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

18 NATIONAL URBAN LEAGUE, et al.,

19 Plaintiffs,

20 v.

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

22 Defendants.

CASE NO. 5:20-cv-05799-LHK

**PLAINTIFFS' RENEWED MOTION
TO COMPEL AND FOR SANCTIONS**

Place: Courtroom 8
Judge: Hon. Lucy H. Koh

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1 **I. INTRODUCTION**

2 On December 10, 2020, the Court granted Plaintiffs’ motion to compel and ordered
 3 Defendants to produce “All summary data reports responsive to Plaintiffs’ sufficient-to-show
 4 requests regarding data collection processes, metrics, issues and improprieties (RFP Nos. 2-4, 6-
 5 10, 15, 16 and 18).” Dkt. 372. On December 12, Defendants filed a motion for reconsideration
 6 in part, but did not ask for reconsideration of the above aspect of the Court’s order compelling
 7 production; instead, Defendants said they would comply and produce the materials by December
 8 14. Dkt. 376-1 at 4. The Court recognized this in its December 13, 2020 Order Denying Motion
 9 for Reconsideration and Clarifying Motion to Compel: “Defendants do not seek reconsideration
 10 of the following requirements in the Order to Compel and thus must comply with these
 11 requirements: Defendants must produce by December 14, 2020 All summary report data
 12 responsive to Plaintiffs’ sufficient-to-show requests regarding data collection processes, metrics,
 13 issues and improprieties (RFP Nos. 2-4, 6-10, 15, 16 and 18).” Dkt. 379 at 8-9.

14 Defendants have defied the Court’s orders. They did not produce the requisite summary
 15 data reports on December 14, and have not produced them since. They cannot identify for
 16 Plaintiffs a single summary data report produced in compliance with the Court’s orders, let alone
 17 all such reports responsive to Plaintiffs’ sufficient-to-show RFPs. And in a long meet and confer
 18 on Sunday, January 3, Defendants told Plaintiffs they would not provide these reports as
 19 requested by Plaintiffs and ordered by the Court. When asked whether Defendants had produced
 20 a single such report, and to identify where, Defendants’ counsel Aleks Sverdlov answered that
 21 Plaintiffs should search Defendants’ productions themselves. Plaintiffs have. The reports aren’t
 22 in there. And Defendants know that. Plaintiffs have tried for weeks to get Defendants to comply
 23 with their obligations, short of filing yet another motion to compel and for sanctions, and thought
 24 last week there might be movement. Instead, Defendants remain fixated on delay. And contrary
 25 to Defendants’ volunteering at the January 4, 2020 case management conference that Defendants
 26 cannot “live-stream” the Census, Plaintiffs are not interested in a live-stream. They are
 27 interested in Defendants halting their bald defiance of this Court’s orders, and providing
 28 Plaintiffs with basic, critical data necessary to the claims in this case. That Defendants now very

1 badly want to hide these summary data reports raises red flags. Also raising red flags are the
 2 new “burden” and “Title 13 immunity” arguments they make about why they should not have to
 3 produce them—arguments they never made to the Court in response to Plaintiffs’ initial motion
 4 to compel, and never made to the Court when Defendants filed a motion for reconsideration on
 5 separate issues but said that they would produce the summary data reports. And were ordered to
 6 do so.

7 Plaintiffs respectfully request that the Court grant this motion, compel yet again the
 8 immediate production of this material, issue a sanction of a substantial daily fine until full
 9 compliance, and award any and all other sanctions and relief the Court deems appropriate so that
 10 Plaintiffs are not further prejudiced by Defendants’ egregious, ongoing behavior.

11 **II. BACKGROUND**

12 As the Court will recall, approximately three months ago, Plaintiffs filed a motion to
 13 compel and for sanctions aimed at forcing Defendants to comply with the Court’s preliminary
 14 injunction order. In it, Plaintiffs discussed at length how Defendants had exhibited a callous
 15 disregard for these proceedings from inception—denying the existence of documents, feigning
 16 ignorance, refusing to answer basic questions posed by the Court, acting in an obstructive
 17 manner, and failing to comply with this Court’s orders. Dkt. 265. The Court, in later clarifying
 18 its preliminary injunction order, discussed Defendants’ improper conduct in detail and referred
 19 back to previous orders finding Defendants’ compliance insufficient. Dkt. 288 at 4-10.
 20 Plaintiffs thought those days were behind this case. The chronology below shows otherwise.

