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.

On Appeal from the United States District Court
for the Northern District of California
Case No. 5:20-cv-05799-LHK

OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

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October 2, 2020

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INTRODUCTION

Defendants want to stop the 2020 Census count *immediately*. They want to do so in irreversible fashion through an emergency stay that will effectively moot the appeal. They ask for this extraordinary relief in the face of overwhelming evidence from the Census Bureau that doing so will produce an incomplete, inaccurate, and constitutionally deficient count. They do so despite the decade-long harm this will inflict on Plaintiffs and the public who rely on quality census data for apportionment, redistricting, federal funding, and much more. And the only reason Defendants now offer for their hasty, unexplained, and dramatic changes to the Bureau's census timelines is a statutory deadline, still three months away, that by their own admission they cannot meet anyway.

A stay is an exercise of equitable discretion. And the balance of equities tips sharply in Plaintiffs' favor. As the district court found just yesterday, "Defendants' dissemination of erroneous information; lurching from one hasty, unexplained plan to the next; and unlawful sacrifices of completeness and accuracy of the 2020 Census are upending the status quo, violating the Injunction Order, and undermining the credibility of the Census Bureau and the 2020 Census. This must stop." Supp.Add.12. This Court should deny Defendants' stay request and allow the 2020 Census to continue to a complete and accurate count under the Bureau's own COVID-19 Plan.

STATEMENT

The factual and procedural background of this case has been recounted by the district court, in Plaintiffs' opposition to the motion for an administrative stay, and in this Court's order denying an administrative stay. *See* Add.1-78; Admin. Stay Opp. 3-11; Admin. Stay Order 2-4. The attached supplemental addendum provides a further compilation of the many statements made by Census Bureau and other federal officials before, during, and after the Replan, taking the position that completing a sufficiently accurate count before the December 31 deadline is impossible. *See* Supp.Add.16-20. And last night, the district court issued an order finding that Defendants repeatedly violated the preliminary injunction order including, most "egregious[ly]," when the Bureau announced (via tweet) that it was ending field operations on October 5. Supp.Add.6.

ARGUMENT

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). In deciding whether to grant a stay, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other

parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (citation omitted).

A. A Stay Will Inflict Serious And Irreparable Harm On Plaintiffs And The Public

As this Court recognized, a stay would leave "the Bureau's ability to resume field operations . . . in serious doubt." Admin. Stay Order 5. "Thousands of census workers currently performing field work will be terminated, and restarting these field operations and data-collection efforts . . . would be difficult if not impossible." *Id.* The district court also recently reaffirmed that "[o]nce field operations are terminated, they are difficult to resume; and once data processing begins, no more data can be added for processing." Supp.Add.12-13. Defendants do not argue otherwise. And Associate Director Fontenot said the same. Add.96-97 (¶¶67-68, 98). Granting the stay will end the count for the 2020 Census.

That alone would inflict serious and irreparable harm on Plaintiffs and the public. The Bureau's own projections on September 28 acknowledged that as many as ten states might not reach 99% completion by October 5. Dkt. 233 at 151. The Bureau now asserts they may miss only six states, *see* Fontenot Decl. (¶10), *LUPE v. Trump*, No. 19-cv-2710 (D. Md.) (Dkt. 126-1)—as if 12% of the nation's states is an acceptable error of margin. It is not, and never has been for the 2020 Census—but their state-wide "enumerated" rate fails to tell the whole story in any event.

The Bureau has never averred or provided evidence that its "enumerated" rate is based on the same procedures and metrics as the COVID-19 Plan or prior censuses. And the evidence in the record strongly suggests it is not. The "enumerated" rate includes households that the Bureau has stopped trying to count and, under the Replan, the Bureau is making broader use of counting methods that adversely impact accuracy, including "pop count only," broader reliance on proxies, and increased use of administrative records. *See* Dkt. 131-7 at 7 (listing shortcuts); Add.147 (¶13); DOC_0008779, Dkt. 199-2 (listing shortcuts); Dkt. 260-1 (¶13); Dkt. 266-1 (¶17); Dkt. 233 at 106-111; Dkt. 131-18 at 3.

