

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2020, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ M. Andrew Zee
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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

NATIONAL URBAN LEAGUE, *et al.*,

Plaintiff,

v.

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

Defendants.

Case No. 5:20-cv-05799-LHK

**[PROPOSED] ORDER GRANTING STAY
OF PRELIMINARY INJUNCTION
PENDING APPEAL**

1 Having considered Defendants' Renewed Motion to Stay, and for good cause shown, the
2 Court hereby GRANTS Defendants' Motion and stays its Order dated September 24, 2020, ECF
3 No. 208, pending resolution of Defendants' appeal of that Order.

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6 IT IS SO ORDERED.

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9 DATED: September __, 2020

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12 _____
13 LUCY H. KOH
14 United States District Judge
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Compressing Backend Processing

Adjusted Activity	Impact and Risks
Cancel Count Review Event 2, eliminating the need for late Group Quarters Enumeration (GQE) operations	State demographer review of GQ data will be cancelled. The Demographic and Decennial staffs will work together to develop the message and communicate it to the Federal State Cooperative for Population Estimates (FSCPE)/states.
Compress POP division and DSSD review and processing times	A compressed review period creates risk for errors not being discovered in the data – thereby decreasing data quality. Additionally, errors discovered in the data may not be fixed – due to reduced time to research and understand the root cause or to re-run and re-review one or multiple state files.
Compress time for creating/verifying apportionment data and preparation of transmittal package for Department of Commerce	A compressed review period creates risk for errors being present in the data.

Exhibit 57

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, *in his official
capacity as President of the United
States*, et al.,

Defendants.

20-CV-5770 (JMF)

NEW YORK IMMIGRATION
COALITION, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, *in his official
capacity as President of the United
States*, et al.,

Defendants.

20-CV-5781 (JMF)

Expert Declaration of Mr. John Thompson

I. Introduction

1. On July 21, 2020 President Trump issued a Memorandum for the Secretary of Commerce on *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census* (in the remainder of this document I will use the term “Memorandum” to refer to this document). I am extremely concerned that this action will adversely affect the quality and accuracy of the 2020 Census.
2. The 2020 Census results will be of great importance to our nation. The Constitution requires that the census be used for reapportioning the Congress of the United States 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 sound policy development; providing critical information for state, local and tribal government planning; and supplying critical information 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.

3. I have carefully reviewed the Memorandum instructing the Secretary of Commerce to provide information to exclude undocumented persons from the Apportionment counts. I have also 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. I have two serious concerns regarding the Memorandum: (1) it will significantly increase the risk of larger total and differential undercounts, relative to previous censuses, for the hard-to-count populations, including immigrant communities; and (2) it lacks transparency as required by law and the Census Bureau Statistical Quality Standards that would allow for the assessment of the methodology that might be used in response to the direction to exclude undocumented persons from the 2020 Census Apportionment counts.

II. Qualifications

4. Below I briefly describe specific aspects of my qualifications and work experience that establishes 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.
5. I have served as both 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 area 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.
6. 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.
7. The Census Bureau is the 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; the release of 13 principle key economic indicators on a monthly or quarterly basis; and conducts about 100 additional surveys. The Director of the Census Bureau is appointed by the President and

confirmed by the Senate.

8. 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. In addition, major field tests were conducted in 2013, 2014, 2015 and 2016. The results of these tests informed the final 2020 Census Design that was tested in the 2018 end-to-end test. During my service, the Census Bureau reviewed the residence criteria used to determine where to count the residents of the United States. A preliminary proposal for the 2020 residence criteria was issued for public comment on June 30, 2016.¹ In particular, the Census Bureau was following the same principles that had guided each previous Decennial Census – the Constitution requires that everyone living in the United States should be included in the enumeration, regardless of immigration status, for all uses of the census, including Apportionment. The final 2020 Census residence criteria were issued on February 5, 2018, and again followed these same principles to count everyone living in the United States at their usual place of residence regardless of immigration status for Apportionment and all other uses.²
9. 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.
10. From July 2017 to August 2018, I served as the Executive Director of the Council 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.

¹ Federal Register, 81 FR 42577, Proposed 2020 Census Residence Rule and Residence Situations, June 30, 2016.

² Albert E. Fontenot, Jr., 2020 Census Residence Criteria and Residence Situations, 2020 Census Program Memorandum Series: 2018.04, February 5, 2018.

11. 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

12. The uses of the data generated by the Decennial Census are extremely important for all components of our democracy and economy, including: the constitutionally required reapportionment of the Congress; 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 business to generate economic growth and job creation. 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.

B. The 2020 Census was already facing unprecedented challenges prior to the release of the Memorandum.

13. The COVID-19 pandemic forced the delay of key operations out of concerns for the safety of both census workers and the general public. The in-person components of the local partnership program to increase response rates of the traditionally hard-to-count populations were delayed, as was the operation to collect responses from those households that do not self-respond. This operation is referred to as nonresponse follow-up or NRFU. In my opinion, NRFU is the most critical operation to achieving a fair and accurate enumeration. Currently the national self-response rate is 63 percent, which means that over 37 percent or over 50 million housing units and their occupants must still be enumerated.³ A successful NRFU is therefore essential to achieving a complete enumeration for the 2020 Census.
14. 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 rescheduled it to start in most of the United States on August 11, 2020 and initially planned to complete it by October 30, 2020.
15. In order to accommodate this delay, the Census Bureau had requested, through the Department of Commerce, a four-month extension of the legal deadlines⁴ to deliver Apportionment and redistricting data. For Apportionment this would extend the current deadline of December 31, 2020 to April 30, 2021. For redistricting data, the requested

³ US Census Bureau 2020 Census daily response rate tracker, <https://2020census.gov/en/response-rates.html> (last accessed August 6, 2020).

⁴ Title 13, US Code, Section 141, (b) and (c).

extension was from March 31, 2021 to July 31, 2021.

16. However, the Census Bureau has announced that the deadlines will not be extended, and that the NRFU will now be completed by September 30, 2020.⁵ The Census Bureau will have to take steps to complete the NRFU more rapidly than they planned.
17. In this situation the risk that the hard-to-count populations will be underrepresented increases greatly. Cooperation on the part of the households in NRFU is going to be essential. However, as I discuss below, the issuance of the Memorandum will most likely decrease cooperation and willingness to participate further reducing the effectiveness of NRFU in achieving a fair and accurate enumeration.

C. The confidence of respondents that the 2020 Census will be confidential will be significantly eroded leading to increased undercounts

18. The Census Bureau has made good progress since the 1990 Decennial Census, and had great success during both the 2000 and 2010 Decennial Censuses in reducing undercounts. A key component of this success has been the deployment of a combined national and local advertising and local partnership program to deliver a message to hard-to-count populations that the census is important to their community, and that the data collected through the census is completely confidential. No individual's information is shared with any other organization or law enforcement entities.
19. This messaging program was responsible for dramatic gains in the accuracy and coverage of the 2000 and 2010 Decennial Census relative to the 1990 Census, which did not include such a program. For example, the undercount of Black or African Americans dropped from 4.6 percent in 1990 to 2.1 percent in 2010.⁶ For the Hispanic population the undercount dropped from 5.0 percent to 1.5 percent.⁷
20. Census Bureau research conducted in planning for the 2020 Census has identified serious concerns that potential respondents have with respect to the confidentiality of their information prior to the release of the Memorandum. For example:
 - a. Census Bureau researchers conducted qualitative research that was presented at the 2018 American Association of Public Opinion Research annual conference that

⁵ 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.

⁶ P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

⁷ P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

indicated that fear of government was higher than had been experienced in prior years.⁸

- b. The 2020 Census Barriers Attitudes and Motivators Study was conducted to understand the concerns of potential respondents to help shape the 2020 Census advertising and communication program themes and messages. The study found that the two most significant barriers to participation in the 2020 Census were: (1) concerns that the Census Bureau would share information with other government agencies; and (2) that the information that respondents provided would be used against them⁹. Non-White and Hispanic groups were much more concerned than the White non-Hispanic group. In addition, respondents that were not proficient in English were much more concerned than those who were (39 percent compared to 23 percent).
- c. The Census Bureau also conducted research on the potential effects of adding a citizenship question to the 2020 Census questionnaire.¹⁰ This research indicated that the question would reduce self-response of the non-citizen population. Furthermore, the research found that it was likely that households that refuse to respond to the census questionnaire because of the citizenship question are also likely to not respond to NRFU enumerators. It is my opinion, based on my experience in implementing the 2000 Census and my work in leading the design and planning for the 2020 Census, that the Memorandum is likely to have similar effects on NRFU response.

21. In order to address these concerns, a cornerstone of the 2020 Census advertising and partnership program, is a message that respondent information is confidential. The Census Bureau will not share it with any outside entities, including law and immigration enforcement. It is my opinion that the Memorandum will reduce the effectiveness of the 2020 Census advertising and partnership program in gaining the confidence of respondents in traditionally hard-to-count communities.

22. For example, a critical factor in underlying response and participation in the 2020 Census is the macro environment under which the NRFU is being conducted. While the 2020 Census advertising and partnership program is designed to positively influence this environment, other factors such as the issuance of the Memorandum can have the opposite effect. As Census Bureau Chief Scientist, Dr. John Abowd, acknowledged during recent trial testimony¹¹ in the matter considering the potential effects of adding a citizenship question to the 2020 Census questionnaire, the macro environment was likely to be affected by actions to

⁸ AAPOR Panel on *Changes in Respondent Privacy, Confidentiality, and Data Sharing Concerns*, Meyers, Goerman, Harris-Kojetin, Terry, and Fobia, Denver, Colorado, May 18, 2018

⁹ CBAMS report

¹⁰ J. David Brown, Misty L. Heggeness, Suzanne M. Dorinski, Lawrence Warren, and Moises Yi *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census*, August 6, 2018.

¹¹ Trial Testimony of Dr. John Abowd, Nov. 13, 2018, *New York Immigration Coalition, et al. v. United States Department of Commerce, et al.*, 18-CV-5025-JMF (S.D.N.Y.), at 926-27.

add a citizenship question. Furthermore, Dr. Abowd acknowledged that the political environment around immigration could amplify the effects of a citizenship question on decreased response.

23. It is my opinion that the effects of the Memorandum on the current macro environment are likely to be as great if not greater than the addition of a citizenship question. Therefore, immigrants and the families of immigrants will be reluctant to participate in the NRFU and many will not be enumerated. It is also likely, in my opinion, that this reluctance to participate will extend to other hard-to-count populations as well. The issuance of the Memorandum has significantly increased the risk of larger total and differential undercounts, relative to previous censuses.

D. Lack of transparency

24. At this point, little is known about the ultimate quality and accuracy of the 2020 Census. The location and magnitude of errors caused by potential undercounts and overcounts has not been determined. In addition, the level of inclusion of undocumented persons in the 2020 Census is also unknown.
25. It will be very challenging for the Census Bureau to determine the number of undocumented persons that are included in the 2020 Census at the time when Apportionment data is required to be reported. It is critical for the Census Bureau and the Department of Commerce to describe the methodology that they intend to utilize to estimate the numbers of undocumented persons enumerated in the 2020 Census and what are appropriate measures of accuracy that would support the usage of such methodologies. The Memorandum does not provide any specific directions and the Census Bureau has not described how it will comply with the Memorandum.
26. There are legal and statistical standards that the Census Bureau has followed and should continue to follow with respect to transparency:
- a. The Census Bureau is a Federal Statistical Agency and as Director Dillingham noted in sworn testimony July 29, 2020, the Census Bureau intends to follow the principles and practices identified by the Committee on National Statistics for Federal Statistical Agencies.¹² Principle 2, *Credibility among Data Users*, states: “Also essential to building credibility are for an agency to be open and transparent about its data sources and their limitations, demonstrate understanding of users’ needs and priorities, fully document the processes used to produce and disseminate statistical products, and take proactive steps to preserve data for future use.”

¹² Committee on National Statistics, Principles and Practices for a Federal Statistical Agency 2 (6th ed. 2017).

- b. The Office of Management and Budget issued a Memorandum on April 24, 2019 *Improving Implementation of the Information Quality Act* to the Heads of all Executive Departments and Agencies strengthening previous guidance in this area.¹³ This document states: “The IQA requires agencies conduct pre-dissemination review of their information products. During this review, each agency should consider the appropriate level of quality for each of the products that it disseminates based on the likely use of that information.”
27. In 2013 the Census Bureau issued Statistical Quality Standards that are currently guiding the conduct of all their programs including the 2020 Census.¹⁴
- a. In particular: Statistical Quality Standard F1, *Releasing Information Products Requirement F1-6* states: “Information products must comply with the Census Bureau’s statistical quality standards and must be free of serious data quality issues in order to be released outside the Census Bureau without restrictions.” Statistical Quality Standard F2, *Providing Documentation to Support Transparency in Information Products* Requirement F2-2 states: “Documentation must be readily accessible in sufficient detail to allow qualified users to understand and analyze the information and to reproduce (within the constraints of confidentiality requirements) and evaluate the results.”
28. The most important information produced and released by the Census Bureau is the constitutionally mandated Apportionment data. Because this information is so vital to our democracy, it is critically important that the Department of Commerce and the Census Bureau are transparent in their adherence to their legal and statistical standards. At a minimum, the Census Bureau has an obligation to assure the public and stakeholders that any methods it develops for determining the number of undocumented individuals is statistically sound.

VI. Conclusion

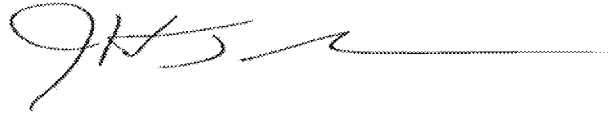
In conclusion, it is my opinion that the issuance of the Memorandum will significantly increase the risk of much larger undercounts for the 2020 Census than measured in previous censuses, including undercounts of immigrant communities. In addition, there is no transparency or documentation of how the quality and fitness for use of the Apportionment counts will be determined, nor is there any documentation of how the number of undocumented persons potentially included in the 2020 Census will be determined.

¹³ Russel T. Vought, Acting Director OMB, Memorandum for the Heads of Executive Departments and Agencies, Subject: *Improving Implementation of the Information Quality Act* (Apr. 24, 2019).

¹⁴ U.S. Census Bureau Statistical Quality Standards (Jul. 2013).

Executed on August 6, 2020 at Bend, Oregon.

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

A handwritten signature in black ink, appearing to read 'JH', followed by a long horizontal line extending to the right.

John Thompson

Appendix A

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
 - 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
 - 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;

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- 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,

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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.

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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

PAPERS AND PUBLICATIONS

- 2018 Thompson, John H and Yablon, Robert. Issue Brief: "Preparing for the 2020 Census Considerations for State Attorneys General". American Constitution 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.) *Encyclopedia of the U.S. Census*, 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 58th 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.