21 **November 17, 2020.** Plaintiffs issue 22 tailored requests for production, less than their
 22 allotment (in order to minimize the burden on Defendants while swiftly producing core materials
 23 for Plaintiffs’ claims in the Second Amended Complaint). Dkt. 368-2, Exs. 1, 2. Eleven (half)
 24 of these Requests are “sufficient to show” requests aimed at summary data reports on key issues
 25 of the case, among them the following requests for information, readily and easily available in
 26 Defendants’ databases:

27 REQUEST FOR PRODUCTION NO. 4: Documents Sufficient to Show the
 28 percentage and number of housing units/addresses, at the national, state, county,
 and census tract level, resolved through particular methods for the 2020 Census,
 including but not limited to the following: (a) enumerations by administrative

1 records (for occupied, vacant, and delete/nonexistent); (b) enumerations by
 2 proxies (for occupied, vacant, and delete/nonexistent); (c) “pop count only”
 3 enumerations; (d) enumerations as vacant (and how so determined); (e)
 4 enumerations as delete/nonexistent (and how so determined); (f) enumerations
 5 that do not contain name and/or date of birth; (g) enumerations using fictitious
 6 names (e.g., ADULT ONE); (h) enumerations with a popcount of 1 and
 information entered as “refused” or “don’t know”; (i) enumerations of closed
 cases that were reopened in the close-out phase of NRFU; (j) enumerations
 where the geo-location data does not match the housing unit/address; and (k) all
 actual and potential housing units/addresses unresolved.

7 REQUEST FOR PRODUCTION NO. 6: As to housing units/addresses resolved
 8 by administrative records, Documents Sufficient to Show in summary detail all
 9 actual and potential housing units/addresses resolved by administrative records
 10 for each of the 2000, 2010 and 2020 censuses, including but not limited to
 11 documents regarding what types of administrative records were used for each
 12 such closeout; when and how the use of various administrative records was
 13 triggered; where various administrative records were used to close housing units
 after zero visits or one visit; the housing units that were eligible to be closed
 using various administrative records after zero visits or one visit; how many
 housing units/addresses were enumerated with administrative records not
 validated by another source; how close in time to April 1, 2020 the
 administrative records were; any quality assessment of the administrative
 records; and the changing rules and parameters regarding the use of
 administrative records.

14 REQUEST FOR PRODUCTION NO. 7: As to housing units/addresses resolved
 15 by proxy, Documents Sufficient to Show in summary detail all actual and
 16 potential housing units/addresses resolved by proxy for each of the 2000, 2010
 17 and 2020 censuses, including but not limited to Documents regarding what types
 18 of proxies were used for each such closeout; when and how the use of proxies
 was triggered; where proxies were used to close housing units after zero visits
 or one visit; the housing units that were eligible to be closed using proxy after
 zero visits or one visit; the geo-location/proximity of the device making the
 enumeration to the housing unit/address being enumerated; and the changing
 rules and parameters regarding the use of proxies.

19 REQUEST FOR PRODUCTION NO. 8: As to housing units/addresses resolved
 20 as vacant or nonexistent/delete, Documents Sufficient to Show in summary
 21 detail all actual and potential housing units/addresses resolved as vacant or
 22 nonexistent/delete for each of the 2000, 2010 and 2020 censuses, including but
 23 not limited to Documents regarding when and how vacancy or nonexistent/delete
 was determined; how many visits were made prior to the resolution of vacancy
 or nonexistent/delete; where, when, and in what fashion the vacancy or
 nonexistent/delete enumeration was made, including by whom (field enumerator
 or any supervisors or management); the geo-location/proximity of the device
 making the enumeration to the housing unit/address being enumerated; and the
 changing rules and parameters regarding the use of any methods allowing for a
 vacant or nonexistent/delete enumeration.

24 REQUEST FOR PRODUCTION NO. 9: As to housing units/addresses resolved
 25 through “pop count only,” Documents Sufficient to Show in summary detail all
 26 actual and potential housing units/addresses resolved as “pop count only” for
 27 each of the 2000, 2010 and 2020 censuses, including but not limited to
 28 documents regarding when and how the determination of making a “pop count

1 only” count was triggered; where “pop count only” enumerations were used to
 2 close housing units after zero visits or one visit; the housing units that were
 3 eligible to be closed using “pop count only” enumerations after zero visits or one
 4 visit; the geo-location/proximity of the device making the enumeration to the
 5 housing unit/address being enumerated; and the changing rules and parameters
 6 regarding the use of “pop count only” enumerations.

