

No. 20-16868

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NATIONAL URBAN LEAGUE, et al.

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

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BRIEF OF AMICI CURIAE COUNTY OF SANTA  
CLARA AND 18 ADDITIONAL LOCAL  
GOVERNMENTS IN SUPPORT OF PLAINTIFFS-  
APPELLEES' OPPOSITION TO DEFENDANTS-  
APPELLANTS' EMERGENCY MOTION FOR A STAY  
PENDING APPEAL

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OFFICE OF THE COUNTY COUNSEL  
COUNTY OF SANTA CLARA  
JAMES R. WILLIAMS, SBN 271253  
County Counsel  
GRETA S. HANSEN, SBN 251471  
Chief Assistant County Counsel  
MARCELO QUIÑONES, SBN 279132  
Lead Deputy County Counsel  
RAPHAEL N. RAJENDRA, SBN 255096  
Deputy County Counsel  
KARUN TILAK, SBN 323939  
Deputy County Counsel  
70 West Hedding Street  
East Wing, Ninth Floor  
San Jose, CA 95110-1770  
Telephone: (408) 299-5900  
Facsimile: (408) 292-7240  
*Attorneys for Amicus Curiae*  
*COUNTY OF SANTA CLARA, CALIF.*

**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae are governmental entities for whom no corporate disclosure is required.

Dated: September 29, 2020

By: /s/ Raphael N. Rajendra  
Raphael N. Rajendra

Attorney for Amicus Curiae  
County of Santa Clara, Calif.

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## **INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT<sup>1</sup>**

Amici Curiae are diverse local jurisdictions from across the country that collectively represent and serve millions of residents.<sup>2</sup> Amici and local governments nationwide will rely on data from the current census for a variety of functions. Indeed, the decennial census provides the best—and in many cases, the only—data for governments to understand the size, location, and composition of their populations. Accurate census data is an irreplaceable and essential foundation for local governments across the country to perform the vital functions that support, protect, and benefit their residents, including those that protect the most vulnerable members of the community.

Census data informs life-saving public health and safety decisions and drives the allocation of federal funding for safety-net services and educational programs. Local governments rely on census data to plan for and respond in disaster and emergency situations; operate safety-net healthcare facilities; monitor, identify, and respond to emerging epidemics; provide vaccinations, nutrition, substance abuse treatment, and mental health services; investigate and prosecute crime; and perform many other basic governmental functions critical to the safety and well-

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<sup>1</sup> All parties have consented to the filing of this amicus brief. No party's counsel authored this brief in whole or in part, and no person or entity other than Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> A complete list of Amici is set out in Appendix A.

being of the entire population. The importance of ensuring an accurate and complete 2020 Census cannot be overstated.

As the district court found—and Amici explain further below—Appellants’ decision to cut short 2020 Census operations (the “Replan”) will likely cause a differential undercount and corrupt the quality of census data. Order Granting Pls.’ Mot. for Stay and Prelim. Injunc. (hereinafter “District Court Op.”) at pp. 23-26, 36-38, ECF No. 208, *National Urban League v. Ross*, No. 20-cv-05799-LHK (N.D. Cal. Sept. 24, 2020); *see also id.* at 47-59. Were this Court to stay the district court’s injunction, it would allow Appellants to end census data collection efforts early and producing an irreversibly corrupted and inaccurate census.

Amici have especially large hard-to-count populations<sup>3</sup>—the very households the Replan is likely to undercount and inaccurately enumerate—so robust 2020 Census field operations are critical to ensuring that everyone in Amici’s jurisdictions is accurately counted. Accordingly, Amici have a particular

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<sup>3</sup> For example, almost 40 percent of Santa Clara County’s 1.9 million residents are foreign born. More than 25 percent of its population is Latinx and roughly seven percent is undocumented. The City of New York’s five boroughs are home to 3.1 million immigrants, who make up more than 37 percent of the City’s population. An estimated one million New Yorkers share households with the City’s estimated 504,000 undocumented immigrants. Likewise, Stockton and Sacramento are among the most diverse cities in California, and the Los Angeles Unified School District (LAUSD) serves a population that is over 73 percent Latinx. A quarter of Dallas residents are foreign born, and more than 40 percent of residents identify as Hispanic or Latinx. And in the City of Portland, more than 20 percent of the immigrant population is undocumented.

interest in the legality of Appellants' decision to slash the time allotted to these mission-critical functions, because truncated field operations will be especially damaging to the completeness and accuracy of data about Amici's residents and will undermine Amici's ability to serve their residents for the next decade.