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- 2001 Thompson, John H., "Decision on Release of Statistically Corrected Redistricting Data." Invited paper presented at the Joint Meetings of the American Statistical Association, Atlanta Georgia, August 6, 2001.
- 1999 Thompson, John H., "Census 2000 – Innovations and New Technology." Paper presented at the Economic Commission for Europe's Conference of European Statisticians Meeting, Geneva, Switzerland, February 15-17, 1999.
- 1998 Thompson, John H. and Robert E. Fay, "Census 2000: The Statistical Issues." Paper presented at the Joint Meetings of the American Statistical Association, Dallas, Texas, August 9-13, 1998.
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John H. Thompson
Page 7

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

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

Maloney (202) 225-6081
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<http://oversight.house.gov>

Opening Statement

Chairwoman Carolyn B. Maloney

Full Committee Hearing

**“Counting Every Person: Safeguarding the 2020 Census Against the
Trump Administration’s Unconstitutional Attacks”**

July 29, 2020

Good morning. Thank you all for being here today.

Our Constitution requires that every ten years, we count every person living in the United States of America. We use this count to allocate more than a trillion dollars in federal resources, to draw legislative maps, and to assign electoral college votes to states. It is no exaggeration to say that the census is a cornerstone of our democracy.

Last week, the President issued a memorandum directing the Secretary of Commerce to provide him with the information necessary to exclude undocumented immigrants from the census count for apportionment purposes.

Let me be clear: the President’s direction is unconstitutional. It is illegal. And it disregards the precedent set by every other President, beginning with George Washington.

The Constitution requires the census to count “the whole number of persons in each state.” Federal law requires the Secretary of Commerce to report the “total population” of each state to the President, and it requires the President to transmit this information to Congress.

In the 230-year history of the census, no President has ever tried to manipulate the census count in this way. In fact, just two years ago, the Census Bureau reaffirmed its commitment to do the exact opposite of what the President is now trying to do—the Bureau committed to counting every person, regardless of citizenship or legal status, under the same rules Congress set in the Census Act of 1790.

The President’s decision to release this illegal memo now appears designed to inflict maximum damage to the accuracy of the ongoing 2020 Census.

In just two weeks, the Census Bureau will start visiting the homes of millions of people who have not yet responded to the Census. The President’s latest attack on immigrants could sow fear and confusion in communities across the country, and could lead many people to decide not to participate. This will hurt communities that are already under-counted, under-represented, and under-funded.

Addressing the chaos caused by the President’s memo will drain valuable resources from the Census Bureau, which is already struggling to administer the 2020 Census in the middle of an unprecedented pandemic.

And it will further divide our country at a time when we need unity.

Of course, this is not the first time that the President Trump has attempted to politicize the census. For more than two years, he tried to add a citizenship question, even though the Census Bureau's own studies showed it would depress response rates in many communities.

When this Committee investigated, Secretary Ross and other Administration officials denied they were trying to exclude immigrants from congressional apportionment, and instead claimed—falsely—that the Department of Justice needed citizenship data to enforce the Voting Rights Act.

The Supreme Court saw through their explanation, calling it “contrived,” and blocking the addition of the citizenship question. And when Secretary Ross and Attorney General Barr refused to turn over documents about the real reason for the citizenship question, the House held them both in contempt.

Now the President is trying again to weaponize the census to hurt immigrants, and help Republicans.

As a nation, we depend on the census to be nonpartisan, fair, and accurate. As I told Director Dillingham the last time he appeared before us: our Constitution requires it, our communities rely on it, and our democracy depends on it.

We are here today, at this emergency hearing, because the Trump Administration is threatening this cornerstone of our democracy. We will hear from four former Census Bureau Directors, who oversaw the Census Bureau during Republican and Democratic Administrations. They will share their views on the President's unprecedented attempts to manipulate the Census count, and why it is important to count every person in the United States.

Then we will hear directly from the current Census Bureau Director, Dr. Dillingham. I expect Dr. Dillingham to give us an honest assessment of how the President's memo could impact the accuracy of the Census and what the Bureau is doing to address this risk.

I thank all of our witnesses for participating today, and I look forward to your testimony. I now recognize the distinguished Ranking Member, Mr. Comer, for an opening statement.

###

Contact: Aryele Bradford, Communications Director, (202) 226-5181

Correspondence Quality Assurance Staff

Office of the Director

U.S. Census Bureau

Control Sheet

August 04, 2020

Census Id: CQAS-10443

DOC Number:

Correspondence Type: Congressional NOT Constituent

Action Office: DCMD

Signature:

Subject: Letter to Director Dillingham from Vice Chair of Senate CJS Appropriations Subcommittee re: data collection and processing.

Instructions: Please prepare draft for formal response.

Please expedite response.

Due in CQAS: 08/11/2020

Sender: Jeanne Shaheen (D-NH)

Constituent:

Corr Date: 08/04/2020

Rec Date: 08/04/2020

Due Date: 08/14/2020

Confidential Information: No

Addressee: Director Dillingham

Infocopy: ADDC,Stanley,Hawkins

Concurrence

Surname								
Initials								
Date								

response to a letter Chairman Jerry Moran and I sent you on July 2, 2020, regarding the importance of executing a complete and accurate 2020 Decennial Census, free from political interference. In your response, dated, July, 10, 2020, you asserted:

“The leadership and staff of the Census Bureau are fully committed to a complete and accurate count of all people living in the United States, without exception...I want to be clear that the 2020 Census is nonpartisan in its operation and support, whether during data collection from self-response and field work or the complicated and important work during post-enumeration processing.”

However, I’m seriously concerned that in a mere matter of weeks this is no longer the case. On August 3, 2020, you announced that: “We will end field data collection by September 30, 2020,” a month earlier than the plan you announced in April 2020. I find it impossible to believe that this decision was based on the best recommendations of career Census Bureau experts. Census data collection operations are incredibly complicated even in the best of conditions, but their complexity is greatly exacerbated by the COVID-19 pandemic. In fact, Census experts believe that the results of accelerating the data collection operations under current conditions could be disastrous, with a career official stating, “It’s going to be impossible to complete the count in time. I’m very fearful we’re going to have a massive undercount.”⁴

Further, in response to a question during a House Committee on Oversight and Reform hearing on July 29, 2020, you contested the expert opinions of Census career staff regarding the need for a delay of statutory requirements. Tim Olson, director of field operations for the 2020 Decennial, stated back in May 2020 that, “We have passed the point where we could even meet the current legislative requirement of Dec. 31...We can’t do that anymore.”⁵ But, when this issue was raised at the hearing, you disagreed, stating: “I can’t agree with him, we have many more assessments ahead of us here.”

The expedited 2020 Decennial Census schedule, along with the Presidential Memorandum issued on July 21, 2020, excluding undocumented immigrants from the apportionment count, has heightened concerns that the Trump Administration is trying to manipulate the 2020 Decennial Census for political gain. As such, I would like a formal response, in writing, to the following questions regarding the Census’s operational plans for the 2020 Decennial Census. I request a response by August 14, 2020.

1. Is the Census Bureau still requesting a four-month statutory extension of the apportionment and redistricting deadlines? If not, what has changed with regard to the COVID-19 pandemic that no longer make these statutory changes necessary?

⁴ Hansi, L.W. (2020, July 30). Census Door Knocking Cut A Month Short Amid Pressure To Finish Count. *National Public Radio*, <https://www.npr.org/2020/07/30/896656747/when-does-census-counting-end-bureau-sends-alarming-mixed-signals>

⁵ Hansi, L.W. (2020, May 27). 'We're Running Out Of Time': Census Turns To Congress To Push Deadlines. *National Public Radio*, <https://www.npr.org/sections/coronavirus-live-updates/2020/05/27/863290458/we-re-running-out-of-time-census-turns-to-congress-to-push-deadlines>

2. What has changed with regard to the COVID-19 pandemic that allows the Bureau to thoroughly complete the nonresponse followup and self-response operations in a compressed timeframe from October 31, 2020, to September 30, 2020? Do career employees agree with this change?
3. Since the nonresponse followup operations will be cut short by a month, will the Census Bureau have to reduce the number of times enumerators approach each household? Will use of administrative records to enumerate unresponsive households increase? Will imputation of data increase, and how much use of imputation is acceptable, especially for “whole households” from which the Bureau could not collect data directly?
4. Is the Census Bureau requesting additional resources to rush data collection operations? What evidence do you have that additional funding will allow the Bureau to complete nonresponse follow-up, as well as operations to count special populations, such as people experiencing homelessness, in a thorough manner, given the unpredictability of coronavirus surges and natural disasters, as well as difficulty the Bureau already has encountered in retaining qualified enumerators and field supervisors?
5. How would a compressed schedule affect vital quality-check activities for the nonresponse followup and self-response operations? Will the Census Bureau still carry out the full re-interview operation as laid out in the detailed operational plan for nonresponse followup? If not, why not, and what will the effect be on the quality of census data?
6. The original schedule included five months to complete data processing and tabulation. How long will these operations last under the new schedule and how will these operations change with the compressed schedule? Will the Bureau still conduct the Count Review program, and if so, how will the schedule for that operation compare to the original timetable?

It is not a lack of resources hampering the data collection process. As the Vice Chair of the Senate Commerce, Justice, Science, and Related Agencies Appropriations Subcommittee, I have worked you and with my colleagues on both sides of the aisle to ensure that the Census Bureau has the resources needed to execute a complete and accurate 2020 Decennial Census. This includes appropriating a \$2 billion contingency reserve that was recommended by Secretary Ross but never requested in the budget. This amount has proven critical, as the Census Bureau required about \$1.5 billion thus far to respond to the COVID-19 impacts, including hiring additional nonresponse followup enumerators.

As I have said throughout this process, it is imperative that the Census counts every person in the United States, where they live. We only have one chance to get this right. I am deeply concerned about the recent announcement. I expect that as the Census Director, you will uphold a complete and accurate count, free of political meddling. Thank you for your consideration.

Fw: Letter to Director Dillingham regarding Expediting the 2020 Decennial

Christopher J Stanley (CENSUS/OCIA FED) <christopher.j.stanley@census.gov>

Tue 8/4/2020 11:51 AM

To: BOC Correspondence Quality Assurance (CENSUS) <boc.correspondence.quality.assurance@census.gov>**Cc:** Bina K Saafi (CENSUS/OCIA FED) <bina.k.saafi@census.gov>; Alan Lang (CENSUS/OCIA FED)

<alan.lang@census.gov>; Kathleen M Styles (CENSUS/ADDC FED) <kathleen.m.styles@census.gov>; Erika H Becker

Medina (CENSUS/ADDC FED) <Erika.H.Becker.Medina@census.gov>; James L Dinwiddie (CENSUS/ADDC FED)

<James.L.Dinwiddie@census.gov>; Melissa L Therrien (CENSUS/DCMD FED) <Melissa.L.Therrien@census.gov>

 1 attachments (116 KB)

08-04-20_Census Director Dillingham_Statutory Delay Letter.pdf;

They sent a third revision. Please control this one.

From: Sheridan, Blaise (Appropriations) <Blaise_Sheridan@appro.senate.gov>**Sent:** Tuesday, August 4, 2020 11:47 AM**To:** Christopher J Stanley (CENSUS/OCIA FED) <christopher.j.stanley@census.gov>**Subject:** RE: Letter to Director Dillingham regarding Expediting the 2020 Decennial

Thanks Chris. Please use this version.

From: Christopher J Stanley (CENSUS/OCIA FED) <christopher.j.stanley@census.gov>**Sent:** Tuesday, August 4, 2020 11:40 AM**To:** Sheridan, Blaise (Appropriations) <Blaise_Sheridan@appro.senate.gov>**Cc:** Benjamin J Page (CENSUS/CFO FED) <benjamin.j.page@census.gov>; Toal Eisen, Jean

(Appropriations) <Jean_ToalEisen@appro.senate.gov>

Subject: Re: Letter to Director Dillingham regarding Expediting the 2020 Decennial

Thank you. We have received.

From: Sheridan, Blaise (Appropriations) <Blaise_Sheridan@appro.senate.gov>**Sent:** Tuesday, August 4, 2020 11:35 AM**To:** Christopher J Stanley (CENSUS/OCIA FED) <christopher.j.stanley@census.gov>**Cc:** Benjamin J Page (CENSUS/CFO FED) <benjamin.j.page@census.gov>; Toal Eisen, Jean

(Appropriations) <Jean_ToalEisen@appro.senate.gov>

Subject: RE: Letter to Director Dillingham regarding Expediting the 2020 Decennial

Apologies, please use this version.

From: Sheridan, Blaise (Appropriations)**Sent:** Tuesday, August 4, 2020 11:25 AM**To:** 'Christopher J Stanley (CENSUS/OCIA FED)' <christopher.j.stanley@census.gov>**Cc:** Page, Benjamin J <benjamin.j.page@census.gov>; Toal Eisen, Jean (Appropriations)

<Jean_ToalEisen@appro.senate.gov>

Subject: Letter to Director Dillingham regarding Expediting the 2020 Decennial

Chris,

Please find the attached letter to Census Director Dillingham from the Vice Chair of the Senate CJS Appropriations Subcommittee regarding the Bureau's decision to expedite the data collection and processing operations. The Senator requests a formal response to the questions by August 14th. Please let me know if you have any questions.

Thanks,
Blaise

Correspondence Quality Assurance Staff

Office of the Director

U.S. Census Bureau

Control Sheet

August 04, 2020

Census Id: CQAS-10443

DOC Number:

Correspondence Type: Congressional NOT Constituent

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Subject: Letter to Director Dillingham from Vice Chair of Senate CJS Appropriations Subcommittee re: data collection and processing.

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Please expedite response.

Due in CQAS: 08/11/2020

Sender: Jeanne Shaheen (D-NH)

Constituent:

Corr Date: 08/04/2020

Rec Date: 08/04/2020

Due Date: 08/14/2020

Confidential Information: No

Addressee: Director Dillingham

Infocopy: ADDC,Stanley,Hawkins

Concurrence

Surname								
Initials								
Date								

From: U.S. Census Bureau [census@subscriptions.census.gov]
Sent: 8/4/2020 1:12:28 AM
To: James L Dinwiddie (CENSUS/ADDC FED) [James.L.Dinwiddie@census.gov]
Subject: Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count



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

August 3, 2020 — The U.S. Census Bureau continues to evaluate its operational plans to collect and process 2020 Census data. Today, we are announcing updates to our plan that will include enumerator awards and the hiring of more employees to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce. The Census Bureau's new plan reflects our continued commitment to conduct a complete count, provide accurate apportionment data, and protect the health and safety of the public and our workforce.

[Learn More](#)

- **Complete Count:** A robust field data collection operation will ensure we receive responses from households that have not yet self-responded to the 2020 Census.
 - We will improve the speed of our count without sacrificing completeness. As part of our revised plan, we will conduct additional training sessions and provide awards to enumerators in recognition of those who maximize hours worked. We will also keep phone and tablet computer devices for enumeration in use for the maximum time possible.

○ We will end field data collection by September 30, 2020. Self-response options will also close on that date to permit the commencement of data processing. Under this plan, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities.

- **Accurate Data and Efficient Processing:** Once we have the data from self-response and field data collection in our secure systems, we plan to review it for completeness and accuracy, streamline its processing, and prioritize apportionment counts to meet the statutory deadline. In addition, we plan to increase our staff to ensure operations are running at full capacity.
- **Flexible Design:** Our operation remains adaptable and additional resources will help speed our work. The Census Bureau will continue to analyze data and key metrics from its field work to ensure that our operations are agile and on target for meeting our statutory delivery dates. Of course, we recognize that events can still occur that no one can control, such as additional complications from severe weather or other natural disasters.
- **Health and Safety:** We will continue to prioritize the health and safety of our workforce and the public. Our staff will continue to follow Federal, state, and local guidance, including providing appropriate safety trainings and personal protective equipment to field staff.