The presentation delivered to Secretary Ross on September 28 made clear the count would be gravely impacted. It gave the Secretary two options: "Option 1: Conclude field work by October 5, 2020 in order to meet apportionment delivery date of December 31, 2020," *or* "Option 2: Continue field work *beyond* October 5, 2020 *in order to increase state completion rates to 99%* and to continue to improve enumeration of lagging sub-state areas, such as tribal areas, rural areas, and hard-to-count communities." Dkt. 233 at 148 (emphasis added). And an email to Mr. Fontenot from the Bureau's Deputy Director confirms that only the second option "furthers the goal of a complete and accurate 2020 Census." Dkt. 233 at 130. The Secretary chose the first.

Defendants are also oddly quiet about the critical data processing phase—in which the Bureau transforms data from 100 million households into usable information, weeds out mistakes, and tests quality. The complexity of this process is hard to overstate:

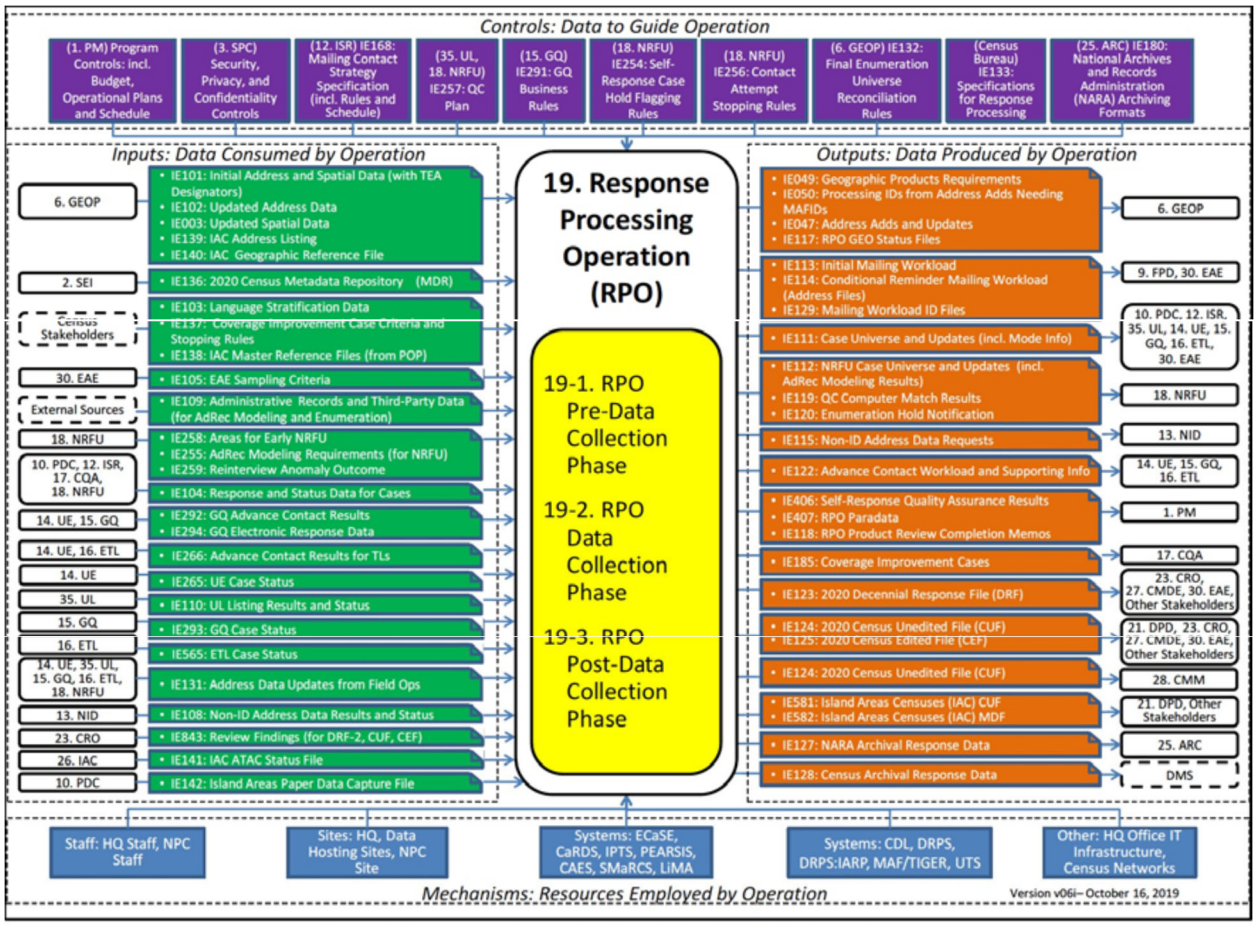

Figure 3: Response Processing Operation (RPO) Context Diagram

Dkt. 36-4 at 17.