7 REQUEST FOR PRODUCTION NO. 10: Documents Sufficient to Show the
 8 total number and relevant percentages of housing units/addresses in the entire
 9 NRFU universe as of each Date, including but not limited to all housing
 10 units/addresses obtained during the NRFU process and closeout phases, all
 11 vacant and nonexistent/delete housing units/addresses identified in the NRFU
 12 process, when and whether any additional housing units/addresses obtained
 13 during the NRFU process were enumerated and were to be accounted for, and
 14 whether and how any completion rates as of the Dates included or failed to
 15 include any additional housing units/addresses in the calculations.

16 REQUEST FOR PRODUCTION NO. 18: Documents Sufficient to Show the
 17 Census Unedited File (CUF) quality indicators, including but not limited to the
 18 numbers and percent of records (a) identified as duplicate enumerations across
 19 different addresses, (b) that do not contain information sufficient for
 20 deduplication, (c) that required status or count imputation, (d) created by count
 21 imputation, (e) that will require whole person imputation, (f) missing a complete
 22 name, (g) missing a date of birth, (h) from administrative records, (i) from
 23 administrative records lacking complete names or date of birth, and (j) that
 24 required item imputation for race, Hispanic origin, sex, and age.

25 There is no question this data is highly relevant to the case and easily obtained by
 26 Defendants. Indeed, at the October 6, 2020 case management conference, Defendants touted the
 27 high completion rates of the Census count, and there was a lengthy discussion about the nature of
 28 those rates and whether the completion metrics were in fact apples-to-apples comparisons. The
 Court asked for responses to question covering identical or similar issues to the RFPs set forth
 above—questions aimed at understanding the definition of completion, quality indicators, how
 units had been counted or enumerated, the issue of vacant units, and so on. Oct. 6, 2020 Tr. at 6-
 8; 19:20. This was in partial response to the declaration of Bureau Director Dillingham a few
 days earlier, highlighting completion rates. Dkt. 300-1. And in response to the Court’s
 questions, Defendants responded by filing, two days later, a declaration by Al Fontenot
 discussing these issues at a high level. Dkt. 323-1. As a review of the Court’s questions and Mr.
 Fontenot’s declaration shows, Defendants did not fully answer all of the Court’s questions, but
 clearly had ready access to whatever data they wanted—very, very quickly.

1 Plaintiffs seek this data in their RFPs, so as to test Defendants’ various assertions
 2 regarding the claimed robust completion rates and metrics of the 2020 Census. And to be sure,
 3 these assertions were not limited to just the filings in this Court. Defendants wove their
 4 completion rate/metrics story at the Ninth Circuit, arguing to overturn this Court’s preliminary
 5 injunction order, stating, “the way we are calculating these 99% numbers, etc., is exactly the
 6 same way we’ve always calculated it.” When that failed, they described the same narrative
 7 before the Supreme Court (claiming, at that point, even higher rates of completion due to the
 8 passage of time—which prompted in part the dissent from Justice Sotomayor on how
 9 Defendants’ claims were last-minute and untested). *See Ross v. Nat’l Urban League*, 592 U.S.
 10 ___, No. 20A62, slip op. at 6 (2020) (Sotomayor, J., dissenting) (“It is thus unsurprising that, for
 11 the 2010 census, the Bureau continued its field operations for a full month after reaching the 99
 12 percent threshold that the Government now deems good enough.”). And they repeated that story
 13 further when they terminated the census count on October 15, 2020—right after the Supreme
 14 Court’s decision staying the preliminary injunction order in this case. It is worth highlighting the
 15 first page of that release, found here: [https://www.census.gov/content/dam/
 16 Census/newsroom/press-kits/2020/nrfu-deadline-completion-rates-faq.pdf](https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/nrfu-deadline-completion-rates-faq.pdf):

2020 Census Completion Rates: Frequently Asked Questions

What makes up the 99.9 percent total response rate?

As of October 16,¹ well over 99.9 percent of addresses nationwide have been accounted for in the 2020 Census, with 67.0 percent accounted for through self-response online, by phone or by mail, and 32.9 percent accounted for through our Nonresponse Followup (NRFU) operation. The self-response rate is higher than the final self-response rate for the 2010 Census. Over 99.9 percent of addresses have been resolved in 49 states, plus the District of Columbia and Puerto Rico. The remaining state, Louisiana, was 99.0 percent complete as of October 16.

The majority of occupied housing units in the NRFU operation were completed by a census taker interviewing a member of the household. The balance were completed by interviews with proxy respondents or using high-quality administrative records.

