2020." Majority Op. at 5.

³ United States Census Bureau, 2020 Census Update,

https://www.census.gov/newsroom/press-releases/2020/2020-census-update.html

⁴ United States Census 2020, *Total Response Rates by State*,

https://2020census.gov/en/response-rates/nrfu.html

Whether to grant a request for a stay is governed by the familiar four-factor test: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Doe #1 v. Trump*, 944 F.3d 1222, 1225 (9th Cir. 2019) (Bress, J., dissenting) (simplified). 5

We should have granted an administrative stay here because defendants are likely to succeed on the merits. The Secretary's decision to adopt the Replan—rather than simply ignore a statutory deadline—was not arbitrary and capricious. At bottom, the district court's APA analysis seems to turn on the court's apparent disagreement with whether the census will be sufficiently accurate under the Replan. But the accuracy of the census is likely a nonjusticiable political question; a properly deferential review would find the Replan satisfies statutory and constitutional requirements; and the plaintiffs here do not appear to have standing

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⁵ The majority suggests that I apply the "wrong standard for a preliminary administrative stay." Majority at 7. But as Judge Bress has already persuasively explained: "the instant request for a temporary stay is part of the request for a stay pending appeal, and the Court cites no authority for why the usual stay factors—including likelihood of success on the merits—would not apply." *Doe #1*, 944 F.3d at 1226 (Bress, J., dissenting). We can't simply ignore the fact that the government is likely to prevail on the merits here. That's particularly true where, like here, the parties have addressed the merits in the request for a stay and the opposition thereto. *See id*.

because their alleged injuries are not redressable. I discuss each flaw with the district court's injunction in turn.

A.

Putting aside momentarily the fact that the crux of this case is not justiciable, *see, infra,* § II-B and II-C, and assuming that the APA applies here and that the Replan can be considered a "final agency action," *cf. NAACP v. Bureau of the Census,* 945 F.3d 183, 189 (4th Cir. 2019) (challenges to 2020 census "design choices" were not final agency actions under the APA), the Replan does not violate the APA.

Under the APA, agencies must engage in "reasoned decisionmaking."

Michigan v. EPA, 576 U.S. 743, 750 (2015). Where census decisions are concerned, this only requires the Secretary to "examine the relevant data and articulate a satisfactory explanation for his decision." Department of Commerce v. New York, 139 S.Ct. 2551, 2569 (2019). "We may not substitute our judgment for that of the Secretary." Id. Nor may we "subordinat[e] the Secretary's policymaking discretion to the Bureau's technocratic expertise." Id. at 2571 (Bureau staff's conclusions are not "touchstones of substantive reasonableness."); accord Wisconsin, 517 U.S. at 23 (Because it is the Secretary "to whom Congress has delegated its constitutional authority over the census," "the mere fact that the

Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision.").

To make reasoned decisions, agencies must consider "significant alternatives." *Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1232 (9th Cir. 1993). The defendants did so. As a Bureau Associate Director explained, the Bureau "considered a variety of options and evaluated risks" in crafting the Replan, ultimately "select[ing] those that we believed presented the best combination of changes to allow us to meet the statutory deadline without compromising quality to an undue degree." Although the Replan compressed several steps, which might "increase the risk" of errors, the Associate Director explained that efficiencies new to the 2020 Census nevertheless allowed the Replan to "achieve a complete and accurate census."

The core of the district court's reasoning is that the Secretary erred in considering the deadline fixed and then trying to maximize accuracy within that constraint. The court thought the Secretary should have been more flexible and considered other alternatives. But all of the alternatives would require the Bureau to consciously blow a statutory deadline. For example, the district court suggests the defendants could have considered "not adopting the Replan while striving in good faith to meet statutory deadlines." Or, as the plaintiffs put it, "Defendants could have continued to operate under the COVID-19 Plan while striving to meet

statutory deadlines." But the COVID-19 Plan was premised on Congress extending the statutory deadlines. By adhering to that plan despite Congress's inaction, the defendants would necessarily not be striving in good faith to meet the deadline; they would be consciously abandoning it.⁶ "An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives." *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996). Thus, *a fortriori*, an agency need not consider alternatives that violate the law. The Bureau cannot be liable for failing to consider an alternative that would undisputedly violate the clear deadline set by Congress to obtain marginal improvements (of some unknown degree) to the census.

The district court also erred in determining that the Secretary's reason for adopting the Replan ran contrary to the facts. The district court noted that some Bureau employees thought it would be impossible to accurately complete the census by December 31, given the COVID-19 delays.⁷ But each statement relied

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⁶ This same core defect infects the other proposed alternatives, such as making "good faith efforts to meet the deadline" short of adopting the Replan and "balanc[ing]" accuracy and timeliness concerns.

⁷ The court also suggests that the Commerce Department pressured the Bureau to cease seeking an extension of the deadline, though nothing in the record before this panel suggests this is so, and the district court's citations show only that the Bureau did not affirmatively request an extension in certain instances. Even if that were true though, it cannot undermine the Bureau's stated reason that it adopted the

on was made *before* the Replan, which the Bureau's Associate Director has attested will reach sufficient levels of accuracy. In any event, "there is nothing even unusual" about a Cabinet secretary "disagreeing with staff, or cutting through red tape." New York, 139 S. Ct. at 2580 (Thomas J., concurring in part and dissenting in part). The Secretary is owed "wide discretion" in this arena because "it is he to whom Congress has delegated its constitutional authority over the census." Wisconsin, 517 U.S. at 22; see 13 U.S.C. § 141(a). Dissent from inferior employees at the Bureau cannot constitute "facts" that the Secretary's decision runs "contrary" to. See Wisconsin, 517 U.S. at 23 ("[T]he mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision."). To hold otherwise would impermissibly "subordinat[e] the Secretary's policymaking discretion to the Bureau's technocratic expertise." New York, 139 S. Ct. at 2571.

Finally, the district court concluded that the defendants "failed to sufficiently consider" their obligations to produce an accurate census because "the Replan will decrease the census's accuracy and undercount historically undercounted

Replan because it realized Congress would not extend the deadline. *See New York*, 139 S. Ct. at 2576 (2019) (Thomas J., concurring in part and dissenting in part) (courts defer to executive agency and it is entitled to a presumption of regularity in part because crediting accusations of pretext, which can be easily lodged by "political opponents of executive actions to generate controversy," could "lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes").

individuals." But the need to consider accuracy does not give courts license to act as a super Census Bureau. The Secretary is "required to consider the evidence and give reasons for his chosen course of action," but "[i]t is not for us to ask whether [the] decision was 'the best one possible' or even whether it was 'better than the alternatives." *New York*, 139 S. Ct. at 2571 (citation omitted). The Bureau fulfilled the deliberative requirement by considering the Replan's impact on accuracy. *See Providence v. Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010) (Agency action is arbitrary and capricious where the agency "*entirely failed*" to consider an important aspect of the problem.) (emphasis added).

B.

Although the district court ostensibly conducted APA review of the procedures the Secretary used to adopt the Replan, the crux of the court's decision is its view that the Replan would not produce an accurate census. But the "accuracy" requirement is a general duty arising from the Census Act, not a specific statutory or constitutional mandate. *See New York*, 139 S. Ct. at 2568–69 ("[B]y mandating a population count that will be used to apportion representatives, *see* [13 U.S.C.] § 141(b), 2 U. S. C. § 2a, the Act imposes a 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.") (simplified). And it is

for the Secretary, under the authority Congress delegated to him, to balance the need for accuracy against the statute's hard deadline.

Although justiciability arguments are only raised briefly on the pending motion for a stay, "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011). Deciding whether the census meets a free-floating concept of "accuracy" is exactly the type of political question that courts are powerless to adjudicate. Virtually all of the factors announced in Baker v. Carr, 369 U.S. 186 (1962), support a finding of this being a nonjusticiable political question. Principally, the district court's "accuracy" requirement is not amenable to "judicially discoverable and manageable standards." See id. at 217. How accurate is accurate enough? See, e.g., Department of Commerce v. United States House of Representatives, 525 U.S. 316, 322 (1999) ("[T]he Bureau has always failed to reach—and has thus failed to

⁸ These factors include: a textual commitment of the issue to a coordinate political branch, a lack of judicially discoverable and manageable standards for resolving it, the impossibility of deciding without an initial policy determination of the kind clearly for nonjudicial discretion, or the impossibility of a court's undertaking independent resolution of the question without expressing a lack of respect due coordinate branches of government. *Baker*, 369 U.S. at 217.

count—a portion of the population.").⁹ And what standard are courts to use when evaluating accuracy anyway? Neither the district court nor this panel offer any answers.

But the answer is actually quite simple: it would be impossible for us to decide this case "without an initial policy determination of the kind clearly for nonjudicial discretion." *See Carr*, 369 U.S. at 217. Even under ordinary circumstances, the Secretary and Bureau must juggle many important considerations when designing the census plan. For example, in choosing the date for when to end its data-collection phase and begin its data-processing phase, the defendants must consider the trade-offs between terminating field operations (even though not everyone has been counted) against the time needed to process the data into the Secretary's report to the President and the States. *See* 2 U.S.C. § 2a(a); 13 U.S.C. § 141(c); *see also NAACP*, 945 F.3d at 191 ("Setting aside' one or more of these 'choices' necessarily would impact the efficacy of the others, and inevitably would lead to court involvement in 'hands-on' management of the Census

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⁹ See also Wisconsin, 517 U.S. at 6 ("[Various] errors have resulted in a net 'undercount' of the actual American population in every decennial census."); Karcher v. Daggett, 462 U.S. 725, 732 (1983) (recognizing that "census data are not perfect," and that "population counts for particular localities are outdated long before they are completed"); Gaffney v. Cummings, 412 U.S. 735, 745 (1973) (remarking that census data "are inherently less than absolutely accurate"); accord C. Wright, History and Growth of the United States Census 16-17 (1900) (noting that the accuracy of our first census in 1790 was seriously questioned by the man who oversaw its implementation as Secretary of State, Thomas Jefferson).

Bureau's operations."). With each decision, the Bureau must consider (and choose among) the various tradeoffs each option presents. By requiring the Bureau to prioritize an elusive standard of accuracy over and above the interest in completing the census in a timely manner, *as prescribed by Congress*, the court substitutes its own policy determination for those set by Congress and delegated to the Secretary.

Analogous cases have held similar claims to be nonjusticiable political questions. Just last year the Court held that trying to decide among "different visions of fairness" for districting maps is an "unmoored determination of the sort characteristic of a political question beyond the competence of the federal courts." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499–2500 (2019) (internal quotations omitted); *accord Nixon v. United States*, 506 U.S. 224 (1993) (constitutional provision granting the "the sole Power to try all Impeachments" does not "provide an identifiable textual limit on the authority which is committed to the Senate"). So too here: determining the "accuracy" of the census is no more of a judicial question than determining the "fairness" of districting maps. ¹⁰

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¹⁰ Nor does the fact that plaintiffs brought their claims under the APA change the political question analysis. *See* 5 U.S.C. § 702 ("Nothing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground[.]"); *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 366 (4th Cir. 2018) (Niemeyer, J., dissenting) ("§ 702(1)'s recognition of 'other limitations' on the scope of APA review reflects Congress's intent to maintain longstanding prudential limits confining the judiciary to its proper role in our constitutional

To be sure, courts may entertain some challenges to census-related decisions. But cases treating such challenges as justiciable involved narrow and deferential review—not a freewheeling inquisition into the "accuracy" of the census. In Department of Commerce v. New York, for example, the Court considered whether the Secretary could add a citizenship question to the census consistent with the Enumeration Clause and Census Act. 139 S. Ct. at 2566, 2569. On the constitutional challenge, the Court reviewed only for whether the addition of the challenged question bore a "reasonable relationship to the accomplishment of an actual enumeration." Id. at 2566. On the statutory question, the Court deferentially considered "whether the Secretary examined the relevant data and articulated a satisfactory explanation for his decision." *Id.* at 2569. The Court's other census cases likewise involved this type of narrow and deferential review. See Wisconsin, 517 U.S. at 19–20 ("[S]o long as the Secretary's conduct of the census is consistent with the constitutional language and the constitutional goal of equal representation, it is within the limits of the Constitution.") (simplified); Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) (similar); see also U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 458–59 (1992) ("The polestar of equal

system, such as the political question doctrine."); *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 92 (D.D.C. 2016) (holding that political question doctrine precluded review of APA claims).

representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course" among multiple options.).

