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

NATIONAL URBAN LEAGUE, *et al.*, Plaintiffs, v. WILBUR L. ROSS, JR., *et al.*, Defendants.	Case No. 5:20-cv-05799-LHK **DEFENDANTS' OPPOSITION TO PLAINTIFFS' "RENEWED" MOTION TO COMPEL AND FOR SANCTIONS** Date: TBD Time: TBD Judge: TBD

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INTRODUCTION

This is a unique case. Plaintiffs challenge the accuracy of a decennial census that is—at this very moment—in the process of being completed. And, by this motion, they demand mammoth amounts of information that is protected from disclosure by federal statute. That information is stored in enormous, live, and actively used databases, and extracting it in the granular form Plaintiffs demand would require a substantial effort to craft computer code just for Plaintiffs' benefit—by the very same people who are currently working around the clock to complete the census.

At the November 13, 2020, case management conference, Plaintiffs pressed the Court for an expedited schedule. Nov. 13, 2020 Tr., ECF No. 361, at 9–12. Although the Court did not expedite proceedings as much as Plaintiffs would have desired, the Court acknowledged that the less-than-eight-week discovery schedule it ultimately entered constituted "a short amount of time," *id.* at 15–16, and expressly "agree[d] with [Defendants' counsel] [that] we need not overly burden the Census Bureau," *id.* at 25. "So I want," the Court explained, "really targeted, targeted discovery and limits imposed on the Plaintiffs." *Id.*

Plaintiffs then proceeded to reassure the Court that they would not unduly hobble the Census Bureau. Plaintiffs pledged that their requests for production would be "narrowly tailored"; that they would work on "appropriate key word search terms that would allow [Defendants] to efficiently gather and produce the materials"; and that they expected that "a lot of the materials that [Plaintiffs] are seeking" would be in "data reports that [Defendants] already have for statistical data," such that production of those reports "shouldn't be burdensome from a production standpoint." *Id.* at 27.

Plaintiffs' discovery requests—served just four days later—were hardly "narrowly tailored." But Defendants proceeded along the very lines that Plaintiffs proposed to the Court. Defendants produced (and continue to produce) documents collected through search terms that Plaintiffs demanded, and also produced (after Title 13 confidentiality review) "data reports that [Defendants] already have." To be sure, Plaintiffs previously moved to compel on the grounds that Defendants' rolling productions were not as fast as Plaintiffs would have liked. ECF No. 368.

But Plaintiffs made clear that that motion was about speed, not search methodology. ECF No. 368–1 at 4 n.1 (noting that the parties were "engaging on appropriate search terms, custodians, and the like" and that Plaintiffs did "not wish to trouble the Court at this time with [such] mundane matters"). And after the Court granted Plaintiffs' motion and expedited Defendants' productions, *see* ECF Nos. 372, 380, Defendants complied. They produced documents based on search terms (including all of Plaintiffs' search terms) and documents they manually retrieved—all as contemplated by Plaintiffs at the November 13, 2020, status conference, and just as Defendants set forth in their discovery objections and responses.

Plaintiffs now want to move the goalposts. Unsatisfied with the documents Defendants produced under the very methodology that Plaintiffs themselves pitched to the Court, they now demand much more. Expanding their sufficient-to-show requests to go *beyond* requests for "all" documents, Plaintiffs demand data at exceedingly granular levels that are not found in "data reports that [Defendants] already have." Defendants have already manually compiled and generated—at significant cost in terms of person-hours—responsive data at the Area Census Office (ACO) level. But the data that Plaintiffs now demand at much-more-granular geographic levels—the Census Field Supervisor (CFS) and census-tract levels—implicate Title 13's statutory provisions enacted to assure the public that census data will be treated confidentially.

Simply put, the data Plaintiffs seek cannot be produced without violating congressional mandate and undermining public confidence in the confidentiality of the data that they provide to the Census Bureau. As explained below, producing such data without appropriate disclosure avoidance would create extraordinary risk that personal data could be identified. The public—recognizing that respondent data may be produced to special-interest groups purporting to "help" the census—will be less likely to participate in future censuses. Ensuring the public that census data would not be improperly disclosed is, of course, the precise reason Congress enacted Title 13's protections in the first place.