The record is replete with statements from the Bureau and other officials warning of significant risks to data quality from rushing data processing. *See* Supp.Add.16-20. The Replan nonetheless cut the time frame in half from six months to three. Add.12. And Defendants' recent "tweet" cut that time by an additional

five days. The harm from a dramatically shorter period to process critical census data stands undisputed and indisputable.

Senior Bureau officials, the Office of Inspector General, the Census Scientific Advisory Committee, the Government Accountability Office, and Plaintiffs' experts (including a former Bureau Director and former Bureau Chief Scientist) all agree: enforcing the Replan will "severely compromise the quality, accuracy, reliability, and indeed the legitimacy of the 2020 Census numbers." Louis Decl. ¶1, Dkt. 36-4; *see* Thompson Decl. ¶¶5, 21-27, Dkt. 36-2; Hillygus Decl. ¶¶5, 39-42, Dkt. 36-3; *see also* Supp.Add.16-20. Jurisdictions with hard-to-count populations, and their residents, will suffer disproportionately from this rushed process, as even a small undercount can result in significant losses in federal funding and political representation. Add.23-28.

B. Defendants Still Have Not Shown Irreparable Harm

Defendants claim that the "Census Bureau may be unable to meet the statutory deadline absent immediate relief, and that injury to the Census would be irreparable." Defs. 9/30 Letter at 2. That is wrong twice over.

First, "the evidence in the administrative record uniformly showed that no matter when field operations end . . . the Bureau will be unable to deliver an accurate census by December 31, 2020." Admin. Stay Order 5-6. Defendants admitted for months before the Replan that it was *already* impossible to meet the December 31

deadline while conducting a constitutionally adequate census. *See* Supp.Add.16-20. On July 23, just after the President issued his memorandum excluding undocumented immigrants from apportionment and the pressure to shorten the count began, Bureau officials again said it could not be done. *See* Supp.Add.16-20. And, contrary to Defendants' unsupported assertion, these dire warnings did not just "precede[]" the Replan. Stay Mot. 15. They persisted between July 29 and August 3—and were included in the presentation to the Secretary the *same day* the Replan was announced. *See* Supp.Add.16-20. More recently, after the Replan's adoption, Associate Director Fontenot "swore under penalty of perjury that the Census Bureau could not meet the December 31, 2020 statutory deadline if data collection were to extend past September 30, 2020." Supp.Add.12 (citation omitted).

Faced with that mountain of evidence, Defendants look the other way. They now say it was *not* impossible to meet the statutory deadline if counting continued past September 30. Defendants new drop-dead date is October 5. *See* Defs. 9/28 Letter; Dkt. 233 at 148; Dkt. 284 at 4. But the only reason they give for this shift is that conditions on the ground are so favorable they can now complete the field operation 26 days early. That is not credible or correct for the reasons stated above. And Defendants have never explained how data processing operations that originally required *six* months can be completed in less than *three*. The October 5 date is made

for litigation—and, even then, the Bureau still would have needed to begin its "'closeout' processes . . . no later than Friday, October 2, 2020." Dkt. 233 at 148.

In short, Defendants cannot meet the statutory deadline—they never could—so a stay will do nothing to alleviate the only harm they assert.

Second, Defendants' claimed inability to meet the statutory deadline is not the sort of harm that could justify a stay.