When our review morphs beyond these precedents into an interrogation of "accuracy," of the type underlying the district court's APA analysis here, we are beyond our proper role as judges. Some legal questions—even ones arising under the same constitutional provision as previously justiciable questions—might prove to be nonjusticiable. See New York v. United States, 505 U.S. 144, 185 (1992) ("[T]he Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions" even if most do). Thus, while the court might be competent to decide whether a particular decision bears a "reasonable" relationship" to the goal of an "actual enumeration," the same cannot be said of evaluating the "accuracy" of a census. Indeed, the Court has rejected the claim that its prior cases require "a census that was as accurate as possible" and has recognized that "[t]he Constitution itself provides no real instruction" on how to measure the "accuracy" of a census. Wisconsin, 517 U.S. at 18; see also Tucker v. U.S. Dep't of Commerce, 958 F.2d 1411, 1417 (7th Cir. 1992) (Posner, J.) ("It might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a judicially administrable standard.").

We cannot mechanically apply the political question doctrine, which must be considered in light of the important separation of powers function it performs. A court's authority to act depends on a threshold question of the "appropriate role for the Federal Judiciary": whether the claims brought "are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere." Rucho, 139 S. Ct. at 2494 (emphasis in original). Here, these background principles weigh in favor of not adjudicating this dispute. No census has been, or can be, fully accurate, according to the Court. See Wisconsin, 517 U.S. at 6 ("Although each [census] was designed with the goal of accomplishing an 'actual Enumeration' of the population, no census is recognized as having been wholly successful in achieving that goal."). Determining what level of accuracy is sufficient is simply not something that the judicial branch is equipped to do. 11 Indeed, "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the

¹¹ The district court and plaintiffs seem to think that the district court's injunction does not require judicial supervision over the accuracy of the census. Instead, they frame the injunction as merely preventing the Secretary from adopting the Replan because it failed to follow the requisite procedures for doing so. But the crux of the district court's injunction is its disagreement with the Secretary's resolution of how to balance accuracy of the census against the statutory deadline. *See, infra*, § II-A. And in ordering relief, the district court has inserted itself at the top of the Executive branch's census operation. *See* Motion at 17 (describing ongoing supervision of the district court under the preliminary injunction).

electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). By allowing census-accuracy supervision under the guise of APA review, we have "given the green light for future political battles to be fought in this Court rather than where they rightfully belong—the political branches." *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1919 (2020) (Thomas, J., concurring in part and dissenting in part).

C.

Plaintiffs also likely fail to establish Article III standing, given that they have not shown that their alleged injury is redressable by the courts, even assuming the other standing requirements are met. An injury is necessarily not redressable if the court has no authority to authorize the relief requested. *See Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.) ("Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury."); *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1199 (9th Cir. 2017) (holding that a lawsuit seeking to enforce a treaty right was not redressable because "the federal courts have no power to right or to prevent . . . violat[ions of] a non-self-executing treaty provision").

Clearly, a district court has no authority to order an Executive agency to disobey a Congressional statute. Neither the district court nor plaintiffs have cited

any authority for this unprecedented expansion of the judicial power to decide cases and controversies. See U.S. Const. Art. III, § 2. Congress makes laws, the Executive enforces them, and we interpret them in the course of adjudicating disputes. Absent the metaphorical "striking down" of an unconstitutional statute, we are impotent to set aside congressionally enacted laws. See United States v. Booker, 543 U.S. 220, 283 (2005) (Stevens, J., dissenting in part) ("[T]he Court simply has no authority to invalidate legislation absent a showing that it is unconstitutional. To paraphrase Chief Justice Marshall, an 'act of the legislature' must be 'repugnant to the constitution' in order to be void." (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803))). Here, no one challenges the constitutionality of the statute establishing the Secretary's deadline. Accordingly, the district court had no authority to ignore it—let alone order an Executive agency to do so.

All of the cases relied on by the district court to enjoin operation of the statute, despite not finding any constitutional infirmity, are wholly inapposite.

None suggest that a court can require an agency to *disobey* a statute; they merely confirm that an agency is not necessarily precluded from acting, even if it is doing so after a statutory deadline. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (holding that despite statute's mandatory deadline, post-deadline action taken by the agency was not void because there was no Congressional intent

that agency would be deprived of statutory authority to act if it did so beyond the deadline); *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1304 (D.C. Cir. 1991) (similar). The fact that an agency can—depending on the text, structure, and history of the statue at issue—continue to act beyond its statutory deadline, says nothing about a court's authority to *require* an agency to do so.

D.

An agency's decision on how to respond to a once-in-a-century pandemic, in order to meet its statutory deadline, is quintessentially the type of decision we should give substantial deference to. Throughout this pandemic, we've deferred to the elected branches to determine how to best respond, even when shuttering our churches and businesses. See, e.g., S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 939 (9th Cir. 2020) (denying Free Exercise Clause challenge to application of California's stay-at-home order to in-person religious services based on deference to elected branches during pandemic). We've done so despite our role in protecting individuals' constitutional rights. See On Fire Christian Ctr., Inc. v. Fischer, 2020 WL 1820249, at *6 (W.D. Ky. 2020) (although "a state may implement emergency measures that curtail constitutional rights" during a pandemic, it cannot enact measures that are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law"). If deference is appropriate there, surely it is doubly appropriate here, where courts are already required to

show deference to the agencies. *See New York*, 139 S. Ct. at 2578 & n.3 (Thomas, J., concurring in part and dissenting in part) (explaining highly deferential review of an "agency's discretionary choices and reasoning under the arbitrary-and-capricious standard"); *Wisconsin*, 517 U.S. at 19–20 (explaining narrow and deferential review of Secretary's census decision). Simply put, there's no basis to anoint ourselves supervisors of this sensitive process at the eleventh hour.

III.

At a minimum, we should have granted an administrative stay while we further considered the underlying motion to stay the injunction pending appeal. The government faces irreparable harm from our refusal to do so. It's undisputed that if the government cannot finalize the data collection phase of the census and move into the data processing phase in a timely fashion, it will likely miss its statutory deadline.

Thus, even if the court ultimately rules for the defendants on the merits, it might not matter much: the plaintiffs will have effectively secured the relief they seek on the merits (e.g., a delay of moving into the data processing phase). In contrast, the defendants have said only that it would be "difficult" to rehire and redeploy workers once terminated, if they are allowed to do so, but not that it would be impossible to revamp these workers if needed. Accordingly, although an administrative stay would be inefficient if ultimately reversed later, the damage

would not be irreparable. At most it would present a bureaucratic hassle for the agencies. The same cannot be said for the majority's decision to deny the administrative stay. Similarly, the district court, and now the majority, fail to consider the harms that irreparably flow to other States. *See* Amicus Brief at 8 ("The effect of the TRO was to run up the census tally in Plaintiffs' jurisdictions at the expense of lagging jurisdictions like Louisiana and Mississippi."); *id.* at 8–9 (noting "disruption of redistricting and reapportionment in 24 states that have constitutional or statutory deadlines" tied to census).

Finally, the status quo here, to the extent that's relevant, is the legal landscape that would have existed prior to the district court's judicial misadventure. *See Doe #1*, 944 F.3d at 1229 (Bress, J., dissenting) (explaining that preserving the status quo is not an enumerated factor, but in any event, an administrative "stay simply suspends judicial alteration of the status quo, while the injunctive relief granted below constitutes judicial intervention upending it") (simplified). Accordingly, we should have granted the request for an administrative stay to restore the parties to the positions they were in prior to the district court's decision.

IV.

Despite its errors, the district court deserves some credit. It seems to have been motivated by a valiant attempt to balance two competing priorities: accuracy

of the census versus timeliness under the statutory deadline. But the elected branches have already done this balancing. The Secretary of Commerce was briefed on all of the Bureau employee concerns the district judge found persuasive. The Secretary considered those concerns, and then, in exercising the role that the President appointed him to perform, made the decision to proceed with the Replan. "By second-guessing the Secretary's weighing of risks and benefits and penalizing him for departing from the Bureau's" views about the Replan, the district court, and now the majority, "substitute[] [their] judgment for that of the agency." New York, 139 S.Ct. at 2571. Likewise, Congress was aware of the potential problem and did not extend the deadline. The House of Representatives held committee hearings and ultimately voted on a bill to extend the deadline. The Senate received the bill, held committee hearings on it, but then took no further action—and hasn't since July 2020.¹² Plaintiffs suggest that the Senate might act on the bill soon.¹³

There is no basis for the judiciary to inject itself into this sensitive political controversy and seize for itself the decision to reevaluate the competing concerns between accuracy and speed, after the elected branches have apparently done so

¹² https://www.congress.gov/bill/116th-congress/house-bill/6800/all-actions?overview=closed

¹³ Plaintiffs' Opposition at 14 n.1 (citing Hansi Lo Wang, Bipartisan Senate Push to Extend Census Begins Weeks Before Count Is Set to End, NPR (Sept. 15, 2020), https://www.npr.org/2020/ 09/15/913163016/bipartisan-senate-push-to-extend-census-begins-weeks-before- count-is-set-to-end)

already—or are actively doing so now. *See Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring) ("Failure of political will does not justify unconstitutional remedies."). Plus, had we ruled for the defendants, nothing would have prevented the elected branches from revisiting this dispute at a later date. A belated fix might entail additional cost and delay that the district court's injunction avoids. But in our constitutional design, courts are not empowered to swoop in and rescue the elected branches from themselves. If additional cost and delay is the consequence of Congress's inaction, or the Secretary's decision to adopt the Replan, then so be it. The recourse for such problems lies with the People themselves at the ballot box—not with unelected and unaccountable judges in chambers.

I respectfully dissent.

SOUTHERN DISTRICT OF NEW YORK	X	
STATE OF NEW YORK, et al.,	:	
Plaintiffs,	•	20-CV-5770 (RCW) (PWH) (JMF)
-V-	•	
DONALD J. TRUMP, in his official capacity as President of the United States, et al.,		
Defendants.	•	
	X :	
NEW YORK IMMIGRANT COALITION, et al.,	:	20-CV-5770 (RCW) (PWH) (JMF)
Plaintiffs,	•	(Consolidated)
-V-	:	
DONALD J. TRUMP, in his official capacity as President of the United States, et al.,	:	FINAL JUDGMENT AND PERMANENT INJUNCTION
Defendants.	: : : V	
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Before: RICHARD C. WESLEY, United States Circuit Judge

PETER W. HALL, United States Circuit Judge JESSE M. FURMAN, United States District Judge

Pursuant to the Court's Opinion and Order of September 10, 2020, it is ORDERED, ADJUDGED, and DECREED as follows:

FINAL JUDGMENT

Final judgment is entered for Plaintiffs and against Defendants on Plaintiffs' claims arising from an *ultra vires* violation of 2 U.S.C. § 2a and 13 U.S.C. § 141 (namely, the Fifth Claim for Relief in the Governmental Plaintiffs' Amended Complaint and Count Two in the NGO Plaintiffs' Amended Complaint).