As of October 16, approximately 24.1 percent of occupied housing units in the NRFU workload have been enumerated by proxy response, which is similar to the 2010 rate. As we continue to resolve cases and remove duplicate responses during data processing, we expect the 2020 final proxy rate to stay about the same or potentially decrease. (See below for more on the use of enumeration by proxy.)

As of October 16, approximately 5.6 percent of addresses nationwide have been completed using high-quality administrative

records, which is 13.9 percent of the NRFU workload. We use administrative records when census taker efforts to contact the housing unit are unsuccessful and our analysis shows very high confidence the administrative records are complete and correct. Completing 13.9 percent of the NRFU workload using administrative records is much lower than our expected 22.5 percent of cases with high-quality administrative records that would have been used if the first visit was not a successful enumeration or a self-response was not received. The use of administrative records to enumerate nonresponding households and resolve addresses is one of the Four Key Innovation Areas in the 2020 Census, and part of our 2020 Census Operations Plan.² (See below for more on the use of high-quality administrative records.)

How many enumerations were completed by proxy?

Each decade, the census uses “proxy responses” to account for some addresses that do not respond to the census. If census takers can’t get a response directly from a household after three visits (except where high-quality administrative records are available), they try to get information about the address from a proxy such as a neighbor, landlord, or building manager. Because COVID-19 delayed the start of census taker visits, we anticipated that we might need significantly more proxies this decade. However, we are pleased to report that the proxy rate is actually similar to the 2010 proxy rate. The 2010

¹ Data collection ended on October 15. The October 16 data reflects additional responses that have been processed, particularly the resolution of online responses submitted without a Census ID.
² 2020 Census Operational Plan, Version 4.0, Issued December 2018 at <<https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan.pdf>>.

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 ATTORNEYS AT LAW
 SAN FRANCISCO

5 CASE NO. 5:20-CV-05799-LHK
 PLAINTIFFS’ RENEWED MOTION TO COMPEL AND
 FOR SANCTIONS

1 Plaintiffs discussed these issues at length in their Second Amended Complaint. *See, e.g.*,
2 Dkt. 352 (“SAC”) at ¶¶ 2, 23, 26-28, 34-40. And one of the primary issues Plaintiffs have
3 raised—in the SAC, in filings with this Court, and in appellate filings—is that Defendants are
4 able to pick and choose among their calculations strategically, bouncing between their
5 denominator universes (e.g., all housing units; addresses nationwide; all housing units in the
6 NRFU operation; all housing units in the NRFU workload; occupied housing units alone, and so
7 on), highlighting what they want for the public and Court and, Plaintiffs believe, hiding the data
8 and calculations from the data that reveal serious flaws in the census. And one of the main ways
9 Defendants are able to do this is by providing data only at the 30,000 foot level—making broad
10 assertions about “national” completion rates and even statewide completion rates, and seeking to
11 hide from view that the metrics tell a *far* different story—one that reveals significant undercounts
12 and differential undercounts. *See, e.g.*, SAC at ¶¶ 26-27, 35, 39, 222, 307-318, 413.

13 This is exactly why Plaintiffs seek the production of summary data reports at the closer-
14 to-ground levels, including by census tract. To be clear, Defendants are free to present whatever
15 completion and “best Census ever” stories they want, via their expert reports, in summary
16 judgment, and at trial in this case. What they *cannot do* is keep the data to themselves, so that no
17 one can test their assertions. The importance of this data to the full elucidation of this case’s
18 issues and claims cannot be overstated. Defendants and only Defendants have full access to their
19 data. And it will surely come as a surprise to no one that, when government statisticians want to
20 present data comparisons (as between the 2020 census and previous censuses), that they can pick
21 and choose comparisons and tables that shine the best light on their position. For example, when
22 making comparisons to the 2010 Census like they did in the October 23, 2020 FAQ document
23 pasted above, and similar such documents, Defendants apparently have the ability to pull data at
24 their whim. Though they are perhaps less concerned with whether such comparisons are actually
25 “apples to apples.” Here is what Bureau employees were saying internally, as shown in a few
26 email exchanges that Plaintiffs have now uncovered, in the documents that this Court separately
27 compelled Defendants to produce:

28

1 To: Ali Mohammad Ahmad (CENSUS/ADCOM FED)[ali.m.ahmad@census.gov]
 2 Cc: Albert E Fontenot (CENSUS/ADDC FED)[Albert.E.Fontenot@census.gov]; Timothy P Olson (CENSUS/ADFO FED)[Timothy.P.Olson@census.gov]; Kathleen M Styles (CENSUS/ADDC
 3 FED)[kathleen.m.styles@census.gov]; Burton H Reist (CENSUS/ADCOM FED)[burton.h.reist@census.gov]
 4 From: Christopher M Denno (CENSUS/ADDC FED)
 5 Sent: Wed 10/21/2020 3:47:01 PM
 6 Subject: Re: DOC request - list of 2010 to 2020 comparisons

7 I'll touch base with the NRFU guys and see what we can get. I just want to ensure we're comparing apples to apples... or as
 8 close as possible anyways.