Even if Title 13's confidentiality provisions had never been enacted, much of the information Plaintiffs now demand either does not exist or does not presently exist in the form that Plaintiffs demand—indeed, the data is, at this very moment, being processed as the Bureau

completes the census. And even to the extent that the information Plaintiffs seek actually exists, Plaintiffs' demands would impose, as explained below, an incredible burden on the Census Bureau—a burden compounded many times over by the fact that the Bureau is in the midst of completing the census, which implicates the very same people and datasets that would be needed to comply with Plaintiffs' burdensome demands.

This type of plenary, wide-ranging discovery is a far cry from the "really targeted, targeted discovery" that the Court contemplated when it proposed and ordered expedited proceedings with only "a short amount of time" allotted for fact discovery. Nov. 13, 2020 Tr., ECF No. 361, at 15–16, 25. The massive, custom database productions and extensive Title 13 confidentiality reviews would be extraordinarily burdensome in a normal discovery case. They are entirely inappropriate in light of the extraordinarily expedited discovery period here, especially because the Census Bureau needs to focus on completing the census in a complete, accurate, and timely as possible manner. Plaintiffs' motion should be denied.

ARGUMENT

Defendants have fully complied with the order this Court issued in response to Plaintiffs' Motion to Compel. That motion was premised on allegations that Defendants' efforts to collect, review, and produce documents responsive to Plaintiffs' productions requests were too slow. In response to the Court's order, Defendants expedited their production of documents from both their searches of custodians' emails and their collection of documents that were responsive to Plaintiffs' sufficient-to-show requests. Plaintiffs now seek to morph the scope of the Court's order from one that addresses Plaintiffs' attempt to compel a more *expeditious* production of documents to one that is unmoored from the issue that Plaintiffs actually presented to the Court in that motion. To wit, Plaintiffs are now dissatisfied with the *scope* of the materials Defendants have produced, and insist that Defendants should be required to construct computer code to retrieve data from active census databases, notwithstanding that the data they seek is protected from disclosure by federal statute. But these particular arguments could not have been brought in Plaintiffs' initial motion because Defendants were still in the process of producing the data documents Plaintiffs now deem contumacious; indeed, that timing complaint was the crux of Plaintiffs' first motion. The relief

Plaintiffs now seek, such as the imposition of dedicated computer coding and setting aside statutory disclosure restrictions: was not contemplated by the Court's Order; would violate Title 13; and would be extraordinarily burdensome to implement—all contrary to the "targeted, targeted" discovery process the Court envisioned when it set the discovery schedule.

I. Defendants Complied With Their Discovery Obligations and the Court's Previous Orders Based on the Methodology That *Plaintiffs* Proposed to the Court, and About Which Defendants Were Fully Transparent

When it allowed discovery in this case, the Court emphasized that "we need not overly burden the Census Bureau," and that the Court desired "really targeted, targeted discovery." Nov. 13, 2020 Tr., ECF No. 361, at 25. Plaintiffs pledged that they were "going to try to keep the RFP, the request for production of documents very limited and tailored"; that "it will be for a tailored time period, primarily over the last six months, if not entirely"; and that "RFP's would be narrowly tailored as far as the subject matter and requests." *Id.* at 27.

Plaintiffs reassured the Court that they would "work[] as [they] normally would with the defendants on a *limited* set of custodians they would have to search and *appropriate key word search terms* that would allow them to efficiently gather and produce the materials." *Id.* at 27 (emphases added). And they further explained that they "expect a lot of the materials that we are seeking, not all, but a lot of them, to be *data reports that they already have* for statistical data. And that shouldn't be burdensome from a production standpoint. So *one* of our RFP's will be focused on that, but otherwise narrowly tailored." *Id.* (emphases added). Consistent with and relying on Plaintiffs' representations, the Court ultimately ordered a schedule with a fact-discovery period lasting just under eight weeks, *see* ECF No. 357, and was recently extended by two weeks, *see* ECF No. 427.