DECLARATION AND PERMANENT INJUNCTION

The July 21, 2020 Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census (the "Presidential Memorandum"), announcing that it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status, is DECLARED unlawful as an *ultra vires* violation of Congress's delegation of authority to conduct the decennial census and apportionment calculation pursuant to 2 U.S.C. § 2a and 13 U.S.C. § 141.

The Secretary of Commerce in his official capacity, the Director of the Census Bureau in his official capacity, the U.S. Department of Commerce, and the U.S. Census Bureau, and any successors to those offices, together with their agents, servants, employees, attorneys, and other persons who are in active concert or participation with the foregoing, *see* Fed. R. Civ. P. 65(d)(2), are PERMANENTLY ENJOINED from including in the Secretary's report to the President pursuant to Section 141(b) any information permitting the President to exercise the President's discretion to carry out the policy set forth in section 2 of the Presidential Memorandum — that is, any information concerning the number of aliens in each State who are not in a lawful immigration status under the Immigration and Nationality Act.

SO ORDERED.

Dated: September 10, 2020
New York, New York
RICHARD C. WESLEY
United States Circuit Judge

/s/
PETER W. HALL
United States Circuit Judge

/s/
JESSE M. FURMAN
United States District Judge

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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 GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

Re: Dkt. No. 66

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 Administrative Procedure Act.

Before the Court is Plaintiffs' September 3, 2020 motion for a temporary restraining order

Case No. 20-CV-05799-LHK

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER DOC-CEN-2020-001602-002306

Northern District of California

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("TRO motion"), enjoining Defendants from implementing Defendants' August 3, 2020 Replan,
which shortens census data collection and processing timelines from the eight months set forth in
the Defendants' April 13, 2020 COVID-19 Plan to four months. Plaintiffs claim that the Replan's
shortened timelines will unlawfully harm the accuracy of crucial census data. Plaintiffs request
that the TRO remain in effect for twelve days, until the September 17, 2020 hearing on Plaintiffs'
motion for stay and preliminary injunction ("PI motion").

Temporary restraining orders "serv[e] the[] underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty., 415 U.S. 423, 439 (1974); accord, e.g., E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 779 (9th Cir. 2018) ("a TRO 'should be restricted to . . . preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing and no longer") (ellipsis in original).

"[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction [or TRO], so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction [or TRO] is in the public interest." All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011); accord Short v. Brown, 893 F.3d 671,675 (9th Cir. 2018) (holding that these factors are "on a sliding scale"). Thus, "when the balance of hardships tips sharply in the plaintiff's favor, the plaintiff need demonstrate only 'serious questions going to the merits.'" hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 992 (9th Cir. 2019) (quoting All. for the Wild Rockies, 632 F.3d at 1135). The issuance of a TRO is at the Court's discretion. See All. for the Wild Rockies, 632 F.3d at 1131.

The Court has considered the TRO motion, opposition, and reply; the parties' oral arguments at the September 4, 2020 TRO hearing; the PI motion and opposition; the relevant law; and the record in this case. Below the Court analyzes in turn (1) the presence of serious questions going to the merits; (2) irreparable harm; (3) the balance of hardships; and (4) the public interest. All. for the Wild Rockies, 632 F.3d at 1135.

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The Court finds that Plaintiffs have presented serious questions going to the merits at least as to Plaintiffs' claims under the Administrative Procedure Act ("APA"). The Court does not prejudge these claims, but merely recognizes that the Plaintiffs have presented serious questions going to the merits of these claims.

For example, there are serious questions as to whether the Replan is reviewable by this Court. There is a serious question as to whether Plaintiffs have standing to challenge the Replan. See Dep't of Commerce v. New York, 139 S. Ct. 2551, 2565-66 (2019) (holding that Plaintiffs had standing because an undercount of "as little as 2%" of noncitizen households constituted an injury in fact and was traceable to the Defendants' actions). Additionally, there is a serious question as to whether the Replan constitutes final agency action. Although the United States Supreme Court decided in Franklin v. Massachusetts that the Secretary of Commerce's transmission of a final Census report to the President is not final agency action, there is a serious question as to whether Franklin governs the facts in the instant case. 505 U.S. 788, 798 (1992) (explaining that the transmission was not final agency action because it "carries no direct consequences for the apportionment"). Finally, there is a serious question as to whether the Replan is committed to agency discretion by law. See Dep't of Commerce v. New York, 139 S. Ct. at 2568 (noting that "census-related decisionmaking" is traditionally reviewable under the Administrative Procedure Act).

There are also serious questions as to whether the Replan was arbitrary and capricious in violation of the APA. See 5 U.S.C. § 706(2)(A). The APA requires that Defendants consider the "important aspect[s] of the problem" before them. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983). Although Defendants justify the Replan based on the statutory deadline, Plaintiffs suggest that Defendants have failed to consider their other statutory obligations, including the statutory requirement that Defendants "conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." Dep't of Commerce v. New York, 139 S. Ct. at 2569 (quoting Franklin, 505 U.S. at 819–20 (Stevens, J., concurring in part and concurring in the judgment)). Thus, there are

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serious questions going to the merits of the Plaintiffs' APA claims.

As to irreparable harm, Plaintiffs identify and support with affidavits four potential irreparable harms that Plaintiffs will suffer as a result of inaccurate census data. First, Plaintiffs state that an inaccurate apportionment will violate their constitutional rights to political representation. Mot. 29. Second, Plaintiffs risk losing important federal funding from undercounting. Mot. 30. Third, Plaintiffs will need to expend resources to mitigate the undercounting that will result from the Replan. Mot. 31. Lastly, local government Plaintiffs' costs will increase because those Plaintiffs rely on accurate granular census data to deploy services and allocate capital.

These harms are potentially irreparable in two ways. To start, at least part of the harms may be constitutional in nature, and "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury." Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). Moreover, to the extent the harm involves expending money or resources, "[i]f those expenditures cannot be recouped, the resulting loss may be irreparable." Philip Morris USA Inc. v. Scott, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers). Because the decennial census is at issue here, an inaccurate count would not be remedied for another decade, which would affect the distribution of federal and state funding, the deployment of services, and the allocation of local resources for a decade. Similar harms have thus justified equitable relief in previous census litigation. See, e.g., Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 328–34 (1999) (affirming injunction against the planned use of statistical sampling in census and citing apportionment harms, among others); New York v. United States Dep't of Commerce, 351 F. Supp. 3d 502, 675 (S.D.N.Y.) (issuing injunction and finding irreparable "the loss of political representation and the degradation of information"), aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York, 139 S. Ct. 2551. Plaintiffs attached to their TRO motion an internal Bureau document indicating that the Replan's compressed deadlines increase the risk of inaccuracy in the census count. ECF No. 66-3. Plaintiffs aver that each day that the Census does not conduct its field operations to reach and

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count hard to reach populations increases the inaccuracy of the census count and thus increases their irreparable harm.

By contrast, a temporary restraining order would merely require Defendants to do what Defendants had planned to do and were doing since April 13, 2020, when Defendants adopted the COVID-19 Plan, through August 3, 2020, when Defendants adopted the Replan. Moreover, the sole evidence Defendants submit in opposition to the TRO motion and the PI motion is the declaration of Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the U.S. Census Bureau (hereafter, "Fontenot"). In his September 5, 2020 declaration, Fontenot declares that:

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

Font. Decl. at ¶ 98. Thus, Fontenot's declaration underscores Plaintiffs' claims of irreparable harm because the Bureau is terminating field staff now and will have difficulty rehiring such staff. Moreover, Fontenot's declaration suggests that the burden of an injunction on Defendants is far less now than later in September.

Furthermore, Defendants' stated reason for the August 3, 2020 Replan is to get the Census count to the President by December 31, 2020 instead of April 30, 2021 as scheduled in the Bureau's COVID-19 Plan. Font. Decl. at ¶ 81. However, Defendants' sole declarant, Fontenot, acknowledged publicly less than two months ago that the Bureau is "past the window of being able to get accurate counts to the President by December 31, 2020." U.S. Census Bureau, Operational Press Briefing – 2020 Census Update at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefingprogramtranscript-july8.pdf. Similarly, on May 27, 2020, Tim Olson, head of field operations for the 2020 Census, stated during a May 26, 2020 webinar organized by the National Congress of

Case No. 20-CV-05799-LHK

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American Indians that, "we have passed the point where we could even meet the current
legislative requirement of December 31st. We can't do that anymore." Nat'l Conf. of Am.
Indians, 2020 Census Webinar: American Indian/Alaska Native, YouTube (May 26, 2020),
https://www.youtube.com/watch?v=F6IyJMtDDgY&feature=youtu.be&t=4689. These statements
support Plaintiffs' claims of irreparable harm arising from an inaccurate census count. On
balance, the Court finds that the balance of hardships tips sharply in favor of Plaintiffs.

As to the public interest, when the government is a party, the analysis of the balance of the hardships and the public interest merge. See Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). As the United States Supreme Court recognized, Congress has codified the public's interest in "a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." Dep't of Commerce v. New York, 139 S. Ct. at 2569 (quoting Franklin, 505 U.S. at 819–820 (Stevens, J., concurring in part and concurring in judgment)) (discussing the Census Act, 2 U.S.C. § 2a). Other courts have held that "the public interest . . . requires obedience to the Constitution and to the requirement that Congress be fairly apportioned, based on accurate census figures" and that "it is in the public interest that the federal government distribute its funds . . . on the basis of accurate census data." Carey v. Klutznick, 637 F.2d 834, 839 (2d Cir. 1980) (per curiam). Thus, the balance of the hardships and public interest tip sharply in Plaintiffs' favor.

Accordingly, having considered the TRO motion, opposition, and reply; the parties' oral arguments at the September 4, 2020 TRO hearing; the PI motion and opposition; the relevant law; and the record in this case, the Court GRANTS Plaintiffs' motion for a temporary restraining order. The Court finds that no security is necessary. See Jorgensen v. Cassiday, 320 F.3d 906, 919 (9th Cir. 2003) ("Rule 65(c) invests the district court 'with discretion as to the amount of security required, if any." (quoting Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999)).

IT IS HEREBY ORDERED THAT, effective as of the date of this Order, 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 are enjoined from

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United States District Court Northern District of California

implementing the August 3, 2020 Replan or allowing to be implemented any actions as a result of
the shortened timelines in the August 3, 2020 Replan, including but not limited to winding down
or altering any Census field operations, until the Court conducts its September 17, 2020 hearing on
Plaintiffs' PI motion.
IT IS SO ORDERED.

Dated: September 5, 2020

LUCY . KOH United States District Judge

MEMORANDUM FOR: RADM Michael D. Weahkee, MBA, MHSA

Assistant Surgeon General, U.S. Public Health Service

Principal Deputy Director Indian Health Service

From: Ron S. Jarmin

Deputy Director

and Chief Operating Officer

Subject: Request for Authorized Use as Amendment #1 to February 10,

2020, Agreement No. 2064-FY20-NFE-0339.000, "Memorandum of Understanding Through Which the U.S. Census Bureau is Acquiring IHS Patient Registration Data from the Indian Health

Service (IHS)"

Thank you for your continuing support to our data acquisition efforts pursuant to the February 10, 2020, Agreement No. 2064-FY20-NFE-0339.000, "Memorandum of Understanding Through Which the U.S. Census Bureau is Acquiring IHS Patient Registration Data from the Indian Health Service (IHS)" to support our work under Executive Order 13880 to create estimates of citizenship status. I write to request that all Indian Health Service data acquired under Agreement No2064-FY20-NFE-0339.000 be added as an approved use for a Census Bureau project responding to the *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

IHS's support to the citizenship project consisted of extracting and transferring to the Census Bureau two deliveries of data drawn from IHS component databases. Both deliveries have been received and we have since been analyzing those data. Based on that analysis, and the later introduction of the July 21, 2020, Presidential Memorandum, we recognized the value of these data to the Presidential Memorandum apportionment project.