9 The summary data reports—at the levels of geographic scope that Plaintiffs requested—
 10 were and are necessary for Plaintiffs and Plaintiffs’ experts to present what they think are the real
 11 metrics, and for a full and fair assessment of the 2020 Census and Plaintiffs’ claims in this case.

12 **November 17 – December 2, 2020.** Defendants refused multiple requests to meet and
 13 confer about the RFPs—including as to how to best and most easily run the data summary
 14 reports to satisfy the 11 sufficient-to-show RFPS. Dkt. 368-2, Ex. 3.

15 **December 2 – December 8, 2020.** After producing 175 documents on December 1,
 16 Defendants finally agreed to meet and confer on December 2. *Id.*, Exs. 4-5. Defendants
 17 represented that “CIG” briefing decks could satisfy Plaintiffs’ sufficient-to-show requests and
 18 would be “granular,” but were going through Title 13 confidentiality review. Makker Decl. ¶ 3.
 19 Defendants also stated that they would pursue the issue of database queries. *Id.* On December 4,
 20 Plaintiffs followed up, pressing on the lack of CIG decks or on any “summary/aggregate report
 21 data;” Defendants stated they were working on them and trying to do things systematically rather
 22 than ad-hoc. Dkt. 368-2, Exs. 4-5. No information was provided about the Title 13
 23 “confidentiality” review being undertaken, or when it would complete, though Plaintiffs
 24 indicated productions would occur in late December (i.e., a week before fact discovery was to
 25 close). *Id.* Plaintiffs warned they would have to file a motion to compel as to numerous
 26 deficiencies in Defendants’ productions if Defendants continued to purposefully delay. *Id.* On
 27 December 8, 2020—a week after their first production, and 3 weeks after the RFPs, Defendants
 28 produced only 516 more documents (and what’s more, largely duplicates and obviously
 irrelevant material)—and no summary reports/data. *Id.*, Ex. 6.

December 9, 2020. Plaintiffs filed their second motion to compel in this case, focused on
 Defendants’ discovery failings and intentional delay (including as to basic discovery obligations,
 such as refusing to provide metadata with their electronic productions). For purposes of the

1 motion, Plaintiffs explained the importance of their straightforward “sufficient to show” data
 2 requests, and how the failure to provide Plaintiffs with the requisite summary data reports was
 3 highly prejudicial. Dkt. 368.

4 **December 10, 2020.** The Court granted Plaintiffs’ motion to compel and orders
 5 Defendants to produce, among other things, “All summary data reports responsive to Plaintiffs’
 6 sufficient-to-show requests regarding data collection processes, metrics, issues and improprieties
 7 (RFP Nos. 2-4, 6-10, 15, 16 and 18).” Dkt. 372.

8 **December 12, 2020.** Defendants filed a motion for reconsideration of a few parts of that
 9 order, but expressly did not ask for reconsideration of that aspect of the Court’s order compelling
 10 production (nor the ruling on the equally basic requirement that Defendants produce metadata
 11 with their electronic productions). Instead, Defendants said they would comply and produce the
 12 materials by Monday, December 14. Dkt. 376-1 at 4.

13 **December 13, 2020.** The Court issued its Order Denying Motion for Reconsideration
 14 and Clarifying Motion to Compel, ordering as follows: “Defendants do not seek reconsideration
 15 of the following requirements in the Order to Compel and thus must comply with these
 16 requirements: Defendants must produce by December 14, 2020...All summary report data
 17 responsive to Plaintiffs’ sufficient-to-show requests regarding data collection processes, metrics,
 18 issues and improprieties (RFP Nos. 2-4, 6-10, 15, 16 and 18).” Dkt. 379 at 8-9.