The Census Bureau continues its work on meeting the requirements of Executive Order 13880 issued July 11, 2019 and the Presidential Memorandum issued July 21, 2020. A team of experts are examining methodologies and options to be employed for this purpose. The collection and use of pertinent administrative data continues.

We are committed to a complete and accurate 2020 Census. To date, 93 million households, nearly 63 percent of all households in the Nation, have responded to the 2020 Census. Building on our successful and innovative internet response option, the dedicated women and men of the Census Bureau, including our temporary workforce deploying in communities across the country in upcoming weeks, will work diligently to achieve an accurate count.

We appreciate the support of our hundreds of thousands of community-based, business, state, local and tribal partners contributing to these efforts across our Nation. The 2020 Census belongs to us all. If you know someone who has not yet responded, please encourage them to do so today online at 2020census.gov, over the phone, or by mail.

###

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

CITY OF SAN JOSE, CALIFORNIA,
et al.,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

Case No. 20-CV-05167-LHK-RRC-EMC

Case No. 20-CV-05169-LHK-RRC-EMC

Declaration of Albert E. Fontenot, Jr.

I, Albert E. Fontenot, Jr., make the following Declaration pursuant to 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I am the Associate Director for Decennial Census Programs, in which capacity I serve as adviser to the Director and Deputy Director on decennial programs. In this role, I provide counsel as to the scope, quality, management and methodology of the decennial programs; provide executive and professional leadership to the divisions and central offices of the Decennial Census Programs Directorate; and participate with other executives in the formulation and implementation of broad policies, which govern the diverse programs of the Census Bureau. I have served in this capacity since November 12, 2017.
2. The following statements are based on my personal knowledge or on information supplied to me in the course of my professional responsibilities. I am providing these statements in support of the Defendants' opposition to the Plaintiffs' Motion for Partial Summary Judgment.
3. Since March 2020, the Census Bureau has been required to make a number of adjustments to its plans for field data collection for the decennial census as a result of the COVID-19 pandemic, and in order to comply with the statutory deadline of December 31, 2020 to deliver the apportionment count.

4. A statutory deadline under 13 U.S.C. § 141(b) requires that the tabulation of total population by States as required for the apportionment of Representatives in Congress among the several States shall be completed within nine months after the official start of the census and reported by the Secretary to the President of the United States. That date is December 31, 2020.
5. To meet that deadline in light of the delays caused by the COVID-19 pandemic, the Census Bureau, (as reflected in the Census Bureau Director's August 3, 2020 Statement), updated its Operational Plan. For clarity, I will refer to the various changes in the operational plan as "the Replan."¹ Our intent in the Replan was to improve the speed of the count without sacrificing completeness. The Replan involved conducting additional training sessions to increase the number of enumerators in the field and providing monetary awards to existing enumerators in recognition of those who maximize hours worked, as well as retention bonuses for those enumerators who serve for multiple weeks. The Census Bureau planned to keep phone and tablet computer devices for enumeration in use for the maximum time possible.
6. Under the Replan, the Census Bureau would end field data collection by September 30, 2020. Self-response options would also close on that date to permit the commencement of data processing. Under the Replan, the Census Bureau intended to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities. Once the Census Bureau has the data from self-response and field data collection in our secure systems, we would review the data for completeness and accuracy, streamline processing of the data, and prioritize apportionment counts to meet the statutory deadline.
7. Between the time field operations are completed and the statutory deadline, the Census Bureau must engage in post-data collection processing in order to produce the Census Unedited File (CUF), which will then be used to produce the apportionment numbers to be delivered to the Secretary.

¹ On September 5, 2020 the U.S. District Court for the Northern District of California issued a Temporary Restraining Order (TRO) enjoining the Census Bureau from "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." The Census Bureau has taken actions to come into compliance with the TRO, and the case remains pending.

8. As of September 8, 2020, over 96 million households, 65.5 percent of all households in the Nation, have self-responded to the 2020 Census. The Non-Response Followup field work has begun and combined with the self-response numbers approximately 88.8 percent of all the households in the nation have been enumerated. Building on our successful and innovative internet response option, the dedicated women and men of the Census Bureau, including our temporary workforce deploying in communities across the country in recent and upcoming weeks, will work diligently to achieve an accurate count.
9. The Census Bureau has responded to the shortened calendar period for Non-Response Follow-Up (NRFU) operations by taking steps to increase and enhance the ability of its employees in the field to work as efficiently as possible, all in an effort to put in as many hours of work, spread across the total workforce, into field operations as would have been done under the original time frame. We have aimed to improve the speed of our count by continuing to maintain an optimal number of active field enumerators by conducting additional training sessions, providing awards to enumerators in recognition of those who maximize hours worked and retention awards to those who continue on staff for successive weeks. Additionally, we are keeping phone and tablet computer devices for enumeration in use for the maximum time possible.
10. As the Director stated on August 3, 2020, under the revised plan discussed above, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities.
11. The Census Bureau will continue to protect and keep confidential respondents' private and personally-identifying information, as is required by law under Title 13.
12. The Census Bureau will continue to comply with the Census Bureau's 2018 Residence Criteria, *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525 (February 8, 2018), which, as in past decennial censuses, requires each person to be counted in their usual place of residence, as defined in the Residence Criteria.
13. The Presidential Memorandum issued on July 21, 2020, *Memorandum on Excluding Illegal*

Aliens From the Apportionment Base Following the 2020 Census, has had no impact on the design of field operations for decennial census, or on the Census Bureau's commitment to count each person in their usual place of residence, as defined in the Residence Criteria.

**Albert E
Fontenot**

Digitally signed by Albert
E Fontenot
Date: 2020.09.09 19:20:03
-04'00'

Albert E. Fontenot, Jr.
Associate Director
Decennial Census Programs
United States Department of Commerce
Bureau of the Census

Dated: _____

No. 20-16868

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL URBAN LEAGUE, et al.

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT
RULE 27-3 FOR AN IMMEDIATE ADMINISTRATIVE STAY PENDING
DISPOSITION OF MOTION FOR STAY PENDING APPEAL

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

SOPAN JOSHI
*Senior Counsel to the Assistant Attorney
General*

MARK B. STERN
BRAD HINSHELWOOD
*Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-7823*

Defendants-appellants respectfully reply to plaintiffs' opposition to our motion for an immediate administrative stay.

1. Plaintiffs urge that the Court should deny an administrative stay because the injury to plaintiffs that will result from granting a stay will outweigh the injury to the Census Bureau's ability to perform its responsibilities if a stay is denied.

This contention requires the Court to accept plaintiffs' position that the Census Bureau is free to disregard the deadline established by the Census Act, and that a district court is empowered to require the Bureau to flout that deadline. Thus plaintiffs declare: "Nor can Defendants articulate what harm (irreparable or otherwise) they would suffer from the Bureau's failure to meet the Census Act's December 31 deadline. That is unsurprising: the district court's order simply restores the status quo ante and allows the Bureau's own previously adopted deadline of April 30, 2021 in the COVID-19 Plan to become operative once again." Opp. 16.

That argument might have some force if the Bureau could simply defy the deadline imposed by Congress and pursue the COVID Schedule that was expressly made contingent on congressional extension of the statutory timetable. But that is not the case. Crucially, plaintiffs do not contest that the absence of a stay will at a minimum threaten to impair the Census Bureau's completion of the census within the statutory timeframe. They similarly disregard the principle that that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303

(2012) (Roberts, C.J., in chambers)) (quoting *New Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see also Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (same). Their argument also disregards the concerns voiced by other states. *See* Amicus Br. of States of Louisiana and Mississippi, at 1 (noting that “24 states have state statutory or constitutional deadlines tied to the census that are imperiled” by the district court’s injunction).

Whereas the injury to the Census Bureau’s performance of its responsibilities is real and immediate, plaintiffs’ asserted harms involve no similar urgency. In plaintiffs’ view, time is not of the essence because the Bureau can simply “revert” to a schedule under which the Census need not be completed until next April. Opp. 16. Their claims of harm bear no resemblance to the government’s need to comply with the unambiguous statutory command of the Census Act.

2. Plaintiffs’ defense of their legal position offers no basis whatsoever on which the district court’s ruling can be sustained. The “Census Act’s statutory deadline,” they declare, “is no excuse for violating the APA.” Opp. 18. But the APA authorizes courts to set aside final agency action that is “not in accordance with law.” 5 U.S.C. § 706(2)(A). Unsurprisingly, plaintiffs identify no case in which a court has invoked this authority to require an agency to violate an express statutory deadline. Plaintiffs likewise cite no authority for the remarkable proposition that a district court can use its power under the APA to “postpone the effective date of an agency

action,” 5 U.S.C. § 705, to “stay” a statutory deadline set by Congress, much less a case in which a court enjoined an agency from “implementing” such a deadline.

In the absence of relevant authority, plaintiffs rely on the district court’s analysis. Opp. 19-20 (citing Add.64-67). But as discussed in our Motion, none of the cases cited by the district court remotely supports the proposition that it can order the Bureau to disregard the deadline, and plaintiffs make no effort to rehabilitate those cases. None of them involved a requirement to report to Congress itself, much less a reporting requirement of the kind here, established pursuant to Congress’s textually-committed authority to “direct” the “Manner” in which the census will be conducted. U.S. Const. art. I, § 2, cl. 3. Nor did those cases involve a deadline that would trigger submissions from the President to Congress that include the data required for allotment of seats in the House of Representatives and for state-level redistricting. And those cases in any event turned on the interpretation of the statute at issue. Plaintiffs make no attempt to explain how the Census Act can be interpreted to be anything less than mandatory. The only case plaintiffs do cite—*Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020)—simply underscores the absence of any authority for their position. Nothing in that case suggests that an agency can choose to disregard a mandatory statutory deadline, much less that a court can order an agency to defy a deadline.

Plaintiffs urge, however, that “the mere existence of a statutory deadline does not free an agency from considering its *other* statutory—and constitutional—

obligations, such as the 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.’” Opp. 18-19 (quoting *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2568-69 (2019)). Plaintiffs’ assertion of “constitutional” obligations here and elsewhere, *see* Opp. 18, fails to recognize that the district court explicitly declined to rule on their Enumeration Clause claims, and instead recognized that the statutory deadline “bind[s] Defendants.” Add. 68. And plaintiffs’ reference to other “statutory” obligations mistakenly posits that the Census Act creates an administrable and enforceable standard of accuracy. As discussed in our motion, and as plaintiffs do not dispute, neither *Department of Commerce* nor any other case has ever identified such a standard. That plaintiffs have identified no such standard—and the district court’s unwillingness to attempt to divine one—is a reflection of the Supreme Court’s recognition that the Constitution grants Congress “virtually unlimited discretion” to “conduct[] the decennial” census. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). In contrast, the Act *does* impose an explicit and unambiguous statutory deadline that no one has previously thought to be only precatory.

Plaintiffs also fail to recognize that the district court did not independently review the Replan Schedule and did not conclude that its operation would violate any constitutional or statutory standard. Add.44. Instead, it held that Census Bureau had acted arbitrarily in declining to consider a schedule that would extend the census beyond the bounds set by Congress, a conclusion irreconcilable with the terms of the

Census Act. Moreover, given Congress's broad constitutional power over the conduct of the census, the agencies' compliance with the statutory deadline cannot be presumed unconstitutional.

Finally, plaintiffs make the improbable assertion that "this is not a broad programmatic attack on the internal operations of the Bureau," and that "district court merely granted the run-of-mine remedy for an APA violation that stays the unlawful action (the Replan) and, returning to the status quo ante, allows the Bureau's previously adopted COVID-19 Plan to govern in the interim." Opp. 21. Plaintiffs cannot seriously mean that an order to defy a statutory deadline is a "run-of-the-mine remedy," and the district court's order in no way reviews discrete agency action. Instead, the court has ordered the Census Bureau to review the extraordinarily complex workings of the decennial census and to do so while disregarding the express command of Congress. Nor are defendants the ones seeking a departure from the status quo. The district court did that by imposing a temporary restraining order and then a preliminary injunction that altered the Bureau's ongoing operations. And the COVID Schedule, which plaintiffs' complaint seeks to reinstate, is not a viable "status quo ante" because its basic assumption—that Congress would extend the deadline for completing the census—never came to pass.

CONCLUSION

The Court should grant both an immediate administrative stay and a stay pending appeal.

Respectfully submitted,

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SEPTEMBER 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 1,307 words according to the count of Microsoft Word.

/s/ Brad Hinschelwood

BRAD HINSHELWOOD

CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2020, I electronically filed the foregoing docketing statement with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

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September 29, 2020

VIA CM/ECF

Molly Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *National Urban League v. Ross*, No. 20-16868 (emergency stay motion submitted September 25, 2020) (Judges O’Scannlain, Rawlinson, and Christen): Response to Letter of Supplemental Authority Filed Under Federal Rule of Appellate Procedure 28(j)

Dear Ms. Dwyer:

Just hours after filing a reply brief in support of the motion for an administrative stay, the Census Bureau issued a tweet and accompanying press release stating that the “Secretary of Commerce has announced a target date of October 5, 2020 to conclude 2020 Census self-response and field data collection operations.” See <https://twitter.com/uscensusbureau/status/131068527410456985>; see also Press Release, U.S. Census Bureau, *2020 Census Update* (Sept. 28, 2020), <https://www.census.gov/newsroom/press-releases/2020/2020-census-update.html>. When Defendants finally informed the Court of this development in a 28(j) letter last night, they claimed their request for an administrative stay remained “unchanged.” That is logically incorrect.

Defendants’ need for an “immediate” stay was premised on the Bureau’s inability to end field operations on September 30, and begin the “post-processing phase” on October 1, because the district court had stayed and enjoined that specific deadline in the Replan. Mot. Stay 19-20. The newly announced October 5 “target date” shows that the Bureau is no longer planning to end field operations on

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September 30. The professed need for immediate, emergency relief was unwarranted then and indefensible now.

Nor can Defendants rely any longer on the December 31 deadline (still three months away) for reporting apportionment counts to the President. Defendants have repeatedly and recently stated, in court and under oath, that they *cannot* meet the statutory deadline if field operations continue even a day beyond September 30. *E.g.*, Stay Mot. 20; Add.149-50 ¶¶ 22, 24; Add. 113 ¶ 100. In the words of Defendants' counsel, it would be "impossible." 9/8/20 Tr. 9:6-10, Dkt. 98. That alone moots the only "harm" Defendants claim they will suffer from *any* stay (as Plaintiffs will brief fully when the Court issues a schedule on the stay pending appeal).

Defendants' tweet has also led to additional proceedings in the district court that may impact the pending emergency stay motion and the appeal. Plaintiffs will keep this Court apprised of any material developments.

Respectfully submitted,

Dated: September 29, 2020

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Statement by Former U.S. Census Bureau Directors
August 4, 2020

**On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve
A Fair and Accurate Enumeration of the United States**

The Census Bureau has addressed the challenges presented by the COVID-19 pandemic by delaying the start of many 2020 Census field operations. Most significantly the start of the operation to enumerate those households that do not self-respond (nonresponse follow-up or NRFU) was scheduled to take place from May 15 through July 31, 2020. The Census Bureau was forced to reschedule most of this operation to take place from August 11 through October 30, 2020. In order to accommodate this delay, the professional staff at the Census Bureau determined that a four-month extension of the legally mandated deadlines for delivering Apportionment and redistricting data was necessary.