Thank you in advance for your assistance with this request. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [HYPERLINK "mailto:michael.a.berning@census.gov"].



If IHS is amenable to authorizing the use of IHS data to su Memorandum, your signature below will signify concurre #1 to the Agreement. APPROVALS	
On behalf of the Census Bureau, the undersigned individual authorized to enter into this Amendment and agrees to a	•
Ron S. Jarmin Deputy Director and Chief Operating Officer U.S. Census Bureau	(Date)
On behalf of the Indian Health Service, the undersigned is authorized to enter into this Amendment and agrees to	-
RADM Michael D. Weahkee, MBA, MHSA Assistant Surgeon General, U.S. Public Health Service Principal Deputy Director Indian Health Service	(Date)
	Attachment:



Attachment - Census Bureau Project Description

Census Bureau Project to Support the July 21, 2020 Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census

Under the July 21, 2020 Presidential Memorandum, the Secretary of Commerce will produce a report consistent with the policy stated therein. The Census Bureau will produce a statistical product requested by the Secretary of Commerce, who was the addressee of the Presidential Memorandum, for transmittal of the report to the President. This product will include state-level information about non-citizens who are illegal aliens and enumerated in the 2020 Census.

To complete this task, the Census Bureau will build upon its work supporting Executive Order (E.O.) 13880, "Collecting Information about Citizenship Status in Connection with the Decennial Census." In support of this E.O., the Census Bureau is using administrative records from multiple agencies to produce estimates of citizenship.

To support the Secretary's transmittal of the report under the Presidential Memorandum, the Census Bureau is expanding the E.O. work using selected Department of Homeland Security administrative records in combination with selected records from other agencies and data from the 2020 Census. These include Enforcement and Removal Operations (ICE), Deferred Action for Childhood Arrival (CIS), Special Immigrant Juveniles (CIS), Lawful Permanent Resident denials (CIS), Arrival and Departure Information Systems (CBP), Incident Management Analysis Reporting System (Department of Interior), and Law Enforcement Management Information System (Department of Interior).

Using those records in combination with other data already obtained regarding citizenship status, the Census Bureau will further refine the non-citizen category into legal, illegal or unknown. The planned output of this project will be state-level tabulations.



MEMORANDUM FOR: Andrew E. Shatto

Deputy Director

Office of Enterprise Data and Analytics Centers for Medicare and Medicaid Services

From: Ron S. Jarmin

Deputy Director and Chief Operating Office

U.S. Census Bureau

Subject: Request for Authorized Use as Amendment #2 to December 14,

2019, Agreement No. TMSIS-2064-20-PAY-01.000, "Interagency Agreement Between the U.S. Department of Commerce, U.S. Census Bureau, and the U.S. Department of Health and Human

Services, the Centers for Medicare & Medicaid Services"

Thank you for your continuing support to our data acquisition efforts pursuant to the December 14, 2019, Agreement No. TMSIS-2064-20-PAY-01.001, "Interagency Agreement Between the U.S. Department of Commerce, the U.S. Census Bureau, and the U.S. Department of Health and Human Services, the Centers for Medicare & Medicaid Services (CMS)" and subsequent amendment (TMSIS-2064-20-PAY-01.001 signed May 4, 2020) to support our work under Executive Order 13880 to create estimates of citizenship status. I write to request that all Centers for Medicare and Medicaid data acquired under Agreement No. TMSIS-2064-20-PAY-01.000, and TMSIS-2064-20-PAY-01.001 be added as an approved use for a Census Bureau project responding to the *Presidential Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

CMS's support to the citizenship project consisted of extracting and transferring to the Census Bureau two deliveries of data drawn from CMS component databases. Both deliveries have been received and we have since been analyzing those data. Based on that analysis, and the later introduction of the July 21, 2020, Presidential Memorandum, we recognized the value of these data to the Presidential Memorandum apportionment project.

Thank you in advance for your assistance with this request. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [HYPERLINK "mailto:michael.a.berning@census.gov"].



If CMS is amenable to authorizing the use of CMS data Memorandum, your signature below will signify concur #2 to the Agreement.	
APPROVALS	
On behalf of the Census Bureau, the undersigned individual authorized to enter into this Amendment and agrees to	
Ron S. Jarmin Deputy Director and Chief Operating Office U.S. Census Bureau	(Date)
On behalf of the Centers for Medicare and Medicaid, the that he or she is authorized to enter into this Amendmenter in the content of the center in the cent	
Andrew E. Shatto Deputy Director Office of Enterprise Data and Analytics Centers for Medicare and Medicaid Services	(Date)
	Attachment:

Attachment - Census Bureau Project Description

Census Bureau Project to Support the July 21, 2020 Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census

Under the July 21, 2020, Presidential Memorandum, the Secretary of Commerce will produce a report consistent with the policy stated therein. The Census Bureau will produce a statistical product requested by the Secretary of Commerce, who was the addressee of the Presidential Memorandum, for transmittal of the report to the President. This product will include statelevel information about non-citizens who are illegal aliens and enumerated in the 2020 Census.

To complete this task, the Census Bureau will build upon its work supporting Executive Order 13880, "Collecting Information about Citizenship Status in Connection with the Decennial Census". In support of this Executive Order (E.O.), the Census Bureau is using administrative records from multiple agencies to produce estimates of citizenship.

To support the Secretary's transmittal of the report under the Presidential Memorandum, the Census Bureau is expanding the E.O. work using selected Department of Homeland Security administrative records in combination with selected records from other agencies and data from the 2020 Census. These include Enforcement and Removal Operations (ICE), Deferred Action for Childhood Arrival (CIS), Special Immigrant Juveniles (CIS), Lawful Permanent Resident denials (CIS), Arrival and Departure Information Systems (CBP), Incident Management Analysis Reporting System (Department of the Interior), and Law Enforcement Management Information System (Department of the Interior).

Using those records in combination with other data already obtained regarding citizenship status, the Census Bureau will further refine the non-citizen category into legal, illegal, or unknown. The planned output of this project will be state-level tabulations.

MEMORANDUM FOR: James W. McCament

Deputy Under Secretary

Office of Strategy, Policy, and Plans U.S. Department of Homeland Security

From: Ron S. Jarmin

Deputy Director

and Chief Operating Officer

Subject: Request for Additional Data and Authorized Use as Amendment #4 to

Dec. 23, 2019, Agreement No. 2064-FY20-NFE-0335, "Memorandum of Agreement Between the United States Department of Commerce U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship-Related Data"

Thank you for your continuing support to our data acquisition efforts pursuant to the December 23, 2019, Agreement No. 2064-FY20-NFE-0335, "Memorandum of Agreement Between the United States Department of Commerce U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship-Related Data," in support of our work under Executive Order 13880 to create estimates of citizenship status. I write to request that the delivery of records that the Customs and Border Protection (CBP) provided to the U.S. Census Bureau in December of 2019, be appended with the Person Identifier (PID) variable and resubmitted to the Census Bureau. I also ask that all Customs and Border Protection (CBP) data acquired under Agreement No. 2064-FY20-NFE-0335 be added as an approved use for a Census Bureau project responding to the *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

U.S. Department of Homeland Security's (DHS) support to the citizenship project consisted of extracting and transferring to the Census Bureau two deliveries of data drawn from DHS component databases. We received the first delivery in December of 2019 and the second delivery in July of 2020 and have since been analyzing those data. Based on that analysis, and the later introduction of the July 21, 2020, Presidential Memorandum, we recognized the value of these data to the Presidential Memorandum appropriations project.

Thank you in advance for your assistance with this request. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [HYPERLINK "mailto:michael.a.berning@census.gov"].



If DHS is amenable to resubmitting the December 2 variable and to authorizing the use of CBP data to s Memorandum, your signature below will signify cor #4 to the Agreement.	upport the July 2020 Presidential
APPROVALS:	
On behalf of the Census Bureau, the undersigned in authorized to enter into this Amendment and agree	
Ron S. Jarmin Deputy Director and Chief Operating Officer	(Date)
U.S. Census Bureau	
On behalf of the Department of Homeland Security that he or she is authorized to enter into this Amen herein.	-
James W. McCament Deputy Under Secretary for the	(Date)
Office of Strategy, Policy, and Plans U.S. Department of Homeland Security	
0.5. Department of Homeland Security	

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Attachment

Attachment – Census Bureau Project Description

Census Bureau Project to Support the July 21, 2020 Presidential *Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*

Under the July 21, 2020 Presidential Memorandum, the Secretary of Commerce will produce a report consistent with the policy stated therein. The Census Bureau will produce a statistical product requested by the Secretary of Commerce, who was the addressee of the Presidential Memorandum, for transmittal of the report to the President. This product will include state-level information about non-citizens who are illegal aliens and enumerated in the 2020 Census.

To complete this task, the Census Bureau will build upon its work supporting Executive Order 13880, "Collecting Information about Citizenship Status in Connection with the Decennial Census". In support of this Executive Order (E.O.), the Census Bureau is using administrative records from multiple agencies to produce estimates of citizenship.

To support the Secretary's transmittal of the report under the Presidential Memorandum, the Census Bureau is expanding the E.O. work using selected Department of Homeland Security administrative records in combination with selected records from other agencies and data from the 2020 Census. These include Enforcement and Removal Operations (ICE), Deferred Action for Childhood Arrival (CIS), Special Immigrant Juveniles (CIS), Lawful Permanent Resident denials (CIS), Arrival and Departure Information Systems (CBP), Incident Management Analysis Reporting System (Department of Interior), and Law Enforcement Management Information System (Department of Interior).

Using those records in combination with other data already obtained regarding citizenship status, the Census Bureau will further refine the non-citizen category into legal, illegal or unknown. The planned output of this project will be state-level tabulations.

MEMORANDUM FOR: James W. McCament

Deputy Under Secretary

Office of Strategy, Policy, and Plans Department of Homeland Security

From: Ron S. Jarmin

Deputy Director

Subject: "Request for Additional Data Elements and Authorized Uses as

Amendment #3 to Dec. 23, 2019, Agreement No. 2064-FY20-NFE-0335, "Memorandum of Agreement Between the United States Department of Commerce U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and

Citizenship-Related Data

Thank you for your continuing support to our data acquisition efforts pursuant to the December 23, 2019, Agreement No. 2064-FY20-NFE-0335, "Memorandum of Agreement Between the United States Department of Commerce U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship-Related Data," in support of our work under Executive Order 13880 to create estimates of citizenship status. I write to request that additional data elements be included as a supplement to the second delivery of data as scheduled within our Memorandum of Agreement. The additional data elements will be drawn from the Immigrations and Custom Enforcement (ICE) data and will be used by Census to develop estimates of the documentation status of noncitizen. The data will include, but not be limited to: information from the ICE Enforcement and Removal databases. I also ask that all ICE data acquired under Agreement No. 2064-FY20-NFE-0335 be approved for use by the Census Bureau project in response to the *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, dated July 21, 2020. A description of that project is attached.

DHS support to the citizenship project consisted of extracting and transferring to the Census Bureau two deliveries of data drawn from DHS component databases. We received the first ICE delivery in December of 2019 and the second delivery in July of 2020 and have since been analyzing those data. Based on that analysis, and the later introduction of the July 21, 2020 Presidential Memorandum, we recognized data gaps from our initial request for data that will impact the quality of our citizenship project work. The DHS Office of Immigration Statistics (OIS) staff have been very helpful in assisting us to identify data that would help us fill that gap. And, based on those conversations we are requesting variables from the Enforcement and Removal data. Specific data elements requested from each of these sources are listed in the attached modification to Addendum #3 of the base agreement.