## **ARGUMENT**

### **I. Accurate Census Data Is the Foundation for Critical Government Functions**

#### **A. Local Governments Depend on Accurate Census Data for Life-Saving Planning and Services**

Local governments across the country, including Amici, use census data every day throughout their operations to perform essential functions. By undermining the accuracy of census data about Amici's residents, Appellants' actions will frustrate critical government services for years—including emergency response and public health functions, where access to accurate data can save lives.

For instance, localities across the country, including Amici, have relied on census data to respond to COVID-19. And as each season brings more, and more intense, wildfires, hurricanes, and tornadoes, local governments prepare to organize and support evacuations and provide services for affected residents. In disasters of all kinds, local governments must identify vulnerable populations in need of emergency food stamps, temporary housing, and other disaster-related services.

None of this is possible without accurate data reflecting the composition and location of local communities—data that, in Amici’s experience, is reliably produced *only* by the census. For instance, governmental emergency managers at all levels of government use Social Vulnerability Indexes (“Indexes”) to identify communities whose members are “more likely to die in a disaster event and less likely to recover after one.” B. Flanagan et al., *A Social Vulnerability Index for Disaster Management*, 8(1) J. Homeland Sec. & Emergency Mgmt. art. 3, at 3 (2011), <https://perma.cc/TXN7-C7V3>. These Indexes guide resource allocation before and during emergencies to protect those most likely to need government intervention to survive and recover. *Id.*; see also Centers for Disease Control, *CDC’s Social Vulnerability Index Fact Sheet* (Sept. 10, 2018), <https://perma.cc/779V-6U7W>.

The Indexes use census data to identify regions with populations and features that emergency-management research has identified as indicators of increased need—for instance, the presence of the elderly and children, who are vulnerable during a disaster; dense housing; lack of vehicles; families below the poverty line; and minority and low-English-proficiency populations. Flanagan, *supra*, at 4-6. In an emergency, access to comprehensive census data on these populations and an Index that aggregates it is critical to allow local governments to quickly identify areas of need and respond effectively. See America Counts Staff,



*From COVID-19 to Hurricanes, Census Surveys Help Areas Prepare and Recover*, U.S. Census Bureau (Apr. 9, 2020), <https://perma.cc/P2WC-CUFN>. Indeed, California jurisdictions rely on Indexes to plan for and respond to wildfires, *e.g.*, Santa Clara County Community Wildfire Plan at 81 (Aug. 2016), <https://perma.cc/2RN4-5XL2>, and New York City relied on decennial census data to plan the evacuation and care of older residents in communities affected by Superstorm Sandy. If Appellants' decision to cut short 2020 Census operations renders data about these socially vulnerable individuals and communities even less accurate and complete, they will be even less visible to first responders in critical moments.

Accurate census data is also vital to public health functions, including the response to COVID-19. For several Amici, census data underlies the epidemiological analyses used to understand the spread of COVID-19 and inform mitigation efforts. For example, the County of Santa Clara relies on decennial census data—both directly and through the American Community Survey (ACS)—to identify the most impacted zip codes and census tracts, deploy pop-up and mobile test sites, understand structural factors contributing to transmission, and develop programs to address health inequities. Likewise, New York City relies on census data to identify the relative incidence of COVID-19 among the City's neighborhoods and to identify vulnerable populations, such as the elderly, that need special assistance. And jurisdictions across the country use census data to

ensure adequate communication with affected communities and to deploy infrastructure to support distance learning during the pandemic.

Local governments rely on census data for other critical functions, including housing development, law enforcement, school construction, and public services for vulnerable populations like the elderly. *See, e.g.*, County of Santa Clara Housing Element Update 2015-2022, at 58-91 (June 10, 2014), <https://perma.cc/8MF5-WZ9S>; Portland Housing Bureau, *State of Housing in Portland* (2019), <https://perma.cc/KSQ5-3ZTP>; LAUSD, 2018 Developer Fee Justification Study (Mar. 2018), <https://perma.cc/D7VD-G52X> (projecting future enrollment from planned residential construction).

In all these cases, local governments require census data that accurately reflects the population in order to serve it. An inaccurate 2020 Census could significantly undercut local governments' ability to evacuate vulnerable individuals, slow or halt an epidemic, and provide other vital services. Nor is there any substitute for census data in performing these functions. In the past, the County of Santa Clara attempted to supplement census data through the use of private demographers, but that effort failed because the private information simply was not reliable enough at the level of granularity required for local government operations. Moreover, like the ACS, private data is often based on the decennial census and therefore may not be a true alternative.