In arguing to the contrary, Defendants rely solely on the "principle" 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." Admin. Stay Reply 1 (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). Whether and to what extent that proposition would apply with respect to statutes containing different and contradictory commands is unresolved. Regardless, it has nothing to do with agency compliance with statutory deadlines. Defendants' cases all concerned enjoining enforcement of a statute against third parties for the purpose of protecting the public. The "ongoing and concrete harm" in *King* was "to Maryland's law enforcement and public safety interests" in " remov[ing] violent offenders from the general population." 567 U.S. at 1301. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, the harm was to California's inability to enforce the Automobile Franchise Act, such that businesses could "locate dealerships without undergoing any scrutiny by the State." 434 U.S.

1345, 1351 (1977) (Rehnquist, J., in chambers). And in *Coalition for Economic Equity v. Wilson*, California had been enjoined from enforcing a ballot initiative prohibiting the use of race- and gender-based affirmative action programs—and this Court *denied* the stay. 122 F.3d 718, 719 (9th Cir. 1997).[1]

C. Defendants Have Not Made A Strong Showing That They Are Likely To Succeed On The Merits

Defendants cannot make a strong showing that they are likely to succeed. Defendants do not assert most of the "threshold" arguments they rested on below. Those issues are thus "not properly before" the Court at this time, and lack merit regardless. Admin. Stay Order 10; *see also* Add.22-29. Defendants instead argue that the district court was wrong for two reasons: (1) there was no "discrete" agency action that could be challenged, and (2) there is a statutory deadline that categorically binds the agency and the court. Neither argument has merit.

1. Agency action is "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. §

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[1] Defendants briefly suggest "other states" may be harmed, citing to the amicus brief submitted by Louisiana and Mississippi. Admin. Stay Reply 2. That brief, in turn, alludes to a risk to "redistricting and reapportionment." Br. of Louisiana and Mississippi 8-9. But they fail to explain what deadlines might be missed. Mississippi's state redistricting deadlines are not until 2022 (Miss. Const. Ann. art. 13, § 254; Miss. Const. Ann. art. 4, § 36; Miss. Code Ann. § 5-3-93), and its congressional redistricting deadlines are expressly tied to the date when census results are *published* (Miss. Code Ann. § 5-3-123). Louisiana's deadlines are tied to the date apportionment counts are delivered to the President. *See* La. Const. art. III, § 6.

551(13). A "rule," in turn, includes "an agency statement of general or particular applicability and future effect designed to implement . . . policy." *Id.* § 551(4). The August 3 press release announcing the Replan was a "rule." Defendants have never argued otherwise.

Defendants' reliance on *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("*SUWA*") and *NAACP v. Bureau of the Census*, 945 F.3d 183 (4th Cir. 2019), is misplaced. Rhetoric aside, this is not a "broad programmatic attack" on the internal operations of the Bureau. Add.30. Unlike *NAACP*, this is not a "sweeping" challenge, to multiple "design choices" in the 2018 Operational Plan." *Id.* at 189-91. The Bureau, after years of testing and analysis, issued a 200-page 2018 Operational Plan dictating how it would conduct the 2020 Census, and announced it in the Federal Register. 83 Fed. Reg. 26,643 (June 8, 2018). That plan set forth a specific timeframe for critical operations including self-response, NRFU, and data processing. *See* Dkt. 37-5 at 79, 132, 144, 208; Add.3-4. The COVID-19 Plan was a discrete decision moving those timeframes but shortening none of them. Add.6-7. And the decision in the Replan to accelerate and severely curtail those same timeframes was similarly discrete. Add.12, 30-32.[2]

[2] That the Replan eliminated or shortened various operations to meet those new deadlines does not make the timelines any less discrete. Nor does the Bureau's litigation-driven, newfound characterization of the Replan's September 30 deadline as a "target" make it any less final. Stay Mot. 1. The Bureau informed the public

Nor does the district court's order require "hands-on management" by the court. *Cf. NAACP*, 945 F.3d at 191. The court granted the traditional remedy for an APA violation: staying the unlawful action (the Replan) and, returning to the status quo ante, thus allowing the *Bureau*'s previously adopted COVID-19 Plan to govern in the interim. *See Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 & n.7 (2020) (affirming judgment vacating recession and restoring Deferred Action for Childhood Arrivals ("DACA") program); *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc) ("The effect of invalidating an agency rule is to reinstate the rule previously in force." (citation omitted)). That should have been the end of it. The district court's other orders—before and after—were not an effort to micromanage census operations. Stay Mot. 18. They were an effort to ensure compliance with court orders in the face of Defendants' repeated violations. *See, e.g.*, Supp.Add.4-10; Add.135-36.