Thank you in advance for your assistance in providing the additional variables from ICE systems in the next delivery of DHS data to the Census Bureau in support of Executive Order 13880. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [HYPERLINK "mailto:michael.a.berning@census.gov"].

If DHS is amenable to providing the additional ICE data to the Census Bureau and approving the use of all ICE data for the additional July 21, 2020 Presidential Memorandum project, your signature below will signify concurrence to amend Addendum #3 of Agreement No. 2064-FY20-NFE-0335, by adding the variables to the list of Individual Data Elements to Section A.4 shown in Addendum #3. This will constitute Amendment #3 to the Agreement.

APPROVALS

On behalf of the Census Bureau, the undersigned individual hereby attests that h	e or s	she is
authorized to enter into this Amendment and agrees to all the terms specified he	rein.	

Ron S. Jarmin	(Date)
Deputy Director	
IIS Census Bureau	

On behalf of the Department of Homeland Security, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

James W. McCament (Date)

Deputy Under Secretary for the

Office of Strategy, Policy, and Plans

U.S. Department of Homeland Security

Attachment

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MEMORANDUM FOR: James W. McCament

Deputy Under Secretary

Office of Strategy, Policy, and Plans Department of Homeland Security

From: Ron S. Jarmin

Deputy Director and Chief Operating Officer

U.S. Census Bureay

Subject: Request for Additional Data Elements and Authorized Uses as

Amendment #2 to Dec. 23, 2019, Agreement No. 2064-FY20-NFE-0335, "Memorandum of Agreement Between the United States

Department of Commerce U.S. Census Bureau and U.S. Department of Homeland Security Regarding the Transfer of

Immigration and Citizenship-Related Data"

Thank you for your continuing support of our data acquisition efforts pursuant to the December 23, 2019, Agreement No. 2064-FY20-NFE-0335, "Memorandum of Agreement Between the United States Department of Commerce U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship-Related Data," (MOA), and support of our work under Executive Order 13880 to create estimates of citizenship status. I write to request that additional data elements maintained by U.S. Citizenship and Immigration Services (USCIS) be provided to help inform this work. The additional data elements will be drawn from USCIS data sources, specifically information pertaining to: Lawful Permanent Resident (LPR) denied applications; Deferred Action for Childhood Arrivals (DACA); and, Special Immigrant Juveniles (SIJ). In addition, I ask that USCIS approve the use of data acquired pursuant to Agreement No. 2064-FY20-NFE-0335, as amended by this memorandum, to assist the Census Bureau, as directed by the Secretary of Commerce, with performing the mandates contained in *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

To date, DHS support to the citizenship project consisted of extracting and providing two tranches of data drawn from DHS component databases to the Census Bureau. The first delivery was provided in December of 2019 while the second delivery occurred July of 2020. We have been hard at work analyzing those data provided pursuant to the terms of the MOA. Based on that analysis, and the later issuance of the July 21, 2020 Presidential Memorandum, we recognized data gaps from our initial request for data that will impact the quality of our citizenship project work. The DHS Office of Immigration Statistics (OIS) staff have been very helpful in assisting us to identify data that would help us fill that gap. As a result of those conversations we are requesting additional variables pertaining to Lawful Permanent Resident (LPR) denied applications; Deferred Action for Childhood Arrivals (DACA); and, Special Immigrant Juveniles (SIJ) maintained by USCIS. Specific data elements requested from each of these sources are listed in the attached modification to addendum one of the base agreement.



Thank you in advance for your assistance in providing the additional variables from USCIS systems to the Census Bureau in support of the Executive-Level directed project. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or https://executive-Level-directed-project. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or https://executive-Level-directed-project. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or https://executive-Level-directed-project.

If DHS is amenable to the provision of the additional USCIS variables to the Census Bureau and in the use of CIS data to support the July 2020 Presidential Memorandum, your signature below will signify concurrence to amend Addendum #1 of Agreement No. 2064-FY20-NFE-0335, by adding the variables to the list of Individual Data Elements shown in item A.5. of the Addendum. This will constitute Amendment #2 to the Agreement.

APPROVALS

Attachment:

On behalf of the Census Bureau, the undersigned indiv to enter into this Amendment and agrees to all the ten	·
Ron S. Jarmin Deputy Director and Chief Operating Officer U.S. Census Bureau	(Date)
On behalf of the Department of Homeland Security, the she is authorized to enter into this Amendment and ag	
James W. McCament Deputy Under Secretary for the Office of Strategy, Policy, and Plans U.S. Department of Homeland Security	(Date)

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Attachment - Census Bureau Project Description

Census Bureau Project to Support the July 21, 2020 Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census

Under the July 21, 2020 Presidential Memorandum, the Secretary of Commerce will produce a report consistent with the policy stated therein. The Census Bureau will produce a statistical product requested by the Secretary of Commerce, who was the addressee of the Presidential Memorandum, for transmittal of the report to the President. This product will include state-level information about non-citizens who are illegal aliens and enumerated in the 2020 Census.

To complete this task, the Census Bureau will build upon its work supporting Executive Order 13880, "Collecting Information about Citizenship Status in Connection with the Decennial Census". In support of this Executive Order (E.O.), the Census Bureau is using administrative records from multiple agencies to produce estimates of citizenship.

To support the Secretary's transmittal of the report under the Presidential Memorandum, the Census Bureau is expanding the E.O. work using selected Department of Homeland Security administrative records in combination with selected records from other agencies and data from the 2020 Census. These include Enforcement and Removal Operations (ICE), Deferred Action for Childhood Arrival (CIS), Special Immigrant Juveniles (CIS), Lawful Permanent Resident denials (CIS), Arrival and Departure Information Systems (CBP), Incident Management Analysis Reporting System (Department of Interior), and Law Enforcement Management Information System (Department of Interior).

Using those records in combination with other data already obtained regarding citizenship status, the Census Bureau will further refine the non-citizen category into legal, illegal or unknown. The planned output of this project will be state-level tabulations.

Exhibit 56

Expert declaration of Matthew A. Barreto, Ph.D.

I. Background and Qualifications

- 1. I am currently a Professor of Political Science and Chicana/o Studies at the University of California, Los Angeles. I am the co-founder and faculty director of the Latino Politics and Policy Initiative (LPPI) in the Luskin School of Public Affairs, a national research center that studies policy issues that impact the Latino and immigrant community.
- 2. Before I joined UCLA in 2015, I was a professor at the University of Washington for more than nine years, where I was promoted to Associate Professor with tenure, and then Full Professor with tenure. At the University of Washington, I was an affiliated faculty member of the Center for Statistics and the Social Sciences, and an adjunct Professor of Law at the UW School of Law. I am also the co-founder of the research firm Latino Decisions.
- 3. Throughout my career, I have taught courses on Immigration Policy, Racial and Ethnic Politics, Electoral Politics, Public Opinion, Voting Rights, Chicano/Latino History, Introduction to Statistical Analysis, and Advanced Statistical Analysis to Ph.D. students.
- 4. I earned a Ph.D. in Political Science at the University of California, Irvine in 2005, with an emphasis on racial and ethnic politics in the United States, political behavior, and public opinion.
- 5. I have published multiple peer-reviewed academic research papers on Latino participation in the U.S. Census, immigrant public opinion and immigrant political engagement (among other topics).
- 6. In 2018 I provided expert reports and testimony in three federal lawsuits challenging the Department of Commerce's inclusion of a citizenship status question on the 2020 Census, which included an extensive literature review and evaluation of how immigrants react to changes to the U.S. Census. In all three federal trials, the courts recognized my expertise in studying immigrant political and civic participation, and cited my literature review in ruling in favor of the plaintiffs.

- 7. I have conducted research nationwide and in New York, California, Indiana, Wisconsin, Pennsylvania, Alabama, Texas, North Dakota, and North Carolina in connection with litigation assessing, among other things, how the public responds to, and is affected by, changes in the law. Courts have accepted my research studies as viable and methodologically accurate instruments to understand how the public responds to changes in state law. In particular, my previous research has focused on understanding sub-group analysis to evaluate differential impacts by race and ethnicity. Recently in North Carolina, a federal court relied on my research in issuing an injunction against the state's voter ID law. In addition, the United States District Court for the District of North Dakota stated in Brakebill v. Jaeger (No. 1:16-cv-008) that "the Court gives the findings of the Barreto/Sanchez Survey, and the other studies and data presented by the Plaintiffs, considerable weight." Prior to this, in 2014 in Veasev v. Perry (No. 13-CV-00193), the United States District Court for the Southern District of Texas, and in findings affirmed by the Fifth Circuit Court of Appeals, found that my survey was statistically sound and relied upon my survey findings to evaluate the impact of Texas's voter ID law. Likewise, in Frank v. Walker (No. 2:11cv-01128), a survey I administered and included as part of my expert report was given full weight by the United States District Court for the Eastern District of Wisconsin in a voter ID case in Wisconsin.
- 8. In *Fish v. Kobach* (No. 16-2105-JAR-JPO), the plaintiffs retained me as an expert witness to evaluate the methodology of the defendant's survey, and the United States District Court for Kansas found me to be an expert on best practices of survey research and credible and qualified to discuss survey methodology.
- 9. I have also regularly presented my expert review and summary of social science literature as part of expert witness reports and declarations, which have been accepted as valid and relied upon by the courts. Review of published social science literature is a well-established method among political scientists and social scientists in general for drawing valid conclusions regarding the general consensus in the field. Literature reviews are an essential component of all academic research and a requirement for publishing peer-reviewed academic research because they

establish the baseline set of knowledge and expectations within the field. As noted above, in litigation challenging the addition of a citizenship question to the 2020 decennial census, three federal courts in New York, California, and Maryland relied upon my literature review as providing credible and valid evidence to help the courts form their opinions.

- 10. Earlier in 2020, in *New York v. Immigration and Customs Enforcement*, I provided an in-depth literature review examining how immigrant communities respond to increased immigration enforcement, surveillance and monitoring of undocumented immigrants.
- 11. My full professional qualifications and activities are set forth in my curriculum vitae, a true and correct copy of which I have attached hereto as Appendix A.

II. Scope of Work

- 12. Plaintiffs in this action retained me to evaluate whether the Presidential Memorandum (PM) issued by President Donald Trump on July 21, 2020 to exclude undocumented immigrants from the apportionment base in 2020 would have a negative impact on the Census participation rates of immigrant communities, including undocumented immigrants, legal permanent residents, and naturalized U.S. citizens. To conduct my evaluation, I reviewed two sources of information. First, I compiled an analysis of news coverage of the PM to assess the reach of the announcement. Second, I conducted a comprehensive literature review on survey methodology, response rates, sensitive questions and methodology, and census procedures addressing missing data and imputation.
- 13. I worked on this project with Mr. Marcel Roman, a Ph.D. student in the department of Political Science at UCLA and Mr. Chris Galeano, a J.D. student in the UCLA School of Law. Mr. Roman and Mr. Galeano both helped me compile sources for the literature review and news coverage of the aforementioned PM.