Just four days after that November 13 case management conference, Plaintiffs served their First Set of Requests for Production on Defendants. *See* ECF No. 368–3. Contrary to Plaintiffs' representations to the Court, the requests were not "narrowly tailored," they were not "primarily" limited to "the last six months," and—as evidenced by the very requests for production at issue in Plaintiffs' motion—Plaintiffs served many more than "one" request for production "focused" on

"data reports" that Defendants supposedly "already have." Instead, Plaintiffs' requests were phrased in broad terms. They included requests to produce "*[a]ll* Documents used by Defendants to calculate the census completion"; "*[a]ll* Documents comparing, contrasting, or assessing the 2020 Census data collection results with the 2000 and 2010 census data collection results . . ."; "*[a]ll* Documents regarding the Replan's effects or potential effects on differential undercounts or potential differential undercounts of hard-to-count populations, including tribal populations, communities of color, legal and illegal immigrants"; and "*[a]ll* Documents and Communications to or from Secretary Ross regarding the 2020 Census." *Id.* at 6, 7, 11 (emphasis added). The requests further sought documents related to a variety of data and statistics about ongoing census operations. *Id.*

Defendants timely lodged objections and responses. ECF No. 368–4. Defendants made crystal clear in their objections that: (i) they "will not produce materials protected from disclosure under the provisions of 13 U.S.C. §§ 8 and 9"; and (ii) "[b]efore any product or document involving census data may be released, the material must be reviewed by the Census Bureau's Disclosure Review Board (DRB) to ensure that no identifiable confidential data are or may be disclosed." *E.g.*, *id.* at 4 ¶ 8. Plaintiffs' repeated insistence that Defendants somehow "waived" this objection is therefore baseless. Defendants also explained that many of the requests Plaintiffs had made were overly broad, unduly burdensome, and disproportionate to the needs of the case. *See id.* at 7–22. Indeed, many of these requests, Defendants noted, stretch back years, or implicate "all household responses, administrative records, and other materials used to conduct the 2020 Census," which are "exempt from disclosure under the provisions of 13 U.S.C. §§ 8 and 9." *Id.* at 7.

That said, Defendants took Plaintiffs at their word when they told the Court that they would "work[] as [they] normally would with the defendants on a limited set of custodians they would have to search and appropriate key word search terms that would allow them to efficiently gather and produce the materials." Nov. 13, 2020 Tr., ECF No. 361, at 27. To accommodate Plaintiffs' requests in a reasonable and proportionate way, given Title 13 issues and the expedited discovery process for which Plaintiffs advocated, Defendants stated that they would collect emails from 21

individual custodians stretching back approximately six months, run defined search terms, and review subsequent materials for responsiveness and privilege. *Id.* at 5–7. The custodians included Secretary of Commerce Wilbur L. Ross, Deputy Secretary Karen Dunn Kelley, their two chiefs of staff, Census Bureau Director Steven Dillingham, Deputy Director of the Census Bureau Ron Jarmin, Associate Director for Decennial Census Programs Albert E. Fontenot, Jr., and numerous other senior officials. *Id.* Defendants began gathering emails from these custodians and loading them into a document review platform even before they served their responses and objections to Plaintiffs' RFPs.

But Defendants did not just rely on keyword search terms. Indeed, in addition to the keyword search terms the Plaintiffs contemplated at the November 13 case management conference, Plaintiffs also "expect[ed] a lot of the materials that [they] are seeking" would be found in "data reports" that Defendants "already have." Nov. 13, 2020 Tr., ECF No. 361, at 27. To that end, Defendants stated in their discovery responses that they would identify and produce categories of documents that would be sufficient to address a number of Plaintiffs' requests for statistical data regarding census operations. ECF No. 368–4 at 8. As Defendants explained, they would "identify materials generated since August 3, 2020, such as briefings to Commerce Department Leadership and briefings presented to the Census Integration Group [CIG], that are likely to contain the requested information," which would be reviewed for privilege, and material exempt from disclosure pursuant to 13 U.S.C. §§ 8 and 9 would be released to the extent possible. *Id.*

The parties subsequently met and conferred on December 2, 2020, when they discussed Plaintiffs' requests and Defendants' responses. Plaintiffs proposed *sixteen* additional search strings that they wanted Defendants to run. *See generally* Ex. A, Dec. 11, 2020, email from A. Makker. Defendants ran Plaintiffs' search terms as well, and produced documents based on those search terms. *See generally* Declaration of B. DiGiacomo, ECF No. 376–2, ¶ 6; Joint Discovery Status Report, ECF No. 402, at 3. Defendants noted, however, that materials protected by 13 U.S.C. §§ 8 and 9 would require special review by the Census Bureau's Disclosure Review Board to ensure that no statutorily protected information was inadvertently released. *See, e.g.*, Joint

Discovery Status Report, ECF No. 402, at 8–9.