Having helped to plan, execute or lead five decennial censuses serving nine Presidents of both parties, our expert opinion is that failing to extend the deadlines to April 30, 2021 will result in seriously incomplete enumerations in many areas across our country. The Census Bureau will not be able to carry out the NRFU fully and will be forced to take steps such as fewer in-person visits and rely instead on the use of administrative records or statistical techniques on a much larger scale than in previous census.

The end result will be under-representation of those persons that NRFU was expected to reach and, at even greater rates for traditionally hard-to-count populations and over-representation of all other populations with potentially extreme differential undercounts.

The Census Bureau will be faced with the enormous burden of determining whether the 2020 Census results are sub-standard. We urge the Congress to share that burden. Task a suitable independent institution – any apolitical and trusted institution of its choosing -- to produce *predetermined quality metrics* that can assess if the final 2020 numbers match other historical and reasonable estimates of the population the Census Bureau produces. And if not, recommend what steps the country should take.

We also call upon the Census Bureau to make transparency and openness a priority for the 2020 Census at this challenging time. The timely release of measures of quality and progress is essential to assure stakeholders that a fair and accurate enumeration is underway.

These transparency measures should include daily reports of the completion percentage of NRFU at levels consistent with the current self-response rates, the rate of proxy enumeration, and other process metrics.

In conclusion, we strongly urge the Congress to extend the legal deadlines for the 2020 Census and to require that the Census Bureau to continue all data collection operations through October 30, 2020.

Vincent Barabba (1973-76 & 1979-81)

Kenneth Prewitt (1998-2001)

Robert Groves (2009–2012)

John Thompson (2013-2017)



Agency Priority Goal Action Plan

Conduct a Complete and Accurate 2020 Decennial Census

Goal Leader:

Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs, Commerce and General Government



Fiscal Year 2020, Quarter 3

Overview

Goal Statement

- The U.S. Census Bureau will conduct a complete and accurate 2020 Decennial Census U.S. population count by executing for optimal self-response with a nationwide target of 60.5% in 2020, delivering apportionment counts to the President by December 31, 2020, and releasing counts for redistricting by April 1, 2021.*

Challenge

- Planning for the Decennial Census requires balancing funding constraints and data accuracy against an official schedule fixed by statute. Recruiting and hiring of needed staff in an increasingly competitive environment with reduced levels of unemployment in the labor market were a challenge during much of the peak recruiting period.

Opportunity

- The Census Bureau is implementing four key innovation areas while putting security controls in place to protect the confidentiality of data. The innovations will:
 - Eliminate the need to physically canvass every census block.
 - Enable people to respond via multiple modes (internet, phone, and mail).
 - Improve the efficiency and effectiveness of the 2020 Census by utilizing federal and state information, and information from third parties.
 - Reduce staffing, infrastructure, and brick and mortar footprint through the increased use of technology compared to previous paper methods.

*Pending the approval of statutory relief by Congress of 120 additional calendar days to deliver apportionment and redistricting counts, COVID-19 operational adjustments plan for apportionment counts to be delivered by April 30, 2021, and redistricting counts to be delivered by July 31, 2021.

Opportunity (continued)

The four innovation areas for the 2020 Census are:

1. Reengineering Address Canvassing
 - Adding new addresses to the Census Bureau's address frame using geographic information systems and satellite imagery instead of sending Census Bureau employees to walk and physically check 11 million census blocks.
2. Optimizing Self-Response
 - Encouraging the population to respond to the 2020 Census using the internet, reducing the need for more expensive paper data capture.
3. Utilizing Administrative Records and Third-Party Data
 - Reduce costs by using data the public has already provided to the government and data available from commercial sources to reduce visits to units that do not self-respond.
4. Reengineering Field Operations
 - Using sophisticated operational control systems to deploy Census Bureau employees to nonresponding housing units and to track daily progress.

Summary of Progress – FY 20 Q3

- As of June 30, 2020:
 - Nearly 91.4 million households have responded.
 - The national rate that self-responded is 61.8 percent.
- Challenges included:
 - In light of the COVID-19 outbreak, the U.S. Census Bureau is adjusting 2020 Census operations in order to:
 - Protect the health and safety of the American public and Census Bureau employees,
 - Implement guidance from federal, state, and local authorities regarding COVID-19, and
 - Ensure a complete and accurate count of all communities.

Summary of Progress – FY 20 Q3 (continued)

- Under the adjusted 2020 Census operational plan, information provided daily to the Census Bureau from FEMA, as well as state and local authorities, will be used to guide Census Bureau decisions on timing for when field activities would resume. As a result, selected field operations will resume on a phased schedule on a geographic basis. In-person activities, including enumeration, office work, and processing activities, will incorporate the most current guidance from authorities to ensure the health and safety of staff and the public. (for more information see <https://2020census.gov/en/news-events/operational-adjustments-covid-19.html>).
- In order to ensure the completeness and accuracy of the 2020 Census, the U.S. Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts. The U.S. Census Bureau has extended 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.

Department Leadership

DOC 2020 Oversight Committee

Monthly meeting to address major operational and budgetary issues that require Secretarial attention. These include, but are not limited to, changes to the Life Cycle Cost Estimate, developments related to major contracts and IT systems, regular reports on the program budget, interactions with Congress and Oversight, including the Office of Inspector General and the Government Accountability Office, and Program Management Reports on the scope, schedule, and risks for the program.

Chair: DOC Secretary

Members include the following from DOC: Deputy Secretary, Chief Financial Officer, Chief of Staff, Office of Acquisition Management, General Counsel, consultants, Chief Information Officer, Deputy Chief of Staff, Under Secretary for Economic Affairs, Office of Policy and Strategic Planning, and Deputy for Program Management; and from Census: Census Management Team.

DOC 2020 Senior Management

Weekly meeting covering the same areas as the Oversight Committee, but with a closer focus on the day-to-day operations of the program.

Chair: DOC Deputy Secretary

Members include many of the listed on DOC 2020 Oversight Committee and the following from the Census Bureau: Census Bureau Director, Deputy Director, Deputy Chief of Staff, Chief Information Officer, Chief Financial Officer, Associate Director for Decennial Census Programs, Associate Director for Communications, Chief of Procurement, Assistant Director for Decennial Census Programs for Systems and Contracts, Assistant Director for Decennial Census Programs for Operations and Schedule Management, and consultants.

Bureau Leadership

2020 Census Integration Group

The Census Integration Group (CIG) replaces the previous Portfolio Management Governing Board and acts as a key venue for decision-making.

Chair: Associate Director, Decennial Census Programs

- Assistant Directors, Decennial Census Programs
- Decennial Division Chiefs
- Decennial Assistant Division Chiefs
- National Processing Center Representation
- Information Technology Application Development and Services Representation
- Field Division Representation
- Population Division Representation
- Center for Adaptive Design Chief
- Integrated Project Teams Representation
- Communications Directorate Representation
- Research and Methodology Directorate Representation

2020 Census Executive Steering Committee

The 2020 Census Executive Steering Committee (ESC) provides enterprise-level governance of the 2020 Census. The 2020 Census ESC provides decision-making support to the Census Bureau Director and Deputy Director on 2020 Census program policies and initiatives.

Chair: Director, Census Bureau

- Deputy Director and Chief Operating Officer
- Chief Financial Officer
- Chief Administrative Officer
- Associate Director, Decennial Census Programs
- Associate Director, Research and Methodology
- Associate Director, Field Operations
- Associate Director, Information Technology and Chief Information Officer
- Associate Director, Economic Programs
- Associate Director, Communications
- Associate Director, Demographic Programs

Bureau Leadership (continued)

COVID-19 Task Force

Formed on February 25, the Bureau's internal COVID-19 Task Force examines policy related issues impacting employee activities including telework, travel, and public events.

Chair: Chief Administrative Officer, Census Bureau

Goal Structure & Strategies

The 2020 Census is ramping up in FY2020 for peak operations and ramping down in FY2021 with dissemination.

The following are internal targets*:

- Maximize self-response data collection through three different modes: internet, phone, and mail
- Conduct Nonresponse Followup (NRFU)
- Release apportionment counts to the President of the United States
- Release PL 94-171 data to the states for redistricting
- Release census data products for use by the public

*In light of the COVID-19 outbreak, the U.S. Census Bureau has adjusted the schedule for some 2020 Census operations including NRFU and the release of data products from the original planned dates.

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Key Questions to Consider:

How will we move the goal from the current state to the targeted state?

What evidence do we have that the strategies will have the desired effect?

What is the causal connection between each strategy and each desired result?

Do resource limitations or the theory of change suggest phasing of strategies?

What milestones might we set along the way in order to motivate periodic achievement at key points in the goal period?

Goal Structure & Strategies (continued)

External factors that can impact the achievement of the internal annual targets

1. Public perception of ability to safeguard response data

IF a substantial segment of the public is not convinced that the Census Bureau can safeguard their response data against data breaches and unauthorized use, THEN response rates may be lower than projected, leading to an increase in cases for follow-up and cost increases.

Mitigation strategies include the following:

- Develop and implement a strategy to build and maintain the public's confidence in the Census Bureau's ability to keep their data safe.
- Follow the IT security-related mitigation strategies of 2020 Census Risk Cybersecurity Incidents.
- Continually monitor the public's confidence in data security in order to gauge their probable acceptance of the Census Bureau's methods for enumeration.

2. Cybersecurity incidents

IF a cybersecurity incident occurs to the systems supporting the 2020 Census, THEN additional technological efforts may be required to repair or replace the systems affected in order to maintain secure services and data.

Mitigation strategies include the following:

- Monitor system development efforts to ensure the proper Census Bureau IT security guidelines are followed during the system development phase.
- Research other Census Bureau programs, other government agencies, other countries, and the private sector to understand how they effectively mitigate cybersecurity incidents.
- Audit systems and check logs to help in detecting and tracing an outside infiltration.
- Perform threat and vulnerability analysis through testing and during production.
- Prepare for rapid response to address any detected cybersecurity incidents.
- Leverage data stewardship and information safeguarding policies and procedures of Census Bureau programs, other government agencies, other countries, and the private sector to understand how to mitigate cybersecurity incidents.

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Key Questions to Consider:

How will we move the goal from the current state to the targeted state?

What evidence do we have that the strategies will have the desired effect?

What is the causal connection between each strategy and each desired result?

Do resource limitations or the theory of change suggest phasing of strategies?

What milestones might we set along the way in order to motivate periodic achievement at key points in the goal period?

Goal Structure & Strategies (continued)

External factors that can impact the achievement of the internal annual targets (continued)

3. Natural disaster

IF a natural disaster occurs at or around the time of the 2020 Census, THEN it will be difficult to conduct NRFU in the impacted geographic areas due to the problems gaining access to the populations living in those areas.

Mitigation strategies include the following:

The current coronavirus (COVID-19) worldwide crisis means this risk has been realized. However, the probability remains that other natural disasters may also occur during the 2020 NRFU operation. COVID-19 related field delays now push NRFU enumeration into the middle of hurricane season (June 1 until November 30).

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Key Questions to Consider:

How will we move the goal from the current state to the targeted state?

What evidence do we have that the strategies will have the desired effect?

What is the causal connection between each strategy and each desired result?

Do resource limitations or the theory of change suggest phasing of strategies?

What milestones might we set along the way in order to motivate periodic achievement at key points in the goal period?

Goal Structure & Strategies (continued)

Conduct a complete and accurate 2020 Census of the U.S. population and housing

Complete the In-Field Address Canvassing data collection

The Census Bureau needs the address and physical location of each living quarter in the United States to conduct the census. During Address Canvassing, the Census Bureau verifies that its master address list and maps are accurate so the tabulation for all housing units, group quarters, and transitory locations is correct. A complete and accurate address list is the cornerstone of a successful census.

The Census Bureau has determined that while there will be a full canvassing of the nation, a full In-Field Address Canvassing of the nation is no longer necessary.

During In-Field Address Canvassing, field staff compare what they see on the ground to the existing census address list and either verify or correct the address and location information, adding addresses to the list as necessary.

Milestone Summary				
Key Milestone	Milestone Due Date	Milestone Status	Change from last quarter	Comments
Complete In-Field Address Canvassing data collection	FY20Q1	Met	N/A	

Goal Structure & Strategies (continued)

Conduct a complete and accurate 2020 Census of the U.S. population and housing (continued)

Deploy systems for FY 2020 operations

Systems Engineering and Integration (SEI) is an IT operation that manages the delivery of a System of Systems that meets the 2020 Census Program business and capability requirements. The SEI Operation provides oversight and structure around the deployment of systems as well as operations and maintenance processes.

Milestone Summary				
Key Milestone	Milestone Due Date*	Milestone Status	Change from last quarter	Comments
Approve Operational Readiness Review (ORR) for Forms Printing and Distribution.	FY20Q1	Met	N/A	
Approve ORR for Self-Response. Approve ORR for Group Quarters Enumeration/Service-Based Enumeration(SBE)/Enumeration at Transitory Locations (ETL). Approve ORR for Update Enumerate/Update Leave. Approve ORR for Remote Alaska. Approve ORR for NRFU. (D10.0)	FY20Q2	Met	N/A	
Approve ORR for Response File Creation. (D12.2)	FY20Q4			

* Q3 & Q4 schedule delays are expected due to the operational adjustments made for COVID-19.

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Goal Structure & Strategies (continued)

Key milestones to conduct self-response data collection

Maximize self-response data collection through three modes: internet, phone, and mail

Self-response reduces the need to conduct expensive in-person follow-up for the enumeration. It is anticipated that online self-response will be the primary mode of data collection.

Milestone Summary				
Key Milestone	Milestone Due Date*	Milestone Status	Change from last quarter	Comments
Start: Conduct training for Census Questionnaire Assistance (CQA) Call Center staff (CSRs and supervisors)	FY20Q1	Met	N/A	
Complete: Training for CQA Call Center staff (CSRs and supervisors)	FY20Q2	Met	N/A	
Start: CQA Inbound Operation				
Start: Self-response mailings				
Start: Internet Self-Response (ISR) data collection				
Start: Paper data capture				
Start: CQA Outbound Operation	FY20Q3	Not Met	N/A	Self-response mailings are not completed. The mailings schedule got extended due to COVID adding additional mailings. Due to the change, this target is unmet.
Complete: Self-response mailings				
Complete: CQA Outbound Operation	FY20Q4			
Complete: CQA Inbound Operation				
Complete: ISR data collection				
Complete: Paper data capture				
Complete: Group Quarters Data Collection				

* Q3 & Q4 schedule delays are expected due to the operational adjustments made for COVID-19.

Goal Structure & Strategies (continued)

Key milestones to conduct self-response data collection (continued)

Launch the integrated communications campaign

The integrated communications campaign involves communication and contact strategies that encourage the use of the internet as the primary response mode through a sequence of invitations and postcard mailings. In addition, Census Bureau enumerators will leave materials to encourage self-response.