19 **December 18, 2020.** In the parties’ December 18, 2020 Joint Case Management
 20 Statement, Plaintiffs flagged that they were reviewing Defendants’ productions (in Defendants’
 21 words, a “truckload” of ~72,000+ documents they had dropped on Plaintiffs between December
 22 14 and December 17) and had asked Defendants for direction on where specific, critical
 23 materials could be found. In that same Statement, Defendants crowed that “any such discussions
 24 will not be productive until Plaintiffs actually review the [approximately 72,000] documents they
 25 have so desperately sought,” and that “Plaintiffs’ counsel should be able to complete their review
 26 and be in a position to assess the sufficiency of the productions in no time[;] it is simply
 27 premature for Plaintiffs to imply that the productions—which are rolling in nature and therefore
 28

1 ongoing—may be insufficient.” Dkt. 394 at 3. Plaintiffs did review. And did not find the
2 materials.

3 **December 18-22, 2020.** Defendants made additional productions throughout the next
4 few days, pursuant to the Court’s order, up until December 21—but the materials weren’t there
5 either. Plaintiffs flagged the issue in the parties’ December 22, 2020 Joint Discovery Status
6 Report, Dkt. 402 at 3-4, and at that point had taken the Court-ordered 30(b)(6) deposition related
7 to document issues, and knew that the sufficient-to-show summary data reports Plaintiffs had
8 sought were available. Defendants simply had not produced them. Defendants’ response? That
9 the reports “would require creating new queries of the Census’s database and subsequent Title 13
10 review,” Dkt. 402 at 9, and that Defendants essentially weren’t obligated to actually produce *all*
11 summary report data responsive to Plaintiffs’ sufficient-to-show requests regarding data
12 collection processes, metrics, issues and improprieties. They had produced none—but no matter.

13 **December 22 – 30, 2020.** Plaintiffs tried everything they could to resolve the issue
14 without further Court intervention. During a long meet and confer on December 28, Plaintiffs
15 thought they had finally started to make some progress, and that Defendants would produce (late,
16 but still produce) the summary data reports requested. Plaintiffs flagged this potential progress
17 in the December 30 Joint Discovery Status Report; Defendants also seemed to indicate that they
18 were moving toward finally producing the materials, stating that “Plaintiffs’ requests cannot be
19 easily fulfilled because the information is not readily available in the level of granularity that
20 Plaintiffs want,” but that “Defendants are considering whether they might run queries against the
21 databases for census tract level information and whether providing the reports would resolve
22 your concerns, but such search results would also implicate Title 13.” Dkt. 417 at 10:1-4, 13:8-
23 13). Never mind that providing the reports was already what Defendants had agreed to do, and
24 the Court had ordered. Dkt. 376-1, 379.

25 **January 3, 2020.** Plaintiffs were willing to overlook everything preceding, if the
26 materials were produced (notwithstanding that, as of January 3, fact discovery was scheduled to
27 close on January 7, and initial expert reports were due on January 14). They were not, and
28 Defendants have now definitively said they will not be. During another long meet and confer on

1 Sunday, January 3, Defendants stated that producing summary data reports to Plaintiffs at the
 2 ACO (Area Census Office) level of scope would not implicate Title 13 but that Defendants just
 3 weren't going to produce them because Plaintiffs supposedly already had some such materials in
 4 the production sets. *See* Makker Decl., Ex. 2. When asked yet again to identify where,
 5 Defendants told Plaintiffs to search the productions themselves, refusing to identify a single
 6 document or report. *Id.* Defendants also stated that producing summary data reports to Plaintiffs
 7 at the more focused geographic levels being discussed—the CFS (Census Field Supervisor) and
 8 Census Tract level of scope—might implicate Title 13 confidentiality concerns. *Id.* Defendants
 9 did not raise any other reason, on that call for failing to produce the materials they had agreed to
 10 produce and had been ordered to produce, weeks prior. *Id.*

11 Plaintiffs stated that they would be forced to file a motion to compel and for sanctions,
 12 and asked Defendants to provide, by 8 p.m. that evening, (1) Defendants' case authority for their
 13 position that Title 13 immunized the summary data reports at the CFS and Census Tract level of
 14 scope, and (2) the Bates number of any summary data report produced. *Id.* Defendants refused.
 15 *Id.* Instead, Defendants sent an email claiming that they should not be required to query their
 16 databases to produce such summary data reports (and argument they never raised, during the
 17 December 9 to 13 motion to compel filings), and stating that Defendants' response to an
 18 interrogatory would provide some information to Plaintiffs—and that Plaintiffs should
 19 essentially be happy with that. *Id.* Defendants did not explain why the summary report data they
 20 had been ordered to produce, at each of the levels of geographic scope, was protected by Title 13
 21 (nor explain of why