On December 9, Plaintiffs filed a "Motion To Compel Timely Production of Documents and for Related Relief." ECF No. 368. The thrust of that Motion was not about Defendants' search methodology. In fact, Plaintiffs expressly stated that Defendants were "engaging on appropriate search terms, custodians, and the like"; that Plaintiffs did "not wish to trouble the Court at this time with mundane matters that should have been worked out by the parties weeks ago, nor with the Parties' discovery correspondence and back-and-forth"; and that "Plaintiffs will work diligently to resolve as much as possible without the Court's additional intervention." ECF No. 368–1 at 4 n.1. Rather, Plaintiffs argued that Defendants "have caused great delay and prejudice to Plaintiffs by failing to provide the requested materials within the Court's ordered schedule," and noted that "[t]he issue is simply one of timing." *Id.* at 4. Defendants opposed Plaintiffs' motion, *see* ECF No. 371, but the Court granted Plaintiffs' motion and accelerated Defendants' response to, among other things, "Plaintiffs' sufficient-to-show requests regarding data collection processes, metrics, issues and improprieties." ECF No. 372, at 7–8; *see also* ECF No. 380 at 9 (modifying production schedule). Defendants moved for partial reconsideration of that Order but did not challenge the expedition of those sufficient-to-show requests. ECF No. 376–1 at 4. Between December 1, 2020, and December 22, 2020, Defendants produced 89,228 documents. *See* Joint Discovery Status Report, ECF No. 402, at 3. Defendants' productions were, as Plaintiffs were at all times well aware, based on keyword searches (including sixteen of Plaintiffs' searches) and manual pulls of existing summary data reports—the exact methodology for which *Plaintiffs* advocated in pressing the Court for expedited discovery: "appropriate key word search terms" and "data reports that [Defendants] already have." Nov. 13, 2020 Tr., ECF No. 361, at 27 (statement of Plaintiffs' counsel).

Ultimately, Plaintiffs were not satisfied with the results of the very methodology that *they* advanced to the Court in the November 13, 2020, case management conference, which was supposedly an attempt to secure an expedited discovery timeframe that comported with the Court's express desire not to "overly burden the Census Bureau." Nov. 13, 2020 Tr., ECF No. 361, at 25. So Plaintiffs jettisoned the "appropriate key word search terms" and "data reports that

[Defendants] already have," *id.*—the methodology they advanced to the Court—and instead argued that Defendants "should have . . . been querying . . . databases for information responsive to Plaintiffs' RFPs from the get go." Joint Discovery Status Report, ECF No. 402, at 4.

In other words, Plaintiffs shifted from the expedited-discovery methodology that they proposed to the Court on November 13, to a far more intrusive form of discovery that was never contemplated during that hearing. In doing so, Plaintiffs moved away from the limited purpose of their "sufficient-to-show" requests, arguing that *all* the documents that Defendants have already produced are inadequate. Indeed, Plaintiffs demanded that Defendants produce "various data/metrics" at the "ACO, CFS [census field supervisor], and census tract" levels, regardless of whether such documents currently exist. *E.g.*, Dec. 31, 2020, Email from S. Huseny, ECF No. 433–3, at 5.

Even on their face, these demands are unsupportable. As a threshold matter, only *one* of the seven requests for production Plaintiffs raise—request no. 4—even mentions information at the census tract level. *See id.* at 2. Indeed, four of Plaintiffs' requests only demand information "in summary detail," *see id.* at 3—a phrase that, as Defendants explained in their objections, "is vague, ambiguous, and self-contradictory," but if it is to mean anything, it would seem to refer to the CIG reports, Data Quality Executive Governance Group (EGG) reports, and Department of Commerce (DOC) briefing materials that Defendants have already produced to Plaintiffs.

As Plaintiffs acknowledge, Defendants provided with their interrogatory responses "detailed Excel spreadsheets (many thousands of lines long) that have some of that ACO-level data" that they demanded. Pl. Mem., ECF No. 433, at 14. But now they also want data at the much-more-granular CFS and census tract levels. Even assuming these demands are theoretically possible to satisfy, it is simply not possible to engage in such expansive and burdensome discovery—on a massive, dynamic dataset subject to Title 13 review, and while the Census is in the process of being completed, no less—on an expedited eight- or ten-week discovery schedule.