Milestone Summary					
Key Milestone	Milestone Due Date	Milestone Status	Change from last quarter	Comments	
Deliver final version of Media Plan 2.0	FY20Q1	Met	N/A		
Deploy 2020 Census.gov release 3	FY20Q2	Met	N/A		
Deliver Broadcast and Audio Tour Report	FY20Q3	Not Met	N/A	The schedule for this activity was adjusted as part of the 2020 Census COVID-19 replan. The activity started 4/25/19 and originally planned to finish 5/29/20. The task is currently 77% complete with an estimated completion date of 10/30/20.	
Post Buy Analyses Report and Presentation of Media Buys	FY20Q4				

* Q3 & Q4 schedule delays are expected due to the operational adjustments made for COVID-19

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Goal Structure & Strategies (continued)

Conduct a complete and accurate 2020 Decennial Census U.S. population count (continued)

Conduct Nonresponse Followup (NRFU) data collection

Nonresponse Followup (NRFU) Operation determines or resolves housing unit status for addresses included in the NRFU workload such as those addresses that have not self-responded. The operation also enumerates housing units that are determined to have a housing status of occupied.

Key Milestone	Milestone Summary			
	Milestone Due Date*	Milestone Status	Change from last quarter	Comments
Complete: Finalize NRFU enumerator training materials	FY20Q1	Met	N/A	
Start: Conduct census field supervisor (CFS) training for Early NRFU	FY20Q2	Met	N/A	
Complete: Conduct census field supervisor (CFS) training for Early NRFU	FY20Q3	Not Met	N/A	Census field supervisor (CFS) training for Early NRFU was completed. Conduct NRFU Field Data Collection now planned to start 07/16/20 due to the operational adjustments made for COVID-19.
Start: Conduct NRFU				
Complete: Conduct NRFU	FY20Q4			

* Q3 & Q4 schedule delays are expected due to the operational adjustments made for COVID-19.

Goal Structure & Strategies (continued)

Release data products on schedule

Deliver apportionment counts to the President of the United States

Deliver apportionment counts to the President by December 31, 2020.*

Milestone Summary				
Key Milestone	Milestone Due Date	Milestone Status	Change from last quarter	Comments
Complete: Deliver Apportionment Counts to President The Director of the Census Bureau delivers to the Secretary of Commerce, who then delivers to the President by December 31, 2020	FY21Q1			

* Pending the approval of statutory relief by Congress of 120 additional calendar days to deliver apportionment counts, COVID-19 operational adjustments plan for apportionment counts to be delivered by April 30, 2021.

Goal Structure & Strategies (continued)

Release data products on schedule (continued)

Release PL 94-171 data to the states for redistricting*

Public Law 94-171, enacted by Congress in December 1975, requires the Census Bureau to provide the states with the small area census data necessary for legislative redistricting. The law also requires that the Census Bureau deliver these data no later than one year from Census Day.

Milestone Summary

Key Milestone	Milestone Due Date	Milestone Status	Change from last quarter	Comments
Complete: Perform Privacy Protection and create the Microdata Detail File (MDF)	FY21Q2			
Complete: Deliver P.L. 94-171 Geographic Products to States "Successfully deliver all geographic support products (shapefiles, maps, equivalency files, block-to-block relationship files) to all states, the District of Columbia, and Puerto Rico by February 1, 2021."	FY21Q2			
Complete: Confirm Receipt of P.L. 94-171 Data Products from States "Successfully deliver and confirm receipt of the official P.L. 94-171 Redistricting Data Summary Files in each state, the District of Columbia, and Puerto Rico by both the majority and minority parties currently holding office in the legislature as well as by any established redistricting commissions."	FY21Q2			

* Pending the approval of statutory relief by Congress of 120 additional calendar days to deliver redistricting counts, COVID-19 operational adjustments plan for redistricting counts to be delivered by July 31, 2021.

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Goal Structure & Strategies (continued)

Release data products on schedule (continued)

Release census data products for use by the public

Tabulate and disseminate selected 2020 Census data products for the 50 states, D.C., Puerto Rico, and the four U.S. Island Areas. These data are used by policymakers, researchers, academia, businesses, government and nongovernmental organizations, journalists, and the general public to learn more about their communities.

Milestone Summary

Key Milestone	Milestone Due Date*	Milestone Status	Change from last quarter	Comments
Produce and Release Demographic and Housing Characteristics (DHC)	FY21Q4			
Produce and Release Demographic Profiles	FY21Q4			
Produce and Release Population and Housing Counts - Island Area Census	FY21Q4			

* Q4 schedule delays are expected due to the operational adjustments made for COVID-19.

Data Accuracy and Reliability

The 2020 Census program tracks milestone data with the 2020 Census Integrated Master Schedule. Publication dates are validated against dates of posting on the 2020 Census website. The Census Bureau Office of Information Security (OIS) reviews the cybersecurity reporting for compliance with the National Institute of Standards and Technology (NIST) Risk Framework, and Federal Information Security Management Act (FISMA) requirements. Plans of Action and Milestones for the Authorization to Operate are reported to the Department of Commerce Chief Information Officer. Where necessary, observation of documents or related materials will verify data recorded in the Integrated Master Schedule.

All evaluation results and program reports are thoroughly reviewed and approved by the Associate Director for Decennial Census Programs and reported up through the governance structure described earlier. The evaluation results are indexed and fact-checked to ensure accuracy.

Additional Information

Contributing Programs

Organizations:

- The Department of Health and Human Services, Department of Housing and Urban Development, Department of Interior, Department of Justice, Department of Homeland Security, Department of State, United States Postal Service, Internal Revenue Service, Office of Personnel Management, Social Security Administration, and the Selective Service System provide key administrative records.
- The National Geospatial-Intelligence Agency provides current, high-resolution imagery at no cost for Interactive Review during In-Office Address Canvassing.
- The National Academy of Sciences; Census Scientific Advisory Committee; and the National Advisory Committee on Racial, Ethnic, and Other Populations contribute to the planning, implementation, and evaluation of Decennial Census Programs.
- Tribal, state, and local governments participate in our geographic partnership programs to ensure the accuracy of the MAF/TIGER System - the foundation of the decennial census.

Additional Information

Contributing Programs (continued)

Program Activities:

- Demographic Programs Directorate: Provides relevant and accurate information on the size, distribution, and characteristics of the nation's population and housing. Also oversees the planning, collection, processing, and distribution of population and housing data obtained from the 2020 Census.
- Research and Methodology Directorate: Performs research into innovative methods and products, and establishes and refines methodologies in support of collaborative research and methodologies supporting the 2020 Census. Assures that the Census Bureau can effectively disseminate the maximum amount of high-quality data about the nation's people, while fully meeting the Census Bureau's legal and ethical obligation to protect the confidentiality of respondents and the information they provide.
- Field Directorate: Primary area responsible for coordinating and implementing 2020 Census data collection activities. Manages the recruiting, hiring, training, and production activities of the 300,000+ field staff needed to implement the 2020 Census. Manages field operations out of six regional census centers and 248 area census offices. At the National Processing Center, handles the logistics for materials supporting the 2020 Census field operations and manages the paper data capture of all paper returns in two data capture centers.
- Communications Directorate: Provides extensive communications support to the 2020 Census products and documentation, the public, and stakeholders.

Additional Information

Contributing Programs (continued)

Regulations:

- Article I, Section 2 of the U.S. Constitution mandates that a census be conducted and used to reapportion representatives in Congress among the states every 10 years.
- The Census Bureau is bound by Title 13 of the United States Code. These laws provide authority for our agency work, and strong protections for the information collected from individuals and businesses.
- The Census Bureau is authorized to acquire or purchase records from states and third party entities under Title 13 United States Code (U.S.C.), Section 6. The Privacy Act of 1974 explicitly permits federal agencies to disclose personally identifiable information to the Census Bureau if for statistical uses under Title 13, United States Code. Additionally, the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) and other federal confidentially statutes permit agencies to share data with the Census Bureau under strict, secure conditions. State laws often mirror these federal statutes.
- The Internal Revenue Service (IRS) proposes and implements regulations concerning the use of IRS administrative records.

Additional Information

Contributing Programs (continued)

Policies:

- The Data Stewardship Executive Policy Committee (DSEP) serves as the Census Bureau's focal point for policy issues related to respondent privacy, security, data confidentiality, data management, record linkage, and administrative data. The DSEP membership includes the Deputy Director and all Associate Directors.
- The Census Bureau 2020 Policy Group advises on 2020 Census activities that are impacted by policy.

Other Federal Activities:

- The Office of Management and Budget provides race and ethnicity guidance and reviews the progress of the 2020 Census.

Additional Information

Stakeholder / Congressional Consultations

Effective communications with external and internal stakeholders, such as the National Academy of Sciences, Department of Commerce Office of Inspector General, and the Government Accountability Office are important. The Census Bureau conducts semiannual meetings with the Census Scientific Advisory Committee and the National Advisory Committee on Racial, Ethnic, and Other Populations. The Census Scientific Advisory Committee addresses emerging census challenges, including adaptive design, cyberinfrastructure, demographic, economic and statistical research, technical and operational priorities. The National Advisory Committee (NAC) considers topics such as hard to reach populations, race and ethnicity, language, aging populations, American Indian and Alaska Native tribal considerations, new immigrant populations, populations affected by natural disasters, highly mobile and migrant populations, complex households, rural populations, and population segments with limited access to technology. The committee also advises on data privacy and confidentiality, among other issues.

The Census Bureau meets quarterly with representatives from congressional appropriation committees in order to brief them on the progress of the 2020 Census. Census staff meet upon request with representatives of oversight committees. Feedback from congressional stakeholders is considered in the design of the 2020 Census and operational planning.

We work with partners in addition to internal and external stakeholders. Partners educate people about the importance of the census, motivate them to return their questionnaires, and encourage cooperation with enumerators. Census has maintained many of the 2010 Census relationships for 2020. In order to optimize self-response, the Census Bureau builds relationships with state, local, and tribal governments; nongovernmental organizations at the national and local level; national companies; and schools. The objectives are to:

- Increase self-response.
- Use trusted voices to make census messages relevant at the local level.
- Increase awareness among the general public.
- Increase partnership engagement at the local level through new or improved programs.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

NATALIA USECHE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

Case No. 8:20-cv-2225-PX

Declaration of Albert E. Fontenot, Jr.

I, Albert E. Fontenot, Jr., make the following Declaration pursuant to 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I am the Associate Director for Decennial Census Programs, in which capacity I serve as adviser to the director and deputy director on decennial programs. In this role, I provide counsel as to the scope, quality, management and methodology of the decennial programs; provide executive and professional leadership to the divisions and central offices of the Decennial Census Programs Directorate; and participate with other executives in the formulation and implementation of broad policies, which govern the diverse programs of the Census Bureau. I have served in this capacity since November 12, 2017.

2. The following statements are based on my personal knowledge or on information supplied to me in the course of my professional responsibilities. These statements are provided in support of the Defendants' opposition to the Plaintiffs' motion for partial summary judgment or in the alternative for a preliminary injunction.

3. Since March 2020, the Census Bureau has been required to make a number of adjustments to its plans for field data collection for the decennial census as a result of the COVID-19 pandemic, and in order to comply with the statutory deadline of December 31, 2020 to deliver the apportionment count.

4. A statutory deadline under 13 U.S.C. § 141(b) requires that the tabulation of total population by States as required for the apportionment of Representatives in Congress among the several States shall be completed within nine months after the official start of the census and reported by the Secretary to the President of the United States. That date is December 31, 2020.

5. To meet that deadline in light of the delays caused by the COVID-19 pandemic, the Census Bureau, (as reflected in the Census Bureau Director's August 3, 2020 Statement), has updated its operations plan. Specifically, the Census Bureau intends to improve the speed of the count without sacrificing completeness. As part of its revised plan, the Census Bureau will conduct additional training sessions to increase the number of enumerators in the field. Additionally, we will be providing monetary awards to existing enumerators in recognition of those who maximize hours worked, as well as retention bonuses for those enumerators who serve for multiple weeks. The Census Bureau will also keep phone and tablet computer devices for enumeration in use for the maximum time possible.

6. The Census Bureau will end field data collection by September 30, 2020. Self-response options will also close on that date to permit the commencement of data processing. Under the revised plan, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities. Once the Census Bureau has the data from self-response and field data collection in our secure systems, the Bureau plans to review the data for completeness and accuracy, streamline processing of the data, and prioritize apportionment counts to meet the statutory deadline.

7. Between the time field operations are completed and the statutory deadline, the Census Bureau must engage in post-data collection processing in order to produce the Census Unedited File (CUF), which will then be used to produce the apportionment numbers to be delivered to the Secretary.

8. As of August 30, 2020, over 96 million households, 64.9 percent of all households in the Nation, have self responded to the 2020 Census. The Non-Response Followup field work has begun and combined with the self-response numbers approximately 82.4 percent of all the households in the nation have been enumerated. Building on our successful and innovative internet response option, the dedicated women and men of the Census Bureau, including our temporary workforce deploying in communities across the country in recent and upcoming weeks, will work diligently to achieve an accurate count.

9. The Census Bureau has responded to the shortened calendar period for Non-Response Follow-Up (NRFU) operations by taking steps to increase and enhance the ability of its employees in the field to work as efficiently as possible, all in an effort to put in as many hours of work, spread across the total workforce, into field operations as would have been done under the original time frame. We have aimed to improve the speed of our count by continuing to maintain an optimal number of active field enumerators by conducting additional training sessions, providing awards to enumerators in recognition of those who maximize hours worked and retention awards to those who continue on staff for successive weeks. Additionally, we are keeping phone and tablet computer devices for enumeration in use for the maximum time possible.

10. As the Director stated on August 3, 2020, under the revised plan discussed above, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities.

11. The Census Bureau will continue to protect and keep confidential respondents' private and personally-identifying information, as is required by law under Title 13.

12. The Census Bureau will continue to comply with the Census Bureau's 2018 Residence Criteria, *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525 (February 8, 2018), which, as in past decennial censuses, requires each person to be counted in their usual place of residence, as defined in the Residence Criteria.

13. The Presidential Memorandum issued on July 21, 2020, *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, has had no impact on the design of field operations for decennial census, or on the Census Bureau's commitment to count each person in their usual place of residence, as defined in the Residence Criteria.

Albert E Fontenot

Digitally signed by Albert E Fontenot
Date: 2020.09.01 15:26:31 -04'00'

Albert E. Fontenot, Jr.
Associate Director
Decennial Census Programs
United States Department of Commerce
Bureau of the Census

Dated: _____

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9. The Census Bureau has responded to the shortened calendar period for Non-Response Follow-Up (NRFU) operations by taking steps to increase and enhance the ability of its employees in the field to work as efficiently as possible, all in an effort to put in as many hours of work, spread across the total workforce, into field operations as would have been done under the original time frame. We have aimed to improve the speed of our count by continuing to maintain an optimal number of active field enumerators by conducting additional training sessions, providing awards to enumerators in recognition of those who maximize hours worked and retention awards to those who continue on staff for successive weeks. Additionally, we are keeping phone and tablet computer devices for enumeration in use for the maximum time possible.

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Albert E Fontenot

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Date: 2020.09.01 15:26:31 -04'00'

Albert E. Fontenot, Jr.
Associate Director
Decennial Census Programs
United States Department of Commerce
Bureau of the Census

Dated: _____

From: BOC BROADCAST (CENSUS/DIR) [boc.broadcast@census.gov]
Sent: 8/5/2020 3:39:56 PM
Subject: Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count

To: All HQ Staff

From the Desk of Steven Dillingham, Director . . .