III. Executive Summary

14. Based on my review of the news coverage of the PM, the extant literature published in the social sciences, and my own extensive experience with immigrant civic engagement. I conclude that the July 21 PM will reduce participation in the 2020 census, and ultimately will reduce the accuracy of the 2020 census. The PM generates the perception of real and immediate threat for undocumented immigrants that will erode their trust in the census, which will lead to increased non-response in immigrant communities. Calling attention to the citizenship or immigration status of immigrants in a negative light causes immigrants to reduce their civic engagement. The new PM sends a signal of government monitoring citizenship status as it relates to the 2020 Census population count, eroding trust that was restored after the threat of a citizenship question on the Census was removed. The strength of that negative signal is visible in coverage of the PM in Spanish-language media, which is a trusted source of news within Latino and immigrant communities. Signals of a threat to the status of undocumented immigrants generate a well-documented "chilling effect" on public participation for immigrants, i.e., the perception of threat will erode trust that leads to a reduction in immigrant engagement with government programs and officials. However, subsequent official action to counteract such threats--either court orders or changes in agency policy--have positive effects on trust and engagement. The perception of immigration status-related threat generated by the PM will make undocumented and mixed-status households less likely to engage with the Census—particularly with enumerators conducting in-person Non-Response Follow-Up (NRFU). The reduction in response rates among undocumented immigrant and mixed-status households will result the Census Bureau using proxyresponse and imputation techniques that are error-prone and tend to undercount immigrant households.

15. My review of news accounts following President Trump's July 21 PM finds there was widespread coverage, particularly within Spanish-language news media. Whether through television, print, or online outlets, the message relayed by the media was that the PM singled out immigrants through a process that invoked citizenship status, or a lack thereof, as part of the 2020

Census, in an effort to exclude them from the apportionment process. Spanish-language news journalists reported that as a result of the PM there was confusion, fear, and anxiety in immigrant communities about fully participating in the 2020 Census. According to a journalist for Telemundo¹ who spoke with many people familiar with the PM, "activists have already reported that this attempt may have scared many people off from responding to the Census, which is particularly detrimental to states with high immigrant populations such as California, Texas, and New York." This sentiment was widely reported across Spanish-language news in the days and weeks following the July 21 PM.

16. Extensive research studies show Spanish-language media acts as a catalyst for engaging, informing and mobilizing Latino and immigrant communities. Spanish-language journalists and news anchors act as a medium for the feelings and concerns prevalent within Latino immigrant communities, specifically those who are undocumented. Spanish-language media plays a central role in mobilizing and educating the immigrant community on immigration issues in particular. The high levels of trust in Spanish-language media amongst immigrants plays a key role when listening and learning about the issues that matter most to them, in particular those related to immigration policy. Research studies have documented that many immigrants take direct cues related to civic engagement and participation from what they hear, read, and watch on Spanish-language media.

17. Undocumented immigrants are deeply intertwined into the fabric of American communities. Research and statistical reports have repeatedly found that undocumented immigrants see themselves as part of American society and indeed have longstanding ties in the cities and towns in which they permanently live. A clear majority of undocumented immigrants have lived in the United States for over five years and have families, hold jobs, own houses, and are part of their community. A survey of Latino undocumented immigrants² found that 89% had

¹ Telemundo. "Trump Ordena Al Censo Que No Incluya a Los Indocumentados En El Recuento Que Determina El Reparto De Escaños Del Congreso," July 21, 2020. https://www.telemundo.com/noticias/noticias-telemundo/inmigracion/trump-ordena-al-censo-que-no-incluya-los-indocumentados-en-el-recuento-que-determina-el-tmna3823616.

² https://latinodecisions.com/wp-content/uploads/2019/06/NALEO_AV_Undoc_Results.pdf

lived in the U.S. over five years, that 74% have children living with them in the U.S. and 85% have a family member in the U.S. who is a U.S. citizen, and indeed that 87% of undocumented immigrants themselves said they hoped to one day become U.S. citizens if legislation were passed to provide that opportunity.

18. Following the June 2019 ruling by the U.S. Supreme Court blocking the inclusion of a citizenship question, Census partners known as *Trusted Voices* conducted extensive outreach to undocumented immigrants to assure them that the federal government would not be monitoring their citizenship status as it relates to the 2020 Census. The new PM sends a signal of government monitoring citizenship status as it relates to the 2020 Census population count, significantly eroding trust.

19. The published literature is quite clear: a critical component to ensure an accurate response rate on any survey, including the census, is trust between the public and the survey administrator. The prior published studies conclude that response rates will fall without a high degree of trust. The new PM erodes the trust that many community-based organizations with experience serving immigrants had built up over the past year.

20. Trust is particularly important in communities with undocumented populations as many prior reports and publications by the Census Bureau have made clear. The Census Bureau has identified vulnerable population subgroups concerned about the potential misuse of personal information provided to the Census as at-risk for low participation rates and for undercounts. From this perspective, the new PM lowers trust and makes it much harder to stimulate participation in the census from vulnerable populations such as immigrant³ and minority communities, if such communities do not trust the Census.

21. Far-ranging social science research documents a phenomenon called "the chilling effect" in which immigrant communities withdraw and avoid interactions with government officials or agencies if they believe there could be a risk of adverse consequences for their own

³ Here we mean persons who are foreign-born and emigrated to the United States.

immigration status or the status of others in the community. Specifically, some studies have found that Census participation rates drop in immigrant communities when federal immigration enforcement is perceived to be connected to the Census. In fact, the Census Bureau has published studies pointing to fears over the federal government learning their about citizenship status as a major obstacle in some immigrant communities.

- 22. Social science research since the 1990s, but especially so in more recent years, is near consensus in finding evidence of the "chilling effect," i.e., strong patterns of avoidance, withdrawal, and exclusion during times of increased immigration enforcement. This research is often community-focused and highlights how increased attention to immigration status or immigration monitoring by authorities, results in noticeable withdrawal in that specific context. Immigrants, and often their children and others in their close network, will purposely avoid or withdraw from an environment where they fear potential immigration enforcement. The fear associated with detention, separation from their children or family, and possible deportation is so paralyzing that many immigrants when faced with possible immigration enforcement avoid even necessary public services such as police protection, health services, going to work, sending their children to school, or attending court to defend their rights. The takeaway is clear increased negative attention to citizenship status issues decreases trust in those specific agencies or actors and leads to immigrant withdrawal.
- 23. If trust is low, attempts to re-interview or re-contact households will be far less successful either. Census respondents must believe that there is no jeopardy or threat of disclosure to ensure their participation in a survey, regardless of how many attempts one might make to prompt their participation.
- 24. Already, a prior study from 2018 about perceptions of the 2020 Census found that levels of trust in immigrant and minority communities in the United States were low as a result of concerns over citizenship. The extensive media attention to the citizenship question resulted in high levels of fears among immigrants. When asked about the protection of their and their family members' sensitive information, including citizenship status, immigrant respondents were

statistically less likely to trust that the Trump administration will protect their information and not share it with other federal agencies (just 35% were trusting). Among Latino respondents overall, just 31% trust the Trump administration to protect their personal information, which is statistically lower than among non-Latinos. While the June 2019 SCOTUS decision may have alleviated these fears by striking the citizenship question, the July 2020 PM effectively re-confirms those immigrant fears because it sends a signal to immigrant communities that the Trump administration will be monitoring their citizenship status so they may subtract these participants from the 2020 base population count for the apportionment base. In essence, Trump has returned the immigrant community to a condition of wariness similar to when the citizenship question was to appear on the census. They believe their participation is either no longer safe, or not required due to the PM of July 2020 to specifically single out undocumented immigrants.

- 25. The survey also found that large percentages of immigrants and minorities are concerned specifically that their personal information reported on the census will be shared with Immigration and Customs Enforcement (ICE). Overall, 41% of immigrants surveyed state they are concerned about this, along with 40% of Latinos.
- 26. When households do not initially self-respond to the census, the Census relies on nonresponse follow up (NRFU) to re-contact households to encourage them to respond. In simulated re-contact, my research has demonstrated that a majority of non-responders to the 2020 census will not switch and become participants when asked again to do so. In particular, research has found that NRFU is less successful when immigrant communities have fears about information concerning their citizenship status being collected or revealed.
- 27. Larger households will be the most difficult to successfully convert from non-participation to participation if there are fears about citizenship status data being collected or monitored, further undermining an accurate count. Existing research has found that among immigrants who would take the census upon NRFU recontact, their average household size is 2.91 compared to an average household size of 3.94 for immigrants who would not participate upon recontact, leaving them, and their larger households uncounted.

28. One of the ways Census Bureau officials try to account for people who refuse to respond to the census is to mathematically account for non-responders through statistical methods such as "substitution" or "imputation." Both of these methods use information on responding households to estimate population information on non-responding households. However, when there are fears about citizenship status are introduced, non-responding households are statistically different than responding households on a variety of critical demographics, which violates an important assumption of substitution or imputation. For these methods to serve as viable alternatives, missing units and reported units should be roughly equivalent. However, the existing research reveals that when fears over citizenship status emerge, non-responding households are more likely to be larger in size, be foreign-born, and have different age and educational outcomes than responding households. This will make substitution and imputation inaccurate and unreliable, and makes it highly likely that there will be a net undercount of households refusing to respond to the census due to the citizenship question.

IV. Literature Review and Research Findings

A. The July 21 Presidential Memorandum Received Wide Coverage in Spanish News Media and Created Confusion and Fear About the 2020 Census

29. On July 21, 2020 President Trump issued a Presidential Memorandum declaring that undocumented immigrants will be excluded from the decennial census for apportionment purposes.⁴ Specifically, following the completion of the 2020 Census, the PM requires that individuals without lawful immigration status be excluded from the apportionment base for the purpose of the reapportionment of the U.S. House of Representatives. The PM refers to last year's Executive Order 13880,⁵ which instructed executive departments and agencies to share

⁴ Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census (July 21, 2020), https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/

⁵ Collecting Information About Citizenship Status in Connection With the Decennial Census (July 11, 2019), https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/

information with the Department of Commerce . . . to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country." This order signals to hard-to-count populations, such as undocumented immigrants and mixed status families, that the federal administration is compiling citizenship related data on them, and that they are to be excluded from the 2020 Census. While there are technicalities that an undocumented immigrant may fill out the Census form, and then be deducted later, this nuance is lost on a community that has been under constant attack and threat from President Trump and his administration. A memorandum issued by the President stating that undocumented immigrants will be identified in specific communities and then excluded from the official Census population count sends a clear message of exclusion.

30. In particular, the PM reverses recent progress that has been made by community-based organizations following the June 2019 Supreme Court ruling which blocked the citizenship question from being added to the 2020 Census. In an effort to mitigate the challenge posed by the citizenship question, outreach advocates also sought to use the U.S. Supreme Court's decision as a starting point "to convince everyone to participate in the census count" and emphasize the benefits of participating in the census. Because the highest and definitive court in our country had struck down the citizenship question, outreach to immigrant communities could emphasize this as a selling point to fill out the census without any fears about someone's immigration status being reported. For the Census Bureau's part, they would enact a public outreach plan that involved "working with local organizations to encourage census participation among immigrants, communities of color and other groups the bureau considers hard to count" to combat the mistrust by these communities.