2. As the district court found, Defendants acted arbitrarily and capriciously in five independent ways by: (1) failing to consider important aspects of the problem; (2) offering an explanation counter to the evidence; (3) by failing to consider an alternative; (4) failing to articulate a satisfactory explanation for the Replan; and (5) failing to consider reliance interests. Add.47-74. Defendants still

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and its partners that the end date for self-response and NRFU *would* be September 30, and it never wavered from that position until days ago, during this litigation.

do not meaningfully argue otherwise. Plaintiffs will not repeat the district court's detailed and comprehensive reasoning here.

Rather than purport to have satisfied the APA's requirements, Defendants argue that they did not need to. The reason: there is a December 31 statutory deadline to report population numbers to Congress, and that will apparently always excuse an agency from abiding by the APA's requirements, no questions asked. Defendants are wrong.

Defendants begin by claiming the district court had no authority to compel the Census Bureau to violate a statutory deadline. But the Supreme Court's decision in *Regents*, 140 S. Ct. at 1910-15, makes clear that an agency's firmly held belief that an action is unlawful (even if correct) does not give it license to violate the APA by failing to consider important aspects of the problem. Nor does it tie a court's hand in vacating agency action that fails to comply with the APA. There, the Attorney General concluded that DACA was illegal and ordered the Secretary to rescind the program. *Id.* at 1915. The Court declined to rule on whether that determination of illegality was correct because, even if it was, the Secretary had still violated the APA by failing to consider important aspects of the decision and possible alternatives to complete rescission. *Id.* at 1910-15. The federal government and the lead dissent had vigorously argued that DACA's illegality was the beginning and end of the analysis. *Id*. at 1915; *id.* at 1921-26 (Thomas, J., dissenting). The Court disagreed

and affirmed the judgment vacating the recession and restoring the assertedly "illegal" DACA program. *Id.* at 1916 n.7.[3]

That reasoning applies here with even greater force. Unlike *Regents*, there is no contemporaneous statement from Defendants declaring that the COVID-19 Plan is or would become unlawful as of December 31. Indeed, in the limited AR produced, there is no mention of the need to discard the COVID-19 Plan because of the statutory deadline until the Secretary's directive on July 29, and no indication that any factors relevant to that decision were even considered. Defendants' only response is to say that nothing in *Regents* "suggests that an agency can choose to disregard a mandatory statutory deadline." Admin. Stay Reply 3. That misses the point. *Regents* required the agency to administer a program it thought violated a statute (and the Constitution) until it complied with the APA. There is nothing special about a "deadline" that elevates it above other binding legal obligations. The multiple cases holding that a statutory deadline does not automatically provide "good cause" to dispense with notice and comment further prove as much. *E.g.*, *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 810-12 (9th Cir. 1980); *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236 (D.C. Cir. 1994); *cf. Am. Mining Cong.*

[3] Section 705 allows courts to stay unlawful agency action pending final disposition. *Bakersfield City Sch. Dist. of Kern Cty. v. Boyer*, 610 F.2d 621 (9th Cir. 1979). That is all the district court did, and the effect is the same as the vacatur in *Regents*. Supp.Add.3.

v. EPA, 907 F.2d 1179, 1191 (D.C. Cir. 1990) ("That an agency has only a brief span of time in which to comply with a court order cannot excuse its obligation to engage in reasoned decisionmaking under the APA.").

Defendants next claim that "the Replan Schedule was unquestionably designed to achieve an accurate census while meeting the statutory deadline." Stay Mot. 2, 15. They cite *nothing* in the administrative record for support. There is nothing. A post-hoc and conclusory assertion of "confiden[ce]"—made one time, in one line, on September 5, 2020, for a filing created solely for the litigation—cannot fill that gap. Add.111 (¶91); Admin. Stay Order 9; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

Defendants' assertion that agencies have no choice but to comply with statutory deadlines at all costs cannot be squared with reality, or with Defendants' own actions. Agencies miss statutory deadlines for far less weighty reasons than the need to complete the critically important and constitutionally mandated work of a decennial census during a global pandemic. Courts "cannot responsibly mandate flat . . . deadlines when the [agency] demonstrates that additional time is necessary" to ensure a reasoned decision. *Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1974). This is why a long line of cases have held that an agency still has authority to act after the deadline has passed and late action will not be invalidated. *See* Add.64-67 (citing cases).