In all events, Defendants have complied with the Court's earlier orders and with their discovery obligations based on the very methodology that Plaintiffs advanced to the Court, and about which Defendants have been transparent. To use the very words Plaintiffs employed in the

November 13, 2020, case management conference, Defendants ran and produced the results of "key word search terms"—including *every single one* of the searches Plaintiffs demanded—over a set of custodians, and produced a variety of "data reports that [Defendants] already have," *i.e.*, the CIG reports, Data Quality EGG reports, and DOC briefing materials. *See* Nov. 13, 2020 Tr., ECF No. 361, at 27. Though Plaintiffs allege that Defendants "cannot identify a single summary data report produced in compliance with the Court's orders," Pl. Mem., ECF No. 433, at 1, all those materials are plainly responsive to Plaintiffs' sufficient-to-show requests.

Plaintiffs' present demands—that Defendants spend weeks creating code to wrestle data from live databases that are simultaneously being used to complete the Census, and to wholly ignore Title 13's confidentiality provisions: (i) were never contemplated by Plaintiffs at the November 13, 2020, case management conference; (ii) are incompatible with the expedited-discovery schedule the Court has imposed in this case; and (iii) are certainly not in keeping with the Court's stated desire to "not overly burden the Census Bureau." *Id.* at 25.

II. Title 13 Bars the Production of Sub-ACO-Level Information

"Although Congress has broad power to require individuals to submit [census] responses, an accurate census depends in large part on public cooperation." *Baldrige v. Shapiro*, 455 U.S. 345, 354 (1982). "To stimulate that cooperation Congress has provided assurances that information furnished to the Secretary by individuals is to be treated as confidential." *Id.* (citing 13 U.S.C. §§ 8(b), 9(a)). Should this Court grant Plaintiffs' request to compel the production of information subject to Title 13's confidentiality provisions, those statutory assurances would be violated, thereby irreparably damaging the accuracy of all future censuses. After all, if special-interest groups and localities could force the Census Bureau to disclose in litigation confidential information on demand, then Title 13's confidentiality provisions are little more than dead letter, and the public is less likely to disclose personal information to the government in future censuses. "The general public, whose cooperation is essential for an accurate census, would not be concerned with the underlying rationale for disclosure of data that had been accumulated under assurances of confidentiality." *Id.* at 361.

Though Plaintiffs—who purport to be concerned about supposedly low census response

rates—treat these confidentiality assurances as a mere speedbump, they are nothing of the sort. As explained above, Defendants have made clear that their discovery efforts are informed by Title 13, and have attempted to work with Plaintiffs to ensure that they are able to provide Plaintiffs with responsive materials while complying with Title 13's mandates. Plaintiffs' discovery requests, and Defendants' responses, must be read in this context. Indeed, "[d]isclosure by way of civil discovery would undermine the very purpose of confidentiality contemplated by Congress." *Id.* at 361; *McNichols v. Klutznick*, 644 F.2d 844, 845 (10th Cir. 1981) ("[T]he broad language of the confidentiality provisions of [§ 9] make abundantly clear that Congress intended . . . a rigid immunity from . . . discovery . . . ."), *aff'd sub nom. Baldrige v. Shapiro*, 455 U.S. 345 (1982); *Carey v. Klutznick*, 653 F.2d 732, 739 (2d Cir. 1981) (same). Even assuming *arguendo* that Plaintiffs "have important reasons" for demanding this information "for purposes of [their] civil suit," Title 13 "shields the requested information from disclosure despite the need demonstrated by the litigant[s]." *Id.* at 362. As the Supreme Court has made clear, this information cannot be provided even under a protective order. *See id.* at 350, 362 (reversing the Third Circuit's judgment that had affirmed disclosure of confidential information "with the proviso that all persons using the records be sworn to secrecy"). Title 13 therefore does not permit a trial court overseeing discovery "to substitute its own techniques for protecting the confidentiality mandated by the statute." *McNichols*, 644 F.2d at 845. And for similar reasons, Plaintiffs' suggestion that the statutory prohibition on disclosure can somehow be "waived" in litigation, ECF No. 433 at 17, is meritless. The statutory prohibition on disclosure exists for the benefit of the public, not the Census Bureau, and is not subject to waiver. Public confidence in the statutory assurance of confidentiality would be shaken regardless of "the underlying rationale for disclosure of data that had been accumulated under assurances of confidentiality." *Baldrige*, 455 U.S. at 361. In all events, as explained above, Defendants raised Title 13's confidentiality provisions in their objections and responses and thus did not waive them.