⁶ Some point out that matching census and administrative data will lead to matching errors and exclude millions of U.S. citizens from the apportionment process. Randy Capps et al., Millions of U.S. Citizens Could Be Excluded under Trump Plan to Remove Unauthorized Immigrants from Census Data, Migration Policy Institute (July 2020), https://www.migrationpolicy.org/news/millions-us-citizens-could-be-excluded-under-plan-remove-unauthorized-immigrants-census

⁷ https://www.huffpost.com/entry/2020-census-citizenship-question_n_5d2f378ce4b02fd71dddf974

https://www.npr.org/2019/07/31/746508182/push-for-a-full-2020-count-ramps-up-after-census-citizenship-question-fight

- 31. The new PM undermines these efforts and implies the government is attempting to enumerate the undocumented immigrant population, which could undercut participation. Because of the 2019 Supreme Court decision, there is no direct mechanism for assessing whether a Census response includes data from an undocumented immigrant using Census responses. If the federal government is attempting to exclude undocumented immigrants from the Census count, immigrant communities are likely to draw two conclusions. First, undocumented immigrants, the people they live in the same household with, and others in immigrant communities may be worried the government is attempting to find out their legal status through other means. This is not beyond the realm of possibility, given that the Trump administration has instructed federal agencies to use existing state and federal records to determine citizenship status (Levine, 2020)⁹. This could generate a chilling effect and incentivize households with undocumented immigrants to provide no additional information to the Federal Government that they feel would implicate their immigration status. Second, undocumented immigrants and those with ties with undocumented immigrants may think the government will use other means to find them, such as their responses to questions asking about nativity or ethnic/racial group. Therefore, they will not fill out the Census form writ large since probabilistically, providing information on other characteristics might facilitate government efforts to track and identify undocumented immigrants.
- 32. After the President announced the PM, widespread reports about how the PM would seek to exclude undocumented immigrant populations from the reapportionment process were published by major news outlets throughout the U.S.¹⁰ Major Spanish-language media and

⁹ For instance, Nebraska, South Dakota, and South Carolina voluntarily agreed to transfer citizenship data from their state driver's license and state ID records to the U.S. Census Bureau (Wang, 2020)

¹⁰ Alex Daughery, Florida Could Lose Power in Washington if Trump's New Immigration Order is Enacted, MIAMI HERALD (July 21, 2020), https://www.miamiherald.com/news/politics-government/article244382462.html; Alexandra Alper and Nick Brown, Trump Issues Memo To Stop Counting Undocumented Migrants In Next Round Of Redistricting, HUFFINGTON POST (July 21, 2020), https://www.huffpost.com/entry/trump-executive-order-immigrants-redistricting-n-5f1709e0c5b615860bb7f415; Chris Megerian, Trump Tries New Move to Restrict Census, Could Cut California's Seats in Congress, L.A. TIMES (July 21, 2020),

https://www.latimes.com/politics/story/2020-07-21/trump-new-tack-restrict-immigrants-census; David Jackson, Trump Tells Census to Not Count Undocumented People for Purposes of Deciding House Apportionment, USA

print news outlets throughout the nation also reported on the PM. They included Telemundo, ¹¹ Univision, ¹² Azteca America, ¹³ and Estrella TV¹⁴—all major media sources for Spanish-speaking viewers with hundreds of local television stations and affiliates throughout the U.S. ¹⁵ Newspapers and online media outlets for Spanish-speaking readers also reported on the PM's intention to leave out undocumented immigrants from the reapportionment process. ¹⁶ Whether

TODAY (July 21, 2020), https://www.usatoday.com/story/news/politics/2020/07/21/trump-tell-census-not-countundocumented-immigrants/5459873002/; Jill Colvin and Kevin Freking, Trump to Exclude Those in US Illegally From Congressional Reapportionment Count, CHICAGO SUN-TIMES (July 21, 2020), https://chicago.suntimes.com/2020/7/21/21333076/trump-to-llegally-from-congressional-reapportionment-count; Katie Rogers and Peter Baker, Trump Seeks to Stop Counting Unauthorized Immigrants in Drawing House Districts, N.Y. TIMES (July 21, 2020), https://www.nytimes.com/2020/07/21/us/politics/trump-immigrants-censusredistricting.html; Kevin Freking and Mike Schneider, Trump's New Immigration Fight: How to Redraw House Districts, HOUSTON CHRONICLE (July 21, 2020), https://www.chron.com/news/article/Trump-seeks-to-bar-illegalaliens-from-15423258.php; Kevin Liptak et al., Trump Signs Order Targeting Undocumented Immigrants in the US Census, CNN (July 21, 2020), https://www.cnn.com/2020/07/21/politics/white-house-census-undocumentedimmigrants/index.html; Tara Bahrampour, Trump Administration Seeks to Bar Undocumented Immigrants From a Portion of the 2020 Census, SEATTLE TIMES (July 21, 2020), https://www.seattletimes.com/nation-world/trumpadministration-seeks-to-bar-undocumented-immigrants-from-a-portion-of-the-2020-census/ ¹¹ Trump Ordena Al Censo Que No Incluya a Los Indocumentados En El Recuento Que Determina El Reparto De Escaños Del Congreso, TELEMUNDO (July 21, 2020), https://www.telemundo.com/noticias/noticiastelemundo/inmigracion/trump-ordena-al-censo-que-no-incluya-los-indocumentados-en-el-recuento-que-determinael-tima3823616; Trump Firma Decreto Para Excluir a Indocumentados del Censo 2020, Telemundo San ANTONIO (July 21, 2020), https://www.telemundosanantonio.com/noticias/la-casa-blanca/presidente-trump-decretoindocumentados-censo-2020/2068275/. ¹² Trump Ordena al Censo No Contar a Los Indocumentados en un Memo de Dudosa Legalidad y Difícil de

¹² Trump Ordena al Censo No Contar a Los Indocumentados en un Memo de Dudosa Legalidad y Difícil de Cumplir, UNIVISION (July 21, 2020), https://www.univision.com/noticias/elecciones-en-eeuu-2020/trump-ordena-al-censo-no-contar-a-los-indocumentados-en-un-memo-de-dudosa-legalidad-y-difícil-de-cumplir.

¹³ Ju Carpy, *Trump Firma Memo Para Excluir a Migrantes del Censo*, AZTECA AMERICA (July 21, 2020), https://aztecaamerica.com/2020/07/21/trump-firma-memo-para-excluir-a-migrantes-del-censo/

¹⁴ Maria Teresa Sarabia, *Inmigrantes Indocumentados No Serán Contados*, ESTRELLA TV (July 21, 2020), http://noticiero.estrellatv.com/noticias/inmigrantes-indocumentados-no-seran-contados-noticiero-estrella-tv/ ¹⁵ *Owned Stations*, TELEMUNDO, https://www.nbcumv.com/owned-stations/telemundo-station-group/about?network=5266626 (last visited July 31, 2020); *Local Media*, UNIVISION COMMUNICATIONS INC., https://corporate.univision.com/partner-with-us/local/ (last visited July 31, 2020); *TV*, ESTRELLA TV,

https://corporate.univision.com/partner-with-us/local/ (last visited July 31, 2020); TV, ESTRELLA TV, http://www.estrellamedia.com/programming/tv (last visited July 31, 2020); Azteca America, GRUPO SALINAS, https://www.grupogolinas.com/ps/azteca US (last visited July 31, 2020)

https://www.gruposalinas.com/en/aztecaUS (last visited July 31, 2020).

16 Jesús García, Trump Firma Memorando Para Excluir a Inmigrantes Indocume

¹⁶ Jesús García, Trump Firma Memorando Para Excluir a Inmigrantes Indocumentados del Censo, La Opinion (July 21, 2020), https://laopinion.com/2020/07/21/trump-firma-memorando-para-excluir-a-inmigrantes-indocumentados-del-censo/; Jesús García, Trump Firma Memorando Para Excluir a Inmigrantes Indocumentados del Censo, El Diario (July 21, 2020), https://eldiariony.com/2020/07/21/trump-firma-memorando-para-excluir-a-inmigrantes-indocumentados-del-censo/; Kevin Freking and Mike Schneider, Trump Firma Memo Que Afectaría Conteo de Migrantes, El Nuevo Herald (July 21, 2020), https://www.elnuevoherald.com/noticias/estados-unidos/estados-unidos/ena-trump-excluir-a-indocumentados-ena-el-censo-indocumentados-el-censo-el-censo-indocumentados-el-censo-el

through television, print, or online mediums, the message relayed by the media was that the order singled out immigrants through a process that invoked citizenship status, or a lack thereof, as part of the 2020 Census, in an effort to exclude them from the apportionment process. Since the PM was signed, it has prompted discussion by Spanish-language news segments on its implications for the immigrant community.¹⁷ These reports have conveyed to Spanish-speaking audiences that millions of undocumented immigrants living in the U.S. would not be counted when deciding how to apportion congressional seats because of the PM, affecting states such as California, Florida, and Texas, each of which includes large undocumented immigrant populations within their communities.¹⁸

- 33. Across these news accounts, immigrants, as well as individuals who worked with community-based organizations that serve immigrants, and even journalists, all stated that they believed the July 21 PM was an effort to sow confusion and distrust, and to reduce the count of Latinos and immigrants on the 2020 Census. Examples of some of the direct quotations from these news sources include:
 - a. "Este memo obviamente causa miedo entre esta población en particular, te pregunto, ¿podría ser el miedo una de las razones por la que la comunidad hispana no participe en el Censo 2020 o se siente que su participación sea baja? Lamentablemente no es la primera ves que el Presidente Trump amenaza y amedrenta nuestra comunidad inmigrante indocumentada... y si, fomenta el miedo en nuestras comunidades. Una ves más, le dice a nuestra comunidad inmigrante, no se cuenten, no los necesitamos." "This memo obviously causes fear among this particular population, I ask you, could fear be one of the reasons

cuente-a-los-indocumentados-segun-funcionario-de-la-casa-blanca/; https://laoferta.com/2020/07/21/trump-ordena-excluir-a-indocumentados-de-distribucion-electoral-tras-censo/; https://www.lavanguardiahoy.com/trump-firma-memorandum-que-busca-excluir-a-indocumentados-del-censo-2020/;

https://www.excelsiorcalifornia.com/2020/07/22/trump-abre-nueva-polemica-al-ordenar-enxcluir-a-indocumentados-de-censo/

¹⁷ https://www.telemundo62.com/videos/videos-noticias/implicaciones-de-remover-a-los-indocumentados-del-censo-2020/2063236/; https://www.univision.com/local/los-angeles-kmex/que-implicaciones-tiene-la-orden-de-trump-que-busca-excluir-a-los-indocumentados-del-censo-2020-video;

 $[\]frac{https://www.univision.com/local/philadelphia-wuvp/lideres-reaccionan-ante-peticion-de-trump-para-excluir-a-personas-indocumentadas-del-censo-2020-video$

¹⁸ https://www.chron.com/news/article/Orden-de-Trump-afecta-censo-en-California-15434405.php; https://eldiariony.com/2020/07/21/enorme-oposicion-a-orden-de-trump-que-afectaria-a-millones-de-inmigrantes-y-que-califican-de-ilegal/; Mike Schneider, Orden de Trump afecta censo en California, Florida y Texas, El Nuevo Herald (July 25, 2020), https://www.elnuevoherald.com/article244496782.html

- why the Hispanic community does not participate in the 2020 Census or feels that their participation is low? Unfortunately, this is not the first time that President Trump has threatened and intimidated our undocumented immigrant community... and yes, he has fostered fear in our communities. Once again, he tells our immigrant community, don't count yourselves, we don't need you." 19
- b. "Hay varias organizaciones que están reaccionando y no están de acuerdo con esta movida de la casa blanca porque ya llevan más de un año tratando de incentivar a la comunidad de indocumentados para que participen del censo, para que no tenga miedo y hagan escuchar su voz, ahora esta acción prácticamente se convierte en un golpe bajo para la comunidad de inmigrantes indocumentados en este país." "There are several organizations that are reacting and do not agree with this move by the White House because they have been trying for more than a year to encourage the undocumented community to participate in the census, so that they are not afraid and make their voice heard, now this action practically becomes a low blow to the undocumented immigrant community in this country." ²⁰
- c. "Además, afirman que el anuncio del presidente "claramente" tiene la intención de promover el miedo y disuadir la participación en el censo de inmigrantes y sus familias, ya que se produce solo unas semanas antes de que los enumeradores estén programados para salir y alentar a los hogares a responder al censo." "In addition, it claims that the president's announcement is "clearly" intended to promote fear and discourage participation in the census by immigrants and their families, since it comes just weeks before enumerators are scheduled to leave and encourage households to respond to the census."²¹
- d. "Algunos oponentes afirman que es un intento para suprimir el creciente poder político de los latinos en Estados Unidos y discriminar a las comunidades inmigrantes de otras minorías no blancas." "Some opponents claim it is an attempt to suppress the growing political power of Latinos in the United States and to discriminate against other non-white, minority immigrant communities" 22
- e. "Es una manera de tratar de eliminarnos numéricamente del mapa, borrarnos en cuanto a números" "It is a way of trying to wipe us out numerically, wipe us out in terms of numbers"
- 34. The PM has threatened to upend a year's worth of outreach efforts by groups focused on hard-to-count populations. These groups now face a big challenge: reach out to

¹⁹ Telemundo 62. "Implicaciones De Remover a Los Indocumentados Del Censo 2020." Telemundo 62. Telemundo 62, July 22, 2020. https://www.telemundo62.com/videos/videos-noticias/implicaciones-de-remover-a-los-indocumentados-del-censo-2020/2063236/.