**B. Local Governments Rely on Census-Based Funding to Provide Vital Social Safety-Net Services**

The Census Bureau reports that census data drives distribution of more than \$675 billion in funds to local and state governments. M. Hotchkiss & J. Phelan, *U.S. Census Bureau, Uses of Census Bureau Data in Federal Funds Distribution* at 8 (Sept. 2017), <https://perma.cc/BQ32-MKM2>. A large portion of this census-based funding goes to basic services like nutrition support and health care for the community's most vulnerable members, including victims of crime and children who are low-income or have been subjected to severe abuse and neglect. *Id.* at 16. Much of this funding flows through local governments, which are often responsible for administering these programs.

For example, several Amici administer programs that depend on tens of millions of dollars in federal funding, including for victims' services offices; Medicaid; Temporary Assistance to Needy Families (TANF); the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC); Community-Based Child Abuse Prevention; foster care; and HUD grants to improve affordable housing, homeless shelters, and infrastructure. Likewise, schools employ Title I, II, and IV funds, and the Child Care and Development Block Grant program, to serve students who might not be able to remain or succeed in school without additional support. In all of these cases, when the census data driving distribution of federal funding is corrupted and inaccurate,

residents in need of these critical programs are shortchanged because local governments are deprived of the federal funding they need to serve those residents.

The disproportionate undercount and compromised data quality that the Replan will cause will result in the underfunding of community needs for which there is no alternative provider to local government. As a consequence, local governments may need to reduce or eliminate services to all residents, including those most in need of support.

## **II. Granting a Stay Will Irreparably Cause a Differential Undercount and Undermine Census Data Quality**

Appellants' decision to drastically curtail the time for 2020 Census data collection efforts will undermine the accuracy of the census count and compromise the quality of census data. Staying the district court's injunction against the Replan, and thereby letting the Replan go into effect, would irreparably harm census accuracy—and therefore also irreparably harm local governments and the residents they serve—because the Census Bureau would cut short data collection efforts such as the critical Non-Response Follow-Up program (or “NRFU”) that are functionally impossible to re-start later.

NRFU operations specifically focus on and ensure inclusion of people from hard-to-count communities, including racial and ethnic minorities, non-English speakers, undocumented immigrants, persons who distrust the government, and low-income persons. In the Census Bureau's own words, NRFU “is entirely about

hard-to-count populations.” U.S. Census Bureau, 2020 Census Operational Plan, at 212 (Dec. 2018) [hereinafter “2018 Operational Plan”], <https://perma.cc/VH4Q-EKSU>.

Even before COVID-19, NRFU was critical to complete and accurate census data because many immigrant communities and communities of color are particularly hesitant to self-respond, given their concerns—fanned by politicization of the census itself—that the federal government would leverage census responses for immigration enforcement. NRFU was—and is—a central element of the Census Bureau’s efforts to overcome these fears and approach a complete and accurate count.

The Census Bureau’s careful April 2020 response to the disruption caused by the pandemic was to postpone NRFU but keep its duration roughly the same. This made sense: NRFU continues to be just as necessary to now enumerate hard-to-count populations and others who have not self-responded as it was when originally planned.

But Appellants’ rushed, secretive, and irrational August 2020 decision to cut more than a third of the time planned for NRFU leaves Bureau staff to count the same number of non-responding households in just two-thirds the time—and to do so while the COVID-19 pandemic continues to ravage the country. As the record in this case amply demonstrates, career staff have repeatedly warned that ending

data collection this early is “ludicrous” and “will result in a census that is of unacceptable quality.” District Court Op. at 49, 53; *see id.* at 49-57.

Indeed, COVID-19 has made it *harder* for NRFU to achieve its aims, not easier. When the Census Bureau originally allocated 11 weeks to NRFU, it assumed local governments would conduct robust outreach efforts to support the Bureau. 2018 Operational Plan, *supra*, at 10, 18-21, 105, 206, 209-11. But COVID-19 has frustrated, and often stymied, these efforts: because of the pandemic, local governments have replaced their plans to use traditional forms of local on-the-ground outreach with social media, texting, and phone-banking—which are not as effective as neighborhood canvassing and in-person communication. Accordingly, if COVID-19 should affect the time dedicated to NRFU at all, it should be to extend NRFU rather than to truncate it.