Section 8(b) of the Census Act provides that the Secretary of Commerce "may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent." 13 U.S.C. § 8(b). And section 9(a) further provides

that the Department of Commerce generally may not "make any publication whereby the data furnished by any particular establishment or individual under this title can be identified." 13 U.S.C. § 9(a). As the Supreme Court has explained, "[t]he unambiguous language of the confidentiality provisions, as well as the legislative history of the Act . . . indicates that Congress plainly contemplated that raw data reported by or on behalf of individuals was to be held confidential and not available for disclosure." *Baldrige*, 455 U.S. at 355; *see also id.* at 361 ("As noted above, § 8(b) and § 9(a) of the Census Act embody explicit congressional intent to preclude all disclosure of raw census data reported by or on behalf of individuals.").

The sweep of these provisions is broad. In that regard, the Supreme Court has rejected the proposition that "the confidentiality provisions protect raw data only if the individual respondent can be identified." *Id.* at 355. "The language of each section refers to protection of the 'information' or 'data' compiled." *Id.* at 356 (quoting 13 U.S.C. §§ 8(b), 9(a)). And "[b]y protecting data revealed 'on behalf of' a respondent, Congress further emphasized that the data itself was to be protected from disclosure." *Id.* (quoting 13 U.S.C. § 8(b)). Even if a recipient "might not be able to identify the individuals who originally gave the information, there would nonetheless be the *appearance* that confidentiality had been breached." *Id.* at 361 n.17 (emphasis in original).

Nor are Title 13's protections limited to the information collected in the census questionnaire. The master address register sought by the *Baldrige* plaintiffs included not just things like addresses and household names, but also operational data such as "vacancy status" and—like many of Plaintiffs' demands—"type of census inquiry." *Id.* at 349. The Supreme Court did not parse Title 13's confidentiality provisions so finely as to allow disclosure of that operational data.

The accompanying declaration of Dr. John Abowd, the Chief Scientist of the Census Bureau, further explains why Title 13's confidentiality provisions protect not only respondent data but also data about Census operations. *See* Declaration of J. Abowd, ¶ 11. In particular, Dr. Abowd details that both the "operational and preliminary response data at the census tract and Census Field Supervisor Area [] level . . . . are protected by the confidentiality provisions of Title

XIII," because the cumulative effect of disclosing such statistics increases the risk that individual data can be identified. *Id.* ¶¶ 11–19. As Dr. Abowd explains, "[s]tatistical releases do not all need to be of the same type, or contain the same data, to enable someone to combine data sets" and re-identify personal information. *Id.* ¶ 14. Indeed, examples from other published sources reveal the degree of risk. *Id.* And "[i]n the context of operational data and preliminary response data particularly, there is an overlap of [] common identifier elements with the other scheduled 2020 Census publications, greatly facilitating the matching and re-identification." *Id.* ¶¶ 16, 17. Simply put, combining information from the various publications would permit someone to learn "the values supplied on the person's census data including the operational data on that person's enumeration method." *Id.* ¶ 17. For this reason, as Dr. Abowd explains, "the Census Bureau treats operational data and preliminary response data at the sub-ACO level as categorically protected under Title XIII and barred from publication without disclosure avoidance compatible with the other 2020 Census publications." *Id.* ¶ 19.