²⁰ Univision. "Líderes Reaccionan Ante Petición De Trump Para Excluir a Personas Indocumentadas Del Censo 2020." Univision, July 22, 2020. https://www.univision.com/local/philadelphia-wuvp/lideres-reaccionan-antepeticion-de-trump-para-excluir-a-personas-indocumentadas-del-censo-2020-video.

²¹ EFE, Agencia. "Coalición De Fiscales Demanda Al Presidente Trump Por Su Acción Con El Censo." Yahoo! Yahoo! Accessed July 29, 2020. https://es-us.noticias.yahoo.com/coalici%C3%B3n-fiscales-demanda-presidente-trump-230425578.html.

²² Mike Schneider. "Orden De Trump Afecta Censo En California, Florida y Texas." Houston Chronicle. Associated Press, July 29, 2020. https://www.chron.com/news/article/Orden-de-Trump-afecta-censo-en-California-15434405.php.

people who haven't filled out their census form yet who are now worried the federal administration will use whatever information they provide in the 2020 Census to target them. Solving this challenge is now more urgent for these groups given the Census Bureau's recent decision to shorten the period for collecting responses, including NRFU operations, by 31 days.²³

ass. According to Arturo Vargas, the CEO of NALEO, one of the nation's top civic engagement organizations in the Latino and immigrant community, the new PM is a setback that creates fear in the immigrant community. NALEO has been identified by the Census Bureau itself as one of the most important "trusted voices" to earn trust in the Latino community. Vargas stated on Twitter²⁴: "With a successful #NALEOVirtual Conference done, time now to refocus on #Census2020 - which just got even MORE DIFFICULT with @POTUS effort to exclude immigrants from the apportionment numbers and cutting short @uscensusbureau's time to finish the count. Our community is scared." Vargas went further to note²⁵ that the new PM was undoing progress made after striking the citizenship question, "#Census2020 is the most challenging to promote participation I have seen in my career. After @SCOTUS stopped a citizenship question, we had a fighting chance. Now @POTUS has made it much harder by his July 21 memo and by cutting off @uscensusbureau's field work early. @NALEO"

B. Spanish-Language News Media is a Trusted Source for Immigrants

36. Studies show Spanish-language media acts as a catalyst for engaging and mobilizing Latino and immigrant communities. Spanish-language journalists and news anchors act as a medium for the feelings and concerns felt amongst Latino immigrant communities, in particular among undocumented immigrants. Green-Barber discuss these trends in Spanish-speaking media.²⁶ She found that Spanish-speaking households have high utilization of internet

²³ https://www.npr.org/2020/07/30/896656747/when-does-census-counting-end-bureau-sends-alarming-mixed-signals

²⁴ https://twitter.com/ArturoNALEO/status/1291764313405812737?s=20

²⁵ https://twitter.com/ArturoNALEO/status/1291792560390729728?s=20

²⁶ Lindsay Green-Barber, Latinos and the media: Patterns, changes and ideas for more connection, Center for Investigative Reporting.

and Spanish TV and radio, indicating the large presence and critical role of the Spanish-language media has in Spanish speaking homes. She also found that the Spanish-speaking media plays a central role in mobilizing and educating Latino communities on immigration issues in particular.

- 37. Research shows that households who more closely follow Spanish-language news rely on that information when it comes to civic and political engagement.²⁷ Garcia-Rios and Barreto (2016) investigated media habits of Latino immigrants and found that people with high rates of Spanish-language news consumption were more informed and had high rates of immigrant identity, meaning that they were particularly aware and responsive to immigration-related news and current affairs.²⁸ In 2012, a positive association between Spanish news coverage of President Obama's DACA program and immigrant identity spurred naturalized citizens to vote at higher rates. In other instances, exposure to negative information can lead to withdrawal.
- 38. Research on Spanish-language media by Federico Subervi-Velez (2008) notes "the intersection between media and Latinos when assessing political socialization and mobilization of Latinos." To put simply, Spanish-language media is a critical bridge that informs and influences immigrants in politics and is often a direct reflection of Latino immigrant opinion in America. One example is the reliance of Spanish-language radio to share and spread information about anti-immigrant legislation in the U.S. Congress (Felix et. al, 2008). Research found that Spanish media personalities such as Almendarez Coello (El Cucuy), Eduardo Sotelo (El Piolin) and Christina Saralei presented and educated the community on the anti-immigration rhetoric that was becoming prominent in politics (Felix et al, 2008). Coello and Sotelo's provided daily updates and created awareness about H.R. 4437, a bill that could negatively impact immigrant communities. In particular, research has found that the high levels of trust in

 ²⁷ Barreto, Matt. Garcia-Rios, Sergio. "Politicized Immigrant Identity, Spanish-Language Media, and Political Mobilization in 2012." RSF: The Russell Sage Foundation Journal of the Social Sciences. January 06, 2016
 ²⁸ Barreto, Matt. Garcia-Rios, Sergio. "Politicized Immigrant Identity, Spanish-Language Media, and Political Mobilization in 2012." RSF: The Russell Sage Foundation Journal of the Social Sciences. January 06, 2016, p. 78.
 ²⁹ Subervi-Vélez, Federico A., ed. 2008. The Mass Me- dia and Latino Politics: Studies of U.S. Media Content, Campaign Strategies and Survey Re- search: 1984–2004. New York: Routledge.

Spanish-language media plays a key role when Latino immigrants read or hear about the issues that matter most to them, like immigration policy.

C. <u>Trust and Socio-Political Context are Two Key Factors That Impact Survey</u> <u>Response Rates and Accuracy</u>

39. The decennial census is a population survey. There have been extensive studies across the social sciences documenting the best practices and potential pitfalls in collecting accurate survey data. With respect to evaluating the 2020 Census there are two key takeaways that are quite clear in the published literature. First, trust between the public and the survey administrator is crucial. Prior studies conclude that response rates will fall without a high degree of trust, leading to a biased survey project because it excludes people from the data and is no longer representative. Second, the social and political context during survey implementation can greatly impact trust, confidence, and participation rates. This is especially the case for vulnerable populations when they perceive an unwelcoming environment or context. Of these key takeaways, the hallmark of cooperation in any survey is trust. Subjects are more likely to participate in a survey, to complete survey items accurately, and respond fully to survey items when they trust the survey administrator. When potential respondents are suspicious, uncertain, anxious or untrusting, nonresponse rates significantly increase. An early study on this topic framed the issue as how much threat potential respondents perceive through the source of the survey (Ball 1967; Bradburn et al. 1978). When subjects identify the survey as being implemented on behalf of authorities who they perceive could use their answers against them, they are likely to not-respond, or to respond untruthfully (Ball 1967). From this perspective, newfound fears about citizenship status due to the July 21 PM will make securing participation of immigrant communities much harder than if the PM had never been issued.

40. A research study by the U.S. Government Accountability Office in 2003 (GAO-03-605) laid out the most appropriate approaches to surveying the Latino population specifically. The report was commissioned because prior government surveys, in particular the Census, were

characterized by high rates of non-response with Latino respondents. The report stated that distrust – especially of those representing the government – was a leading factor in Latino immigrant non-response. To fix this, the report recommended increasing trust so that potential survey respondents are not fearful of their participation, and not suspicious of the census questions being asked, or the census enumerators visiting their community. The July 21 PM related to undocumented immigrants does precisely the opposite, increasing *distrust* and, therefore, making it substantially less likely that members of the Latino immigrant subgroups will respond to the census.

- 41. De la Puente (1995) examined issues related to trust, confidentiality, and fear among potential census respondents in El Paso, Texas and found that fear and apprehension on part of the sample area residents led to concealment of information from the Census Bureau and from the ethnographers, due to their belief that the government will not keep their information private or confidential when it comes to highly sensitive questions. This research establishes that the Census Bureau already knows it has challenges with trust in some immigrant communities and attempts to overcome those challenges by not asking sensitive questions that make it very difficult to persuade communities with low trust. While the threat of a citizenship question was dropped, this brand new PM of July 21 instills a new sense of confusion and fear and will result in increased problems with trust in such communities and a corresponding reduction in Census response.
- 42. In a follow-up study a decade later, de la Puente (2004) concluded that individuals with unstable immigration statuses were much less likely to trust the government and specifically less likely to fill out the census questionnaire. Indeed, properly counting undocumented immigrants has long been a concern for the Census Bureau. De la Puente's research demonstrated that respondents with irregular immigration statuses are unlikely to directly cooperate with the Census if they perceive their immigration status will be revealed. The July 21 PM does precisely this,; it sends a strong signal to undocumented immigrants that the federal government is collecting data about them, and will match various government records to find and exclude certain immigrants. One respondent in the de la Puente study, who did have legal status as a student, was afraid to participate in the Census because she feared that at some point in the future she may go out of

status and that the information she provided to the Census Bureau might be used to track her down. According to de la Puente, it is critical that immigrant respondents clearly understand that their immigration status is not associated with the Census population count.

43. An important practice that ensures higher participation rates in surveys is respondent anonymity, particularly when there might be concerns over immigration status. The Census violates anonymity by requiring the respondent to list the names of all household members. If respondents do not trust the survey administrator, and there is no anonymity, vulnerable respondents are far less likely to participate. Tourangeau and Yan (2007) explain how the "threat of disclosure" can result in non-response. Generally, people have concerns about the possible consequences of participating in a survey, or giving a truthful answer should information become known to a third party with enforcement powers. The authors explain a survey may be "sensitive" if it raises fears about the likelihood or consequences of disclosure of the answers to agencies or individuals directly, or not directly involved in the survey. As an example, Tourangeau and Yan (2007) discuss asking a question about marijuana use to a group of teenagers. If the teens suspect that the answers could be shared with their parents, they opt out of the survey or lie. But if the survey is completely anonymous and implemented by their peers, they are much more likely to participate and be truthful. The perceived threat of disclosure to authorities is what matters. With the July 21 PM, the federal government has clearly created a perception of threat for immigrants and the 2020 Census.

44. A review of findings across different surveys suggest that the likelihood of survey response largely depends on timing and contextual factors, including the respondent's personal situation and the features of the data collection, such as the degree of privacy it offers. The exact same survey might be highly sensitive and risk non-participation in one setting, but be acceptable and proper in another. To this point, a comprehensive review of survey environment research indicates that highly sensitive surveys will be disruptive, produce non-response, or result in biased data when the respondent is concerned that their answers could be known by authorities. However, if the respondent feels secure and has total privacy and anonymity, they are likely to participate