Defendants' attempt to distinguish these cases falls flat. Stay Mot. 12-13. The key question is whether Congress imposed a sanction for non-compliance, rather than simply speaking in mandatory "shall" language. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003); *Nielsen v. Preap*, 139 S. Ct. 954, 967 (2019) (plurality opinion). And here, not only did Congress not provide sanctions for any late census report (let alone one necessitated by serious accuracy concerns), every time comparable census deadlines were violated, Congress retroactively extended them. Add.67. And to the extent it matters, there *are* other cases that "involve[d] a requirement to report to Congress itself" (Admin. Stay Reply 3). *See Regions Hosp. v. Shalala*, 522 U.S. 448, 459 n.3 (1998).

Finally, Defendants attack the district court's determination that the APA required them to consider the "statutory and constitutional duties to accomplish an accurate count." Stay Mot. 14. Defendants do not dispute that such duties exist. Nor could they. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568-69 (2019) (Congress has imposed a "duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment") (citation omitted); *see also Utah v. Evans*, 536 U.S. 452, 478 (2002) (recognizing a "strong constitutional interest in accuracy"); *cf.* 1998 Appropriations Act, Pub. L. No. 105-119, § 209(a), 111 Stat. 2480, 2480–81 (1997) (codified at 13 U.S.C. § 141 note). They argue instead that "accuracy" is too

amorphous a concept to provide any "judicially administrable standard." Stay Mot. 14; Admin. Stay Reply 4. That argument fails for several reasons.

For one, it misunderstands the district court's APA holding. The court held that Defendants failed to sufficiently consider their (undisputed) constitutional and statutory duties to conduct an accurate census. Add.47-59. Whether a court can enforce such a standard, and what precisely that standard might be, the agency charged with conducting the census must at a minimum meaningfully consider accuracy when deciding to cut the census timeline in half during a global pandemic. For another, the Census Act's requirement to conduct an "accurate" census is no more amorphous than the myriad other standards courts use to assess agency compliance. *See, e.g.*, *WorldCom, Inc. v. FCC*, 238 F.3d 449, 457-64 (D.C. Cir. 2001) (requirement to ensure "just and reasonable" rates).

Defendants thus had to at least weigh the overwhelming evidence in the record raising significant concerns about accuracy. *See* Supp.Add.16-20; Add.47-59; *id.* at 57-58. They had to at least acknowledge that they were drastically changing position as to what was needed to conduct an accurate census. *Organized Vill. of Kake*, 795 F.3d at 968. And they had to at least consider alternatives—including that Congress still had *five* months to extend the deadline and had been actively working to do so until Defendants rescinded their request. Add.63-68.

Finally, while the district court did not reach the question, application of the statutory deadline in these extraordinary circumstances would be unconstitutional as applied. That Defendants cannot achieve perfect accuracy (Stay Mot. 14) does not mean that they can adopt policies that bear no "reasonable relationship" to that goal. *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). While that standard is undoubtedly deferential, it is not meaningless. (Defendants could not decide, for example, to complete the 2020 Census in a week, using one enumerator per State.) A truncated timeline that does not even meet the Bureau's *own* standards for accuracy bears no such relationship. And it would require the Bureau to use statistical imputation in ways that cannot be squared with the Constitution's requirements. *See Utah*, 536 U.S. at 472-79.

CONCLUSION

The Court should deny Defendants' motion for an emergency stay pending appeal.

Respectfully submitted,

Dated: October 2, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion response complies with the type-volume limitation of Circuit Rules 27-1(1)(d) and 32-3(2) because the document together with the Compilation of Key Record Cites in Plaintiffs' Supplemental Addendum contains 5,592 words according to the count of Microsoft Word, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f) and Circuit Rule 27-1(1)(d).

This response 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) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

By: s/ Melissa Arbus Sherry
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