I want to make sure everyone saw the blog I put out this week with key updates to our 2020 Census operations. It is important everyone knows how much the entire Census Bureau leadership appreciates your efforts every day across all our critical surveys and censuses, including the 2020 Census. You are all exceptional public servants.

You can access a copy of the blog [here](#). I have included the full text below.

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

AUGUST 3, 2020 — The U.S. Census Bureau continues to evaluate its operational plans to collect and process 2020 Census data. Today, we are announcing updates to our plan that will include enumerator awards and the hiring of more employees to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce. The Census Bureau's new plan reflects our continued commitment to conduct a complete count, provide accurate apportionment data, and protect the health and safety of the public and our workforce.

- **Complete Count:** A robust field data collection operation will ensure we receive responses from households that have not yet self-responded to the 2020 Census.
 - We will improve the speed of our count without sacrificing completeness. As part of our revised plan, we will conduct additional training sessions and provide awards to enumerators in recognition of those who maximize hours worked. We will also keep phone and tablet computer devices for enumeration in use for the maximum time possible.
 - We will end field data collection by September 30, 2020. Self-response options will also close on that date to permit the commencement of data processing. Under this plan, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities.
- **Accurate Data and Efficient Processing:** Once we have the data from self-response and field data collection in our secure systems, we plan to review it for completeness and accuracy, streamline its processing, and prioritize apportionment counts to meet the statutory deadline. In addition, we plan to increase our staff to ensure operations are running at full capacity.
- **Flexible Design:** Our operation remains adaptable and additional resources will help speed our work. The Census Bureau will continue to analyze data and key metrics from its field work to ensure that our operations are agile and on target for meeting our statutory delivery dates. Of course, we recognize that events can still occur that no one can control, such as additional complications from severe weather or other natural disasters.

- **Health and Safety:** We will continue to prioritize the health and safety of our workforce and the public. Our staff will continue to follow Federal, state, and local guidance, including providing appropriate safety trainings and personal protective equipment to field staff.

The Census Bureau continues its work on meeting the requirements of Executive Order 13880 issued July 11, 2019 and the Presidential Memorandum issued July 21, 2020. A team of experts are examining methodologies and options to be employed for this purpose. The collection and use of pertinent administrative data continues.

We are committed to a complete and accurate 2020 Census. To date, 93 million households, nearly 63 percent of all households in the Nation, have responded to the 2020 Census. Building on our successful and innovative internet response option, the dedicated women and men of the Census Bureau, including our temporary workforce deploying in communities across the country in upcoming weeks, will work diligently to achieve an accurate count.

We appreciate the support of our hundreds of thousands of community-based, business, state, local and tribal partners contributing to these efforts across our Nation. The 2020 Census belongs to us all. If you know someone who has not yet responded, please encourage them to do so today online at 2020census.gov, over the phone, or by mail.

###



CONGRESSIONAL HISPANIC CAUCUS

116th Congress

August 7, 2020

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Chair

Rep. Ruben Gallego (AZ-07)
First Vice-Chair

Rep. Nanette Diaz Barragán (CA-44)
Second Vice-Chair

Rep. Adriano Espaillat (NY-13)
Whip

Rep. Veronica Escobar (TX-16)
Freshman Representative

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Rep. Lori Trahan (MA-03)
Rep. Juan Vargas (CA-51)
Rep. Filemon Vela (TX-34)
Rep. Nydia M. Velázquez (NY-07)

Dr. Steven Dillingham
Director
United States Census Bureau
4600 Silver Hill Road
Washington, DC 20233

As Members of the Congressional Hispanic Caucus (CHC), we write to you urgently requesting a virtual meeting with yourself as well as the senior leaders of your team. It has been nearly five months since the last in-person meeting with the CHC and been almost two months since our last telephonic Tri-Caucus Member Briefing.

Since then, major changes to the 2020 Census have been announced. Our Members understand the necessary pause and delay in operations given the public health concerns presented by the novel COVID-19 pandemic. However, the following four public announcements are of grave concerns to our Caucus:

- The appointment of two new political appointees, Mr. Nathaniel Cogley and Mr. Adam Korzeniewski;¹
- President Trump's recently announced policy memorandum on how his Administration plans to exclude undocumented immigrants from the 2020 apportionment count;²
- The Bureau's announcement that it will be cutting door knocking and self-response data collection by an entire month;³
- The Bureau's confirmation that it continues to work on meeting the requirements of Executive Order 13880.⁴

Since these recent announcements were made, your team has been less responsive to our questions. For example, it has been over three weeks since Caucus staff sent a list of questions on operations key to a complete count of Latino communities and we have yet to hear back on answers addressing our questions. Further, staff from other Caucus offices have expressed the same experience in recent weeks. All this while response rates in Latino communities

¹ <https://www.census.gov/newsroom/press-releases/2020/statement-new-staff.html>

² <https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-alien-apportionment-base-following-2020-census/>

³ <https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html>

⁴ *Ibid.*

continue to fall behind national response rates. As such, we respectfully request a virtual meeting during the month of August to discuss these urgent and time-sensitive concerns. We expect that the members of your staff will work with CHC staff to schedule this important and time-sensitive meeting by no later than Friday August 14, 2020.

Sincerely,

A handwritten signature in black ink that reads "Joaquin Castro". The signature is written in a cursive, slightly stylized font.

Joaquin Castro
Chair
Congressional Hispanic Caucus

Ruben Gallego
First Vice-Chair
Congressional Hispanic Caucus

Nanette Diaz Barragán
Second Vice-Chair
Congressional Hispanic Caucus

Adriano Espaillat
Whip
Congressional Hispanic Caucus

Veronica Escobar
Freshman Representative
Congressional Hispanic Caucus

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

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;
 and ADRIAN GARCIA,

Plaintiffs,

v.

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

Defendants.

CASE NO. 20-cv-5799-LHK

**DECLARATION OF JOHN
 THOMPSON IN SUPPORT OF
 PLAINTIFFS' MOTION FOR STAY
 AND PRELIMINARY INJUNCTION**

EXPERT DECLARATION OF JOHN THOMPSON

I. Introduction

1. I served as the Director of the U.S. Census Bureau from August 2013 to June 2017. My responsibilities as Director included overseeing the research and testing that produced the design for the 2020 Census. Prior to becoming Director, I worked at the Census Bureau for 27 years, culminating with my role as the career senior executive in charge of management of all aspects of the 2000 Decennial Census. These experiences and more inform my assessment that the Trump administration's decision to accelerate the timelines for completing the 2020 Census will likely result in significant and material degradation of the quality of the 2020 Census relative to previous censuses.

2. 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."¹

3. 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."² Based on my experience and expertise, I believe that this August 3 decision will adversely affect the quality and accuracy of the 2020 Census.

4. The 2020 Census results will be of great importance to our nation. The

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, <https://2020census.gov/en/news-events/press-releases/statement-covid-19-2020.html?linkId=100000011751624>.

² Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count, August 3, 2017, <https://2020census.gov/en/news-events/press-releases/delivering-complete-accurate-count.html>.

1 Constitution requires that the census be used for reapportioning the House of Representatives
 2 and the Electoral College. The 2020 Census will also be used for numerous other functions to
 3 support good policymaking and economic growth including: redrawing congressional and state
 4 legislative voting districts; allocating over \$1.5 trillion of federal funds annually; informing
 5 sound policy development; providing critical information for state, local and tribal government
 6 planning; and supplying important data to large and small businesses to generate growth and job
 7 creation. Inaccuracies or errors in the 2020 Census will have grave consequences on these uses
 8 for the subsequent 10-year period.

9 5. I have carefully reviewed the 2020 Census Operational Plans as well as the
 10 documentation that the Census Bureau has issued describing the actions it is taking in response
 11 to the COVID-19 pandemic and its recently issued documentation regarding its plans to conclude
 12 data collection by September 30, 2020. I have evaluated these documents by drawing on my
 13 experience and expertise developed over 31 years working on four censuses under seven
 14 different presidential administrations. Based on my experience and expertise, it is my opinion
 15 that reducing the time for data collection at this late date will most likely have grave and material
 16 consequences for the 2020 Census and public perceptions of its legitimacy, because: (1) the time
 17 constraints will force the Census Bureau to modify the plans for their data collection operations;
 18 (2) these modifications will significantly increase the likelihood of larger total and differential
 19 undercounts for the hard-to-count populations, as well as increase the levels of erroneous
 20 enumerations and reduce the overall quality of this census, relative to previous censuses; and (3)
 21 the Census Bureau is not providing timely measures that will allow stakeholders to assess
 22 whether the 2020 Census is succeeding in carrying out a fair and accurate enumeration,
 23 undermining the legitimacy of the count.

24 **II. Qualifications and Retainer Information**

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

28 7. I have been retained to evaluate the likely impact of the administration's decision

1 to compress data-collection and data-processing operations of the 2020 Decennial Census. My
2 compensation in this case is \$150 per hour.

3 8. I have served both as the Director of the U.S. Census Bureau and as the career
4 senior executive in charge of management of all aspects of the 2000 Decennial Census. I am
5 also a distinguished professional in the areas of statistics and survey design. I have a deep
6 understanding of the processes that are necessary to achieve a complete and highly accurate
7 Decennial Census.

8 9. I started my career as a mathematical statistician in 1975. I spent the majority of
9 my employment at the Census Bureau focused on the Decennial Census and ultimately served as
10 the Associate Director for the 2000 Decennial Census, with management responsibility for all
11 phases of the 2000 Decennial Census. As I mentioned above, I served as the Director of the U.S.
12 Census Bureau from August 2013 to June 2017 and worked at the Census Bureau for 27 years.

13 10. The Census Bureau is the country's largest Statistical Agency and produces a
14 wide range of demographic and economic statistics including: the Decennial Census; the
15 American Community Survey; the Current Population Survey; the National Crime Victimization
16 Survey; the National Health Interview Survey; the Economic Census; 13 principal key economic
17 indicators released on a monthly or quarterly basis; and about 100 additional surveys. The
18 Director of the Census Bureau is appointed by the President and confirmed by the Senate.

19 11. Prior to being appointed Director of the Census Bureau, I was at National Opinion
20 Research Center (NORC) at the University of Chicago, serving as Executive Vice President from
21 2002 to 2008 and President from 2008 to 2013. NORC is an objective, non-partisan independent
22 research institution that delivers reliable data and rigorous analysis to guide critical
23 programmatic, business, and policy decisions. Clients include government, corporate, and
24 nonprofit organizations around the world who partner with NORC to transform increasingly
25 complex information into useful knowledge. NORC conducts research in five main areas:
26 Economics, Markets, and the Workforce; Education, Training, and Learning; Global
27 Development; Health and Well-Being; and Society, Media, and Public Affairs. NORC services
28 include designing and conducting surveys (telephone, internet, and in-person), as well as

1 analytical studies.

2 12. From July 2017 to August 2018, I served as the Executive Director of the Council
3 of Professional Associations on Federal Statistics (COPAFS). COPAFS is an organization with
4 a membership consisting of professional associations and research organizations that depend on
5 and support high quality federal statistics. The Executive Director of COPAFS must have a deep
6 understanding of the Federal Statistical System and the wide range of data products that are
7 produced. Serving as the Executive Director of COPAFS reinforced my appreciation of the
8 importance of high-quality Decennial Census data to the entire Federal Statistical System.

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

12 **III. Analysis**

13 **A. The requirement to end data collection by the end of September 2020 will** 14 **force the Census Bureau to modify data collection procedures, resulting in a** 15 **less complete enumeration compared to previous censuses.**

16 14. My responsibilities as Director of the Census Bureau included overseeing the
17 research and testing that produced the design for the 2020 Census. During my tenure, the
18 original operational plan for conducting the 2020 Census was released, as was an updated
19 version 2.0 of this plan.³ In addition, major field tests were conducted in 2013, 2014, 2015 and
20 2016. The results of these tests informed the final 2020 Census Design that was tested in the
21 2018 end-to-end test. This was the final large scale test in advance of the 2020 Census. It
22 combined the results of all previous tests and could be viewed as a dress rehearsal for the 2020
23 Census. Additionally, during the 2000 Census, I managed all aspects of census operations.
24 These experiences and the expertise that I developed in their course equip me to evaluate the
25 likely systemic effects of the August 3 decision to truncate the 2020 Census.

26 15. The COVID-19 pandemic forced the delay of key 2020 Census operations out of
27

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

1 concerns for the safety of both census workers and the general public. The in-person
 2 components of the local partnership program to increase response rates of the traditionally hard-
 3 to-count populations were delayed, as was the operation to collect responses from those
 4 households that do not self-respond. This operation is referred to as nonresponse follow-up or
 5 NRFU. As of August 16, the national self-response rate is 63.8 percent, which means that over
 6 36 percent—or over 50 million housing units and their occupants must still be enumerated.⁴ As I
 7 will discuss below, the hard-to-count populations are disproportionately represented in the
 8 nonresponse universe. A failure to obtain a complete enumeration in NRFU would result in
 9 disproportionate undercounts of these populations. Therefore, I view a successful NRFU as the
 10 most important census operation to ensuring a fair and accurate count.

11 16. The NRFU operation had been scheduled to start on May 15, 2020 and run
 12 through July 31, 2020. However, as a result of the COVID-19 pandemic, the Census Bureau
 13 rescheduled it to start in most of the United States on August 11, 2020 and initially planned to
 14 complete it by October 31, 2020.

15 17. In order to accommodate this delay, the Census Bureau had requested, through the
 16 Department of Commerce, a four-month extension of the deadlines⁵ to deliver apportionment
 17 and redistricting data. For apportionment, the requested extension was from the current deadline
 18 of December 31, 2020 to April 30, 2021. For redistricting, the requested extension was from
 19 March 31, 2021 to July 31, 2021.

20 18. However, the Census Bureau has now announced that NRFU will be completed
 21 by September 30, 2020.⁶ The Census Bureau will have to take steps to complete NRFU more
 22 rapidly than it planned, given that it has already lost over a third of the schedule that the career
 23 staff had developed under the original plan, all while managing the added difficulties that the

24
 25 ⁴ U.S. Census Bureau 2020 Census daily response rate tracker,
<https://2020census.gov/en/response-rates.html> (last accessed August 16, 2020).

26 ⁵ 13 U.S.C. § 141(b), (c).

27 ⁶ Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and
 28 Accurate 2020 Census Count, August 3, 2020, <https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html>.

1 pandemic has created.