By cutting NRFU short, moreover, the Replan forces the Census Bureau to rely on far less reliable information. When households do not self-respond or respond to NRFU, the Bureau attempts to count them by relying on proxies (such as neighbors and landlords), administrative records, and statistical imputation. But these secondary data sources are substantially less accurate than households’ own responses.<sup>4</sup> So cutting NRFU short undermines census data in two ways. First, it

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<sup>4</sup> Proxies are significantly less likely to accurately report information about uncounted households, administrative records are least accurate for hard-to-count

forces the Census Bureau to resort to significantly less reliable enumeration methods, meaning the Replan will cause a differential undercount of hard-to-count populations. Second, even in the unlikely event the Bureau somehow accurately counts the *number* of people in hard-to-count households, it will likely inaccurately record demographic information (e.g., age, gender, race) about them.

As the district court found, Appellants’ absence of reasoned justification, lack of an explanation consistent with the evidence before the agency, and failure to consider important aspects of enumerating hard-to-count communities during a pandemic on a drastically shortened timeframe is arbitrary, capricious, and counterproductive. If this Court stays the district court’s order, the Census Bureau will end NRFU operations early—all but guaranteeing that the 2020 Census will undercount Amici’s most vulnerable residents and produce inaccurate and corrupted data. The disastrous, life-threatening, decade-long impacts to Amici’s

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populations including racial and ethnic minorities, and statistical imputation uses data that differentially undercounts hard-to-count households that may not match the demographic characteristics of surrounding households. Thomas Mule, U.S. Census Bureau, DSSD 2010 Census Coverage Measurement Memorandum Series 2010-G-01 at 16, Table 8, and 30, Table 21 (May 22, 2012), <https://perma.cc/9X7G-MJJQ> (despite the use of statistical imputation in the 2010 Census, there were still statistically significant undercounts of Blacks, Hispanics, and Native Americans; during NRFU, proxies are less accurate than household members’ own responses); Sonya Rastogi and Amy O’Hara, 2010 Census Match Study, U.S. Census Bureau at 47 (Nov. 16, 2012), <https://perma.cc/GX9X-RF5D> (higher percentage of non-Hispanic than Hispanic households had matching administrative records data, and thus relying on administrative records could “produce undercounts for various race, Hispanic origin, and age groups”).

ability to deliver critical government services and meet the needs of their communities will be irreparable.

### CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that this Court deny Appellants' emergency motion for a stay.

DATED: September 29, 2020

Respectfully submitted,

**COUNTY OF SANTA CLARA**  
JAMES R. WILLIAMS,  
County Counsel

By: /s/ Raphael N. Rajendra  
Raphael N. Rajendra  
Deputy County Counsel

Greta S. Hansen  
Karun Tilak  
Marcelo Quinoñes  
70 West Hedding Street  
East Wing, 9th Floor  
San Jose, California 95110  
Tel. (408) 299-5900  
Fax (408) 292-7240  
Greta.Hansen@cco.sccgov.org  
Raphael.Rajendra@cco.sccgov.org  
Marcelo.Quinones@cco.sccgov.org  
Karun.Tilak@cco.sccgov.org

*Attorneys for County of Santa Clara,  
California*



**APPENDIX A – LIST OF AMICI CURIAE**

The County of Santa Clara, California  
The County of Marin, California  
The County of Monterey, California  
The County of San Mateo, California  
Cook County, Illinois  
The County of Bucks, Pennsylvania  
The County of Delaware, Pennsylvania  
The County of Montgomery, Pennsylvania  
The City of Oakland, California  
The City of Sacramento, California  
The City of Stockton, California  
The City of Santa Cruz, California  
The City of Boston, Massachusetts  
The City of Baltimore, Maryland  
The City of New York, New York  
The City of Portland, Oregon  
The City of Dallas, Texas  
The City of Seattle, Washington  
The Los Angeles Unified School District

**ADDITIONAL COUNSEL FOR AMICI CURIAE**

JOHN C. BEIERS  
County Counsel  
San Mateo County  
400 County Center, Sixth Floor  
Redwood City, CA 94063  
Tel. (650) 363-4775  
Fax (650) 363-4034

*Attorney for County of San Mateo,  
California*

JOSEPH J. KHAN  
County Solicitor  
County of Bucks – Law Department  
55 E. Court St., Fifth Floor  
Doylestown, PA 18901  
Tel. (215) 348-6464

*Attorney for County of Bucks,  
Pennsylvania*

JOSHUA M. STEIN  
County Solicitor  
Montgomery County Solicitor's Office  
One Montgomery Plaza  
Suite 800  
Norristown, PA 19401  
Tel. (610) 278-3033