III. Much of the Information Plaintiffs Seek Cannot Be Derived at This Time

Plaintiffs seek to compel production of certain data within two days of an order from this Court granting their motion. However, Plaintiffs put the cart before the horse; among the data products requested by Plaintiffs are a number of tabulations that cannot be derived from the files created up to this point in the Census post-processing stream. *See* Declaration of D. Stempowski, ¶¶ 17–19. Contrary to Plaintiffs' baseless assertions that these products can be obtained through simple queries of existing files, the data that would necessarily underlie certain requests are in a preliminary format, including duplicated data points and other anomalies, which cannot be resolved until the files obtained at later stages of post-processing have been created. *See id.*; *see also, e.g.*, Deposition of Tamara Adams, ECF No. 433–4 at ECF 103–04, 117; Stempowski Decl. ¶¶ 4–15 (explaining the stages of post-processing). For example, the tabulations specified by Plaintiffs concerning enumeration below the ACO-level using administrative record data cannot accurately be produced until the Census Unedited File ("CUF"), which removes duplicates and

determines the most valid response for each household, is created.[1] *See* Stempowski Decl. ¶ 18; *see also id.* ¶ 19 (tabulation of vacant housing units cannot be produced until DRF2 is complete). Consequently, accurate and useable statistical information responsive to some of Plaintiffs' requests cannot be derived at this stage of the Census process. Nor can the process of obtaining this information be accelerated independent of the actual work of completing the Census as designed, which as discussed *infra*, would be impeded by pursuing many of Plaintiffs' other requests. Defendants cannot be compelled to produce—let alone be held in contempt—for not producing information that cannot yet be obtained and is based solely on Plaintiffs' misunderstanding of the census data and post-processing procedures.

IV. To the Extent It Is Possible To Derive Some of the Information Plaintiffs Demand, Doing So Would Be Extremely Burdensome

Plaintiffs also seek the production of information that could theoretically be derived from existing databases, but not without significantly burdening the work of the Census Bureau and further delaying the Bureau's efforts to meet its statutory obligations to complete the Census. Contrary to Plaintiffs' glib assertions, deriving data products from the Bureau's existing databases is both inherently and incredibly burdensome. Indeed, to derive the ACO-level data already provided to Plaintiffs in response to their requests, five days of full-time work were required from a Bureau statistician in addition to the efforts of a number of other staff for consultation, review, and disclosure avoidance review. Stempowski Decl. ¶ 20. The ACO data product produced included only unprocessed operational data from a system, the Unified Tracking System ("UTS"), designed to maintain operational data at that geographic level. *Id.* Moreover, there are 248 ACOs total across the country for which this data is applicable. Stempowski Decl. ¶ 5. Conversely, Plaintiffs' sub-ACO level requests, in addition to this existing burden, demand both operational and response data from the CFS Area and Census Tract geographic levels. This information is not maintained in the UTS system and some of it (the response data) must be processed to provide

[1] At the CUF stage of post-processing, the Bureau identifies households for which there are duplicate responses, selecting the most valid available response. For example, if a household was enumerated during Non-Response Follow Up based on information from a landlord, but subsequently self-responded to the census, the Bureau would rely on the self-response and remove the other response from the file.

accurate results. Unlike the limited number of ACOs there are *13,000* CFS Areas and *over 80,000* census tracts.

Plaintiffs contend that because certain database queries may only take two days, Defendants should be compelled to provide responses to *all* of Plaintiffs' many requests in only two days. However, this short-sighted claim ignores both the cumulative amount of work required to compile the many data products Plaintiffs now demand, and the fact that the resources of the Census staff are already more than fully committed to the work of completing actual Census tasks. *See* Stempowski Decl. ¶ 24. In order to respond to each of Plaintiffs' requests at the sub-ACO level (to the extent those operations are even possible currently, *see supra*) knowledgeable programmers would need to create and run queries covering billions of unprocessed transactional records, then have their results reviewed for both accuracy and disclosure avoidance protection. *Id*. ¶ 22. Completing these tasks for all of Plaintiffs' sub-ACO requests would, by the Bureau's estimate, require the full time work of two to three programmers and several testers over multiple weeks, precluding them from assisting in the work necessary to actually complete the Census. *Id.* ¶¶ 22–24. It is simply impossible for Defendants to comply with the schedule demanded by the Plaintiffs, and similarly impossible for Defendants to comply on a longer but still limited schedule without impeding the work needed to actually complete the Census.

In addition to the inherent burdens of producing the many data products demanded by Plaintiffs, some of the requests are even more burdensome because: (i) the products would not otherwise be created at any point; or (ii) they require complex procedures to render statistics from past censuses comparable to 2020 data.