2 19. The Census Bureau recently released a review of the 2020 Census Operational
3 Plan Schedule⁷ that describes actions being taken to complete all data collection, including
4 NRFU, by September 30, 2020. According to the Plan, these actions include:

- 5 • Starting NRFU in all areas by August 9, 2020
- 6 • Sending enumerators to make up to 6 visits to attempt to obtain an interview with
7 occupied housing units
- 8 • Offering bonuses to NRFU enumerators to maximize staff production hours
- 9 • Making efforts at “Keeping Staff Levels Up”
- 10 • Implementing outbound telephone calling to supplement in-person contact attempts as a
11 means of enumerating hard-to-count populations

12 20. It is very unlikely that these actions will effectively address the constraints
13 imposed by the revised timelines for completing NRFU. My conclusion is informed by my
14 experiences in managing all aspects of the 2000 Census and by directing the research and
15 development necessary to plan the 2020 Census. The bases for my conclusion are as follows:

- 16 • The staffing levels will not be adequate to complete NRFU without accepting lower
17 quality enumerations and incompletely enumerating the traditionally hard-to-count
18 populations. The Census Bureau has lost over 30 percent of the time that had been
19 planned for NRFU, so it stands to reason that they will need more staff to complete this
20 critical undertaking. However, the plan being put forth to end data collection by
21 September 30 is to maintain staffing at levels determined before the advent of the
22 COVID-19 pandemic. The Department of Commerce Office of the Inspector General has
23 recently reviewed the progress of staffing for the NRFU and stated:

24 “Bureau management have stated that their target number of enumerators, needed
25 by the end of August 2020 to complete NRFU production, is just above 300,000.

26 As of August 17, 2020, the Bureau has just under 220,000 enumerators trained

27
28 ⁷ U.S. Census Bureau, *Review of 2020 Census Operational Plan Schedule*, August 17, 2020,
<https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/2020-operational-plan-schedule-review.pdf>.

1 and ready to start working on the NRFU operation that is underway—this
 2 represents approximately 73 percent of the estimated number of enumerators
 3 needed to complete NRFU production. However, 132 out of 248 total Area
 4 Census Office (ACOs) are less than 75 percent toward reaching their estimated
 5 goals; of those 132 ACOs at less than 75 percent, 37 are less than 50 percent
 6 toward reaching their goal.”⁸

7 Briefly, the Bureau has established Area Census Offices (ACO) to carry out the 2020
 8 Census field operations, including NRFU. There are 248 ACOs, each of which has a
 9 significant portion of the NRFU workload to carry out. On average, this would be
 10 about 226,000 housing units from which a self-response was not received. But the
 11 Census Bureau is already falling significantly behind in its plans for staffing NRFU,
 12 and these hiring shortfalls for NRFU staff are not uniform. Approximately 15 percent
 13 of the NRFU workload is in areas where the Census Bureau is falling 50 percent short
 14 of hiring goals. While the Census Bureau stated in the Review of the Operational
 15 Plan Schedule that it was making efforts at “keeping staff levels up,” it is falling well
 16 behind in reaching the staffing levels it had determined were necessary for NRFU.
 17 Insufficient staffing will significantly lower the quality and effectiveness of NRFU
 18 operations, as I explain below.

- 19 • The self-response rates are not uniformly distributed and are disproportionately lower in
 20 areas with higher proportions of Black and Hispanic populations, as well as in some rural
 21 areas. As of August 6, 2020, there were 50.7 million people living in census tracts in the
 22
 23
 24
 25

26 ⁸ Mark H Zabarsky, Principal Assistant Inspector General for Audit and Evaluation, **2020**
 27 **Census Alert: The Census Bureau Faces Challenges in Accelerating Hiring and Minimizing**
 28 **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.

lowest fifth of self-response.^{9, 10} The overall self-response rate for these tracts is less than 51.3 percent, compared to a national average of over 63 percent. Furthermore, while non-Hispanic Blacks make up 12.3 percent of the US population, they represent 22.2 percent of the population in these low response areas. For Hispanics, the corresponding rates are 18.3 and 25.8 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. In addition, since these areas have the lowest self-response rate, they will have the largest NRFU workloads, making recruiting and hiring sufficient staff to achieve a complete enumeration particularly challenging. 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 try 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 6 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:

⁹ A census tract is a small geographic area that is similar to a neighborhood. *See* https://www.census.gov/programs-surveys/geography/about/glossary.html#par_textimage_13.

¹⁰ Steven Romalewski, Mapping “Self-Response” for a Fair and Accurate Census, Center for Urban Research at the Graduate Center, City University of New York, August 7, 2020, https://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/Centers/Center%20for%20Urban%20Research/Resources/Census2020-self-response-rates-thru-Aug-6-CUNY-Graduate-Center.pdf.

“according to preliminary 2016 Census Test data, there were 19,721 NRFU cases 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 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.”¹¹

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.¹²

In addition, hard-to-count communities have significantly lower levels of self-response, and a corresponding larger proportion of households that fall into NRFU. It will not only be more difficult to recruit adequate staff for these areas, but making 6 attempts will be exceedingly difficult, and as I noted above, will not be enough to obtain complete responses from all households in these areas. My experience has shown that the proposed use of outbound telephone calling will be ineffective in reducing the need for in-person interviewing. For example, the Pew Research Center has documented that telephone survey rates have fallen from 36 percent in 1997 to under 6 percent in 2018.¹³ In addition, outbound telephone calling for NRFU has not been tested to determine whether it is even effective. 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. Limited staff and a

¹¹ 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.

¹² U.S. Census Bureau, *2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU)*, Version 2.0 Final, July 15, 2019.

¹³ Courtney Kennedy and Hannah Hartig, *Response rates in telephone surveys have resumed their decline*, Pew Research Center report, February 27, 2019.

1 shortened time frame will likely result in serious and material increases in the
2 undercounts for these communities relative to previous censuses.

3 b. Increased proxy enumerations, resulting in increased levels of erroneous
4 enumerations. The limited NRFU workforce combined with the shortened schedule
5 will result in a higher level of proxy enumerations than in previous censuses. Proxy
6 enumerations are those obtained by asking people other than the actual residents of
7 NRFU households for information about those residents. These proxies can include
8 neighbors, apartment managers, or other knowledgeable persons. The Census Bureau
9 conducted the 2010 Census Coverage Measurement (CCM) program which included
10 an extensive evaluation of the accuracy and quality of the 2010 Census. The CCM
11 found that in the 2010 Census, proxy enumerations were obtained for about 21
12 percent of the NRFU returns. The erroneous enumeration rate for the proxy
13 enumeration was 6.7 percent—over twice the overall erroneous enumeration rate of
14 3.3 percent.¹⁴

15 c. Increased reliance on administrative records to complete NRFU enumerations,
16 leading to less complete enumerations for the hard-to-count populations. The Census
17 Bureau plans include the use of administrative records (e.g., records from the IRS,
18 Medicare, and the Social Security Administration) to reduce the NRFU workload,
19 where feasible, by using such records to enumerate occupied households that have
20 failed to respond after several contact attempts.¹⁵ The Census Bureau may be forced
21 to rely more heavily on such enumerations if NRFU cannot be completed as planned.
22 Based on the research that the Census Bureau conducted to develop the current
23 NRFU strategy, it had planned to enumerate 12.9 percent of the occupied NRFU
24 housing units after making one visit.¹⁶ Expanding the uses of administrative records

25 ¹⁴ P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01,
26 (May 22, 2012), https://www.census.gov/covrage_measurement/pdfs/g01.pdf.

27 ¹⁵ Albert E. Fontenot, *Intended Administrative Data Use in the 2020 Census*, 2020 Census
Program Memorandum Series: 2020.06, May 7, 2020.

28 ¹⁶ U.S. Census Bureau, *2020 Census Detailed Operational Plan for: 18. Nonresponse Followup
Operation (NRFU)*, Version 2.0 Final, July 15, 2019.

1 to enumerate a higher portion of the NRFU occupied housing units is not supported
 2 by the research the Census Bureau has used to date, and the Census Bureau has not
 3 released additional research to support such actions. Census Bureau research has
 4 shown that the quality and completeness of administrative records is not expansive
 5 enough to replace a decennial census.¹⁷ Therefore, the use of administrative records
 6 beyond the planned levels for NRFU will be less representative of the hard-to-count
 7 populations than a complete NRFU.

8 d. Likely an increased use of “whole person imputation” relative to previous censuses.

9 Such imputations will not correct for any undercounts that have resulted from an
 10 incomplete NRFU. In conducting NRFU in previous censuses, situations have arisen
 11 where, despite the best efforts of NRFU enumerators, either minimal or no
 12 information was obtained for some housing units by the conclusion of the NRFU.
 13 The Census Bureau uses statistical techniques, referred to as imputation, to correct for
 14 this missing data problem. The statistical processes are used to estimate—or
 15 impute—all of the characteristics of the persons in these housing units. The Census
 16 Bureau applies “Count Imputation” for situations where no information is available
 17 for a housing unit. This methodology will first estimate whether the unit is occupied,
 18 and if so, will estimate or impute a household size – meaning, the number of people
 19 in that household. The process will then use “whole person imputation” to estimate
 20 characteristics for persons in a household of this size. The Census Bureau also uses
 21 whole person imputation in situations where only the count of people residing in a
 22 housing unit could be determined. In the 2010 Census, about 2.0 percent of the
 23 enumerations fell into the category of whole person imputation – 0.4 percent were the
 24 result of count imputation and 1.6 percent resulted when only the population count
 25
 26

27 ¹⁷ Rastogi, Sonya and Amy O’Hara, *2010 Census Match Study*, 2010 Census Planning
 28 Memorandum Series, No. 247, November 19, 2012.

1 was known.¹⁸ It should be noted that of the 16.3 million persons enumerated by
 2 proxy in the 2010 Census, 23.1 percent required whole person imputation.¹⁹ I believe
 3 that the levels of housing units requiring whole person imputation will be much larger
 4 in 2020 than in 2010, due to the reduction in time and staff limitations for NRFU
 5 enumerators to get a complete response. Unfortunately, the statistical methods that
 6 the Census Bureau uses for whole person imputation rely on using information from
 7 the resolved housing units to estimate or impute for the unresolved housing units.
 8 Therefore, any undercounts that are in the resolved housing units will be carried
 9 forward and not corrected.

10 **B. The reduced schedule for NRFU will have serious accuracy and quality**
 11 **implications for the 2020 Census**

12 21. Undercounts, particularly for traditionally hard-to-count populations, are likely to
 13 increase significantly in 2020 relative to previous censuses as a result of the Bureau's new,
 14 reduced schedule. As I discussed above, the NRFU workloads will be relatively higher in areas
 15 with lower self-response rates. The Census Bureau uses low self-response as a key measure in
 16 determining whether an area is hard-to-enumerate,²⁰ so by definition the challenge for NRFU to
 17 obtain a complete count is in these areas. In addition, these areas also contain higher proportions
 18 of Black and Hispanic populations relative to the White non-Hispanic population. The end result
 19 for these communities is likely to be incomplete NRFU enumeration due to staffing and time
 20 limitations, as well as more use of proxy enumerations and whole person imputation. This will
 21 lead to increased undercounts relative to previous censuses. For example, in the 1990 Census the
 22 undercount of Black or African American population was 4.6 percent and for the Hispanic
 23 population the undercount was 5.0 percent.²¹ It is important to understand that in 1990, the

24 _____
 25 ¹⁸ P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01,
 May 22, 2012, <https://www.census.gov/cov/memo/pdfs/g01.pdf>.

26 ¹⁹ Ibid.

27 ²⁰ Response Area Outreach Mapper, Census.gov, www.census.gov/roam, July 2018.

28 ²¹ P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01,
 May 22, 2012, <https://www.census.gov/cov/memo/pdfs/g01.pdf>.

Census Bureau had the flexibility to extend the NRFU beyond its planned end date until it had reached a completion rate of 99 percent for NRFU enumeration.²² However, even with this high completion rate for 1990, serious undercounts were measured. The Census Bureau does not have the flexibility to extend NRFU for the 2020 Census – it has a hard stop at 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 unmovable 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.

22. The overall quality of the 2020 Census data will very likely be materially 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 than in previous censuses. While this will be a particular problem for the hard-to-count areas, 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 whole person imputation will result in lower quality than would have been achieved through direct in-person contact.

23. 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.

C. Increased transparency is essential to assure stakeholders of the legitimacy of 2020 Census data collection

24. 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 portion of the 2020 Census: detailed and granular data have been made available to allow for public assessment of self-response for many areas, including census tracts. This is not true for the

²² U.S. Census Bureau, *1990 Census of Population and Housing – History Field Enumeration 6-36*, Report Number CPH-R-2, 1996, <https://www.census.gov/library/publications/1996/dec/cph-r-2.html>.

1 NRFU portion of the 2020 Census.

2 25. The current Census Bureau plan is to release only NRFU resolution rates at the
3 State level. These rates are not helpful in assessing the actual progress of NRFU in achieving a
4 complete enumeration of all population groups and areas. In order to demonstrate that the NRFU
5 is meeting the goal of a complete and accurate enumeration, it is essential that the Census Bureau
6 provide additional data beyond just the resolution rate of housing units in NRFU. These data
7 should include information such as the rate of proxy and count-only enumerations at similar
8 levels of geographic aggregation as the self-response data. The absence of more granular data
9 will compromise public perception of the legitimacy of any final results that the Bureau does
10 release.

11 26. The public's perception of the legitimacy of the census is already imperiled. The
12 Census Bureau has recently announced three new political appointees, including a new Deputy
13 Director for Policy²³ and a new Deputy Director for Data.²⁴ Having political appointees with
14 vague responsibilities at the Deputy Director level of the Census Bureau (which has always been
15 a career position) is unprecedented and is raising serious concerns among stakeholders.
16 Perceptions that the results of the 2020 Census have been manipulated for political purposes will
17 erode public and stakeholder confidence, not only in the 2020 Census, but also in our democratic
18 processes more generally. Therefore, it is critical that the Census Bureau release the data that I
19 have described above to demonstrate that it is achieving a complete and fair enumeration through
20 NRFU.

27 ²³ Statement from Census Bureau Director Steven Dillingham, Release Number CB20-RTQ.20.

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

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.


John Thompson

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
 - 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
 - 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;

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- 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,

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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.

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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

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PAPERS AND PUBLICATIONS

- 2018 Thompson, John H and Yablon, Robert. Issue Brief: "Preparing for the 2020 Census Considerations for State Attorneys General". American Constitution 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.) *Encyclopedia of the U.S. Census*, 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 58th 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.

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- 2001 Thompson, John H., "Decision on Release of Statistically Corrected Redistricting Data." Invited paper presented at the Joint Meetings of the American Statistical Association, Atlanta Georgia, August 6, 2001.
- 1999 Thompson, John H., "Census 2000 – Innovations and New Technology." Paper presented at the Economic Commission for Europe's Conference of European Statisticians Meeting, Geneva, Switzerland, February 15-17, 1999.
- 1998 Thompson, John H. and Robert E. Fay, "Census 2000: The Statistical Issues." Paper presented at the Joint Meetings of the American Statistical Association, Dallas, Texas, August 9-13, 1998.
- 1996 Thompson, John H. and Karen Mills, "Census 2000 Content: Tradeoffs on Cost, Quality, and Quantity." Paper presented at the Annual Meeting of the Population Association of America, New Orleans, Louisiana, May 9-11, 1996.
- 1995 Thompson, John H., Mary H. Mulry, Susan M. Miskura, "Census 2000: Statistical Issues in Reengineering the Decennial Census." Paper presented at the Annual Meeting of the American Statistical Association, Orlando, Florida, August 13-17, 1995.
- 1992 Fay, Robert E. and John H. Thompson, "The 1990 Post-Enumeration Survey: Statistical Lessons in, Hindsight." Paper presented at the Annual Research Conference, March 22-25, 1992, Arlington, Virginia.
- 1989 Edson, Robert G. and John H. Thompson, "1990 Decennial Census Coverage Improvement Program." Paper presented at the Annual Winter Meetings of the American Statistical Association, San Diego, California, January, 1989.
- 1988 Navarro, Alfredo, John H. Thompson, and Linda Flores-Baez, "Results of Data Switching Simulation." Paper presented to the Census Advisory Committees at the Joint Advisory Committee Meetings, Oxon Hill, Maryland, April, 1988.
- 1987 Griffin, Richard A. and John H. Thompson, "Confidentiality Techniques for the 1990 Census." Paper presented to the Census Advisory Committees at the Joint Advisory Committee Meetings, Oxon Hill, Maryland, October, 1987.