*Attorney for County of Montgomery,  
Pennsylvania*

LESLIE J. GIRARD  
Monterey County Counsel  
Office of the County Counsel  
County of Monterey  
168 West Alisal St., 3rd Fl.  
Salinas, CA 93901  
Tel. (831) 755-5045  
Fax (831) 755-5283

*Attorney for County of Monterey,  
California*

WILLIAM F. MARTIN  
County Solicitor  
County of Delaware, Pennsylvania  
Government Center, 2nd Floor  
201 W. Front Street  
Media, PA 19063  
Tel. (610) 891-4074

*Attorney for County of Delaware,  
Pennsylvania*

BARBARA J. PARKER  
City Attorney  
Office of the Oakland City Attorney  
One Frank H. Ogawa Plaza, Eighth  
Floor  
Oakland, CA 94612  
Tel. (510) 238-6623  
Fax (510) 238-6500

*Attorney for City of Oakland,  
California*

SUSANA ALCALA WOOD  
City Attorney of the City of  
Sacramento  
915 I Street, Fourth Floor  
Sacramento, CA 95814  
Tel. (916) 808-5346  
Fax (916) 808-7455

*Attorney for City of Sacramento,  
California*

ANTHONY P. CONDOTTI, City  
Attorney  
Atchison, Barisone, & Condotti,  
A Professional Corporation  
PO Box 481  
Santa Cruz, CA 95061  
tcondotti@abc-law.com

*Attorney for City of Santa Cruz,  
California*

EUGENE L. O'FLAHERTY  
City of Boston Corporation Counsel  
City of Boston Law Department  
City Hall, Room 615  
Boston, MA 02210  
Tel. (617) 635-4034

*Attorney for City of Boston,  
Massachusetts*

DANA P. MOORE  
Acting City Solicitor  
Baltimore City Law Department  
100 N. Holliday St., Suite 101  
Baltimore, MD 21146  
Tel. (410) 396-3100

*Attorney for City of Baltimore,  
Maryland*

JAMES E. JOHNSON  
Corporation Counsel of the City of  
New York  
100 Church Street  
New York, NY 10007  
Phone: (212) 360-5043

*Attorney for City of New York, New  
York*

TRACY REEVE  
City Attorney for the City of Portland,  
Oregon  
1221 SW Fourth Avenue, Room 430  
Portland, OR 97204  
Tel. (503) 823-4047  
Fax (503) 823-3089

*Attorney for City of Portland, Oregon*

PETER S. HOLMES  
Seattle City Attorney  
701 Fifth Avenue, Suite 2050  
Seattle, WA 98104-7097  
Tel. (206) 684-8200

*Attorney for City of Seattle,  
Washington*

CHRISTOPHER J. CASO SBN  
03969230  
Dallas City Attorney  
City Attorney's Office  
1500 Marilla Street, Room 7DN  
Dallas, TX 75201  
Tel. (214) 670-3519

*Attorney for City of Dallas, Texas*

MICHAEL TUBBS  
Mayor of the City of Stockton, CA  
425 N. El Dorado Street  
Stockton, CA 95202  
Tel. (209) 937-8499

*Mayor of City of Stockton, California*

DAVID HOLMQUIST  
General Counsel  
Los Angeles Unified School District  
333 South Beaudry Avenue  
Los Angeles, CA 90017  
Tel. (213) 241-7600

*Attorney for Los Angeles Unified  
School District*

JESSICA M. SCHELLER  
Chief; Advice, Business & Complex  
Litigation Division  
Cook County State's Attorney's Office  
500 Richard J. Daley Center  
Chicago, IL 60602

*Counsel for Cook County, Illinois*

BRIAN E. WASHINGTON  
County Counsel  
County of Marin  
3501 Civic Center Drive, Room 275  
San Rafael, CA 94903  
Tel. (415) 473-6117

*Attorney for County of Marin,  
California*

## CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,560 words, exclusive of the portions of the brief that are exempted by Federal Rule of Appellate Procedure 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: September 29, 2020

By: /s/ Raphael N. Rajendra  
Raphael N. Rajendra

## CERTIFICATE OF SERVICE

I, Raphael N. Rajendra, hereby certify that I electronically filed this Brief of Amici Curiae County of Santa Clara and 18 Additional Local Governments in Support of Plaintiffs-Appellees' Opposition to Defendants-Appellants' Emergency Motion for a Stay Pending Appeal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 29, 2020. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed September 29, 2020, at Berkeley, California.

/s/ Raphael N. Rajendra  
Raphael N. Rajendra