First, Plaintiffs demand various data products that the Census Bureau would not create in the ordinary course of its operations and will not have a use for once they are created. *See* Stempowski Decl. ¶¶ 27–30. The Bureau has both limited time and limited funds for operations, including testing and disclosure prevention review and has determined in its discretion how best to use those resources. *Id.* ¶¶ 29–30. If these resources are diverted for the sole purpose of this litigation to products that will not later be used by the Bureau, then Plaintiffs' requests are not only

burdensome in the immediate term as census processing is being completed, but also burden the overall operations of the Bureau.

Second, Plaintiffs demand comparisons of 2020 data with data from the two previous censuses. In addition to the inherent burden of producing this data, these requests are even more complicated and burdensome because the data from the earlier years is not maintained in the same way and is not easily comparable to the 2020 data. Stempowski Decl. ¶¶ 25–26. In order to manipulate these data so that they can be compared significant programming would be necessary and many of the results produced through this laborious process would not be direct equivalencies because of the many substantive differences between the censuses. *Id.*

V. Sanctions Are Inappropriate

Even if the Court concludes that Defendants' discovery responses have been deficient, the Court should deny Plaintiffs' request for monetary sanctions for two independent reasons.

Initially, Plaintiffs have not established that Defendants acted in bad faith, a threshold requirement for monetary sanctions. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) ("Before awarding such [monetary] sanctions, the court must make an express finding that the sanctioned party's behavior 'constituted or was tantamount to bad faith.'") (quoting *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997)). As explained above, Defendants used the very methodology that Plaintiffs proposed to the Court and as explained in their objections and responses; the information Plaintiffs seek by this motion is barred from disclosure by Title 13; and that information either does not exist as Plaintiffs requested it or cannot be provided without imposing a demonstrably unreasonable burden on Defendants' staff, who are already working around the clock to complete the census. Plaintiffs may disagree with Defendants' arguments, but have not demonstrated bad faith.

And in all events, courts cannot rely on their inherent authority to impose monetary sanctions against the government because Congress has not waived the United States' sovereign immunity in this circumstance. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies" from monetary damages. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also Ordonez v. United States*, 680 F.3d 1135, 1138 (9th Cir. 2012) ("Unlike actions involving

private parties, 'where a cause of action is authorized against the federal government, the available remedies are not those that are appropriate, but only those for which sovereign immunity has been expressly waived.'") (quoting *Lane v. Pena*, 518 U.S. 187, 197 (1996)). Plaintiffs carry the burden to meet the "high standard" of showing a waiver of sovereign immunity. *Hajro v. U.S. Citizenship & Immigration Servs.*, 811 F.3d 1086, 1101 (9th Cir. 2016).

Plaintiffs have identified no waiver of sovereign immunity for contempt sanctions under a court's inherent authority, and have thus failed to carry their burden of showing such a waiver. Several federal courts of appeals have rejected claims that a court's inherent authority can override the government's sovereign immunity and order monetary contempt against the government absent a waiver of sovereign immunity. *See, e.g.*, *United States v. Droganes*, 728 F.3d 580, 590 (6th Cir. 2013) ("[M]ost circuits faced with similar arguments have suggested that the government's sovereign immunity wins when it comes head-to-head with a lower court's inherent authority. We see no good reason to chart a different course at this time.") (citations omitted); *United States v. Horn*, 29 F.3d 754, 761–66 (1st Cir. 1994); *Coleman v. Espy*, 986 F.2d 1184, 1191–92 (8th Cir. 1993). The Ninth Circuit has likewise expressed "doubts" about the ability to overcome sovereign immunity to impose sanctions, at least in the absence of a federal rule or statutory text that expressly authorizes monetary sanctions. *Barry v. Bowen*, 884 F.2d 442, 444 (9th Cir. 1989) (expressing "doubts about the power of the district court to impose monetary sanctions" against the federal government and noting that the Ninth Circuit was aware of no authority "which suggests that the United States expressly has waived its sovereign immunity with respect to contempt sanctions").[2]

CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion in its entirety.

[2] A panel of the Ninth Circuit opined once in dictum that a federal court may be able to "impos[e] monetary sanctions under an exercise of its supervisory powers" without violating sovereign immunity, *United States v. Woodley*, 9 F.3d 774, 782 (9th Cir. 1993), but that decision was not necessary to the court's decision and has been described by another court of appeals as "dictum" that is "gratuitous and unsupported." *Horn*, 29 F.3d at 763.

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