U.S. Bureau of the Census, "Programs to Improve Coverage in the 1980 Census," by John H. Thompson. Evaluation and Research Reports, PHC80-E3.
- 1986 Thompson, John H. and David Franklin, "Test Census Results and Applications for the 1990 Planning." Paper presented at the Census Bureau Second Annual Research Conference, Reston, Virginia, March, 1986.
- 1984 Miskura, Susan M., John H. Thompson, Henry F. Woltman, "Uses of Sampling for the Census Count." Paper presented at the Annual Meeting of the American Statistical Association, Philadelphia, Pennsylvania, August, 1984.

Fan, Milton C., Martha L. Sutt, and John H. Thompson, "Evaluation of the 1980 Census Precanvass Coverage Improvement Program." Paper presented at the Annual Meeting of the American Statistical Association, Philadelphia, Pennsylvania, August, 1984.

Keeley, Catherine and John H. Thompson, "The 1980 Census Nonhousehold Sources Program." Paper presented at the Annual Meeting of the American Statistical Association, Philadelphia, Pennsylvania, August, 1984.

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, *et al.*,

Plaintiffs,

v.

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

Defendants.

No. 8:19-cv-02710-PX

MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendants Wilbur L. Ross, in his official capacity as Secretary of Commerce; Steven Dillingham, in his official capacity as Director of the U.S. Census Bureau; U.S. Department of Commerce; and U.S. Census Bureau (collectively, "Defendants"), by and through their undersigned counsel, move the Court to dismiss the claims against them under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendants' arguments in support of this motion are fully explained in the attached Memorandum of Law.

DATED: December 18, 2019

Respectfully submitted,

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Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, *et al.*,

Plaintiffs,

v.

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

No. 8:19-cv-02710-GJH

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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REGULATIONS

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INTRODUCTION

Secretaries of Commerce have long exercised their statutory authority to gather administrative records—files from other federal and state agencies—in aid of their mission to provide vital statistics to the nation. After the Secretary’s unsuccessful attempt to obtain citizenship data using a citizenship question on the 2020 Census, the President issued Executive Order 13880 in July 2019 with the “goal of making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population.” Exec. Order No. 13880, 84 Fed. Reg. 33821 (July 11, 2019). While the Secretary had collected enough administrative records for the Census Bureau (the primary statistical agency in the Department of Commerce) to “determine citizenship status for approximately 90 percent of the population,” he “remain[ed] in negotiations to” access “several additional important sets of [administrative] records with critical information on citizenship.” *Id.* The President therefore directed “all executive departments and agencies” to “provide the [Commerce] Department the maximum assistance permissible” in order “to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the Department.” *Id.*

Plaintiffs—individuals and organizations concerned about their *States and localities’* potential use of citizenship data—now take issue with a process decades in the making: the Secretary’s collection of administrative records, facilitated by the President’s

internal guidance to federal agencies, to obtain comprehensive citizenship data on the U.S. population. In seeking to “[e]njoin Defendants and their agents from collecting data as dictated by EO 13380,” Plaintiffs’ First Amended Complaint (FAC) alleges violations of the Administrative Procedure Act (APA), the Fifth Amendment’s equal protection component, and 42 U.S.C. § 1985(3) (civil conspiracy). FAC ¶¶ 88–117, ECF No. 41; *Id.* at 31. But the FAC is fatally flawed from beginning to end.

The Secretary’s administrative-record collection does not affect any private parties, let alone Plaintiffs. It is only when Plaintiffs’ *States and localities* “discriminatorily” choose to use citizenship data that Plaintiffs could possibly be injured. *See* FAC ¶ 87. So they lack standing, and their suit is unripe, because their injuries can only result from a highly attenuated chain of possibilities, including the independent decisions of States and localities to use (or not use) citizenship data. This also torpedoes Plaintiffs’ APA and equal protection claims, as the Secretary’s administrative-record collection is neither “agency action” for APA purposes, nor does it cause a “disparate impact” for equal protection purposes.

If that were not enough, Plaintiffs’ § 1985(3) is barred on several threshold grounds, including sovereign immunity and a lack of statutory authorization for injunctive relief. And Plaintiffs do not plausibly allege any facts supporting their equal protection and § 1985(3) claims, instead relying almost exclusively on the events leading

up to a *citizenship question*, not the collection of administrative records. Plaintiffs' FAC is meritless and should be dismissed.

BACKGROUND

I. The Secretary's Collection of Administrative Records and Citizenship Data

The use of administrative records is not new. In the 1890 Census, for example, "special enumerators visited real estate recorders' office[s] [] to obtain data on individual and corporate debt."¹ And after the Department of Commerce was formed, Congress specifically empowered the Secretary of Commerce, "whenever he considers it advisable," to "call upon any other department, agency, or establishment of the Federal Government . . . for information pertinent to the work" of the Census Bureau. 13 U.S.C. § 6(a).² Secretaries have routinely exercised this power to collect and use administrative records. As just two of many examples, administrative records have been used since the 1940s to help produce population estimates between censuses,³ and in 1954 the Census

¹ U.S. Census Bureau, *History of the 1997 Economic Census* (July 2000), at 63, <https://www.census.gov/history/pdf/1997econhistory.pdf>.

² The Secretary may also acquire similar information from "States, counties, cities, or other units of government," or "from private persons and agencies." 13 U.S.C. § 6(b).

³ U.S. Census Bureau, *Current Population Reports, Population Estimates* (Aug. 13, 1948), at 2, <https://www2.census.gov/library/publications/1948/demographics/P25-13.pdf>.

Bureau implemented “large-scale use of administrative records” from the Internal Revenue Service as part of the Economic Census.⁴

The Secretary has collected administrative records containing citizenship data since at least 2002.⁵ But the Census Bureau has never had a full set of administrative records to determine citizenship for every person in the country. To inform immigration policy, support research, plan investments, design programs, and aid Voting Rights Act enforcement—which requires citizenship estimates to determine the number of eligible voters in a given geographic area—the Census Bureau has used sample-based surveys. From 1970 to 2000, the Census Bureau used the long-form census, a set of over thirty questions (including citizenship) sent to one in six households during each decennial census. *Kravitz v. U.S. Dep’t of Commerce*, 366 F. Supp. 3d 681, 693 (D. Md. 2019). The long form was discontinued after the 2000 Census and replaced by the American Community Survey (ACS) in 2005, a similarly lengthy survey (also including a citizenship question) that is sent to one in 38 households annually. *Id.*

⁴ U.S. Census Bureau, *History of the 1997 Economic Census* (July 2000), at 63, <https://www.census.gov/history/pdf/1997econhistory.pdf>.

⁵ J. David Brown, et al., *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census* (June 2019), at Table A8, <https://www2.census.gov/ces/wp/2018/CES-WP-18-38R.pdf> (noting the use of Social Security records after the 2000 Census).

These surveys did not, and do not, provide perfect citizenship data. For example, because the ACS is based on a sample of the population, its citizenship data is not available at the lowest geographic level, called a “census block” and roughly equivalent to a city block. *See id.* (discussing census blocks). Instead, ACS-based citizenship data is only reported at a higher geographic level (called a “census block group”), containing about 600 to 3,000 people. *See id.* (discussing census block groups). While the Census Bureau is statutorily obligated to produce *population* data for States and localities to use in redistricting (so-called Public Law 94-171 data), it also provides citizen voting age population by race and ethnicity (CVAP) data tabulated from the ACS.⁶ 13 U.S.C. § 141(c); FAC ¶ 39. Population totals are reported at the census-block level; CVAP data is not. *Kravitz*, 366 F. Supp. 3d at 692–93.

In December 2017, the Department of Justice sent a letter to the Census Bureau requesting a citizenship question on the 2020 Census, which would enhance Voting Rights Act enforcement by allowing the Census Bureau to calculate citizenship data at the census-block level. *Id.* at 698. In March 2018, the Secretary of Commerce issued a memorandum directing the Census Bureau to include a citizenship question on the 2020 Census. *Id.* at 693.

⁶ *See* U.S. Census Bureau, *Citizen Voting Age Population by Race and Ethnicity (CVAP)*, <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html>.

Various parties—including two organizations and one individual in this case—challenged the Secretary’s decision. *Id.* at 691. Throughout the year-long litigation, the plaintiffs consistently and forcefully argued that the Secretary’s so-called Alternative C—collecting citizenship data using administrative records—was “objectively superior” to employing a citizenship question on the 2020 Census.⁷ The issue eventually reached the Supreme Court, which vacated and remanded the Secretary’s decision on other grounds. *See Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2570–75 (2019).

II. The Executive Order to Continue Gathering Citizenship Data Using Administrative Records

Several weeks after the Supreme Court’s decision, the President issued Executive Order 13880. While noting the Supreme Court’s holding that “the Department of Commerce [] may, as a general matter, lawfully include a question inquiring about citizenship status on the decennial census,” the President explained that “[t]he Court’s

⁷ *See, e.g.,* Pls.’ Corrected Conclusions of Law, *Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041 (D. Md. Feb. 18, 2019), ECF No. 151-2 at ¶ 129 (“The uncontroverted evidence before the Secretary demonstrated that the use of [administrative records] alone without a decennial Census citizenship question—Alternative C—was superior to [including a citizenship question] by every relevant metric, including those that the Secretary purported [] to value.”); *id.* ¶ 178 (“[T]he only reasonable conclusion to be drawn from the [administrative record] is that Alternative C would yield more accurate citizenship data than [including a citizenship question], with no compromise of timeliness, scope, or other criteria of quality relevant to DOJ’s stated use.”); Pls.’ Mem. in Opp’n to Defs.’ Mot. for Summ. J., *LUPE v. Ross*, No. 18-cv-1570 (D. Md. Nov. 27, 2018), ECF No. 85 at 34–41, 44 (arguing that “all evidence from the Census Bureau points out that [including the citizenship question] is less accurate and more costly” than Alternative C).

ruling . . . has now made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire.” E.O. 13880, 84 Fed. Reg. at 33821. Nonetheless, the President sought to “ensure that accurate citizenship data is compiled,” with the “goal of making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population.” *Id.* at 33822.

This is important, the President explained, to “help us understand the effects of immigration on our country,” to “implement specific [public-benefits] programs and to evaluate policy proposals for changes in those programs,” and to “generate a more reliable count of the unauthorized alien population in the country.” *Id.* The President also noted that “the Supreme Court left open the question whether ‘States may draw districts to equalize voter-eligible population rather than total population,’” but “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.” *Id.* at 33823 (citing *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)). Among other helpful aspects, “a more accurate and complete count of the citizen population” derived from administrative records would enable the Census Bureau to produce a CVAP tabulation at the lowest geographic level (the census block), unlike recently available CVAP tabulations derived solely from the ACS. *See id.* at 33824.

By the time of the Executive Order, the Census Bureau had enough 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.” *Id.* at 33821. “[T]o eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the [Commerce] Department,” the President directed “all executive departments and agencies” to “provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country,” including “by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective.” *Id.* The President also established an “interagency working group to improve access to administrative records,” and directed “the [Commerce] Department to strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship.” *Id.* at 33822.

III. Plaintiffs’ Challenge

Plaintiffs now take issue with the exact decision some of them previously desired—the use of administrative records to gather citizenship data. Their lawsuit stems from a purported concern that if the Census Bureau “provides [Plaintiffs’] states with citizenship data to be used along with the total population tabulations in the P.L. 94-171 Redistricting Data File,” these States may “use CVAP as a population base for drawing congressional and state legislative redistricting plans in 2021.” FAC ¶ 87.

On the merits, Plaintiffs overlook the Secretary's decades of gathering administrative records to allege that the mere collection of citizenship data from federal and state agencies is now part of a conspiracy "motivated by racial animus towards Latinos, and animus towards non-U.S. citizens and foreign-born persons." FAC ¶¶ 110–17. For that reason, and alleged violations of the APA, Plaintiffs seek to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31. This motion follows.

LEGAL STANDARDS

In evaluating a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the Court must "accept as true the allegations for which there is sufficient factual matter to render them plausible on their face." *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 620 (4th Cir. 2018) (alterations and citations omitted). But the Court need not do the same for "legal conclusion[s] couched as [] factual allegation[s]." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). So, to survive a Rule 12(b)(1) motion to dismiss, Plaintiffs must establish this Court's jurisdiction through sufficient allegations. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Similarly, to survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

face.” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “The mere recital of elements of a cause of action, supported only by conclusory statements, is not sufficient to survive a motion made pursuant to Rule 12(b)(6).” *K.M. by & Through C.M. v. Bd. of Educ. of Montgomery*, 2019 WL 330194, at *3 (D. Md. Jan. 25, 2019) (Xinis, J.) (quoting *Walters v. McMahan*, 684 F.3d 435, 439 (4th Cir. 2012)).

ARGUMENT

I. Plaintiffs Lack Standing

Article III of the Constitution limits the judicial power of federal courts to “Cases” and “Controversies.” U.S. Const. art. III, § 2. “[R]ooted in the traditional understanding of a case or controversy,” standing doctrine developed to implement this Article III command. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). It “limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong,” thus preventing “the judicial process from being used to usurp the powers of the political branches” and “confin[ing] the federal courts to a properly judicial role.” *Id.*

Standing “requires an injury in fact that is caused by the challenged conduct and is likely to be redressed by a favorable decision.” *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 405 (4th Cir. 2019). As the parties invoking this Court’s jurisdiction, Plaintiffs bear the burden of establishing these requirements. *Spokeo*, 136 S. Ct. at 1547. They cannot. Plaintiffs claim that they “live in states where lawmakers have expressed an interest and desire to use CVAP as a population base for drawing congressional and

state legislative redistricting plans in 2021.” FAC ¶ 87. If the Census Bureau “provides those states with citizenship data,” the 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.” *Id.* This theory fails every prong of standing.

A. Plaintiffs’ purported harm is not traceable any action of Defendants and not redressable by the Court.

Most obviously, Plaintiffs fail to demonstrate traceability and redressability. Standing requires Plaintiffs to show that their purported injury is “fairly traceable to the challenged action of the defendant[s], and not the result of the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560 (alterations and citations omitted). This is important because “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 561 (quotation marks and citations omitted). Here, it is only “independent action of some third party not before the court”—States and localities using redistricting data—that could possibly cause Plaintiffs’ alleged redistricting injury, and no court order is likely to redress that injury.

For starters, Plaintiffs’ claimed injury could only occur if state and local officials exclude “non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts.” FAC ¶ 87. But that redistricting choice is, quite obviously, an independent decision by state and local officials. The Supreme Court has

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.⁸

⁸ 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 voter-registration 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 (alleging that *inclusion* of noncitizens in congressional apportionment is 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. Organizational Plaintiffs lack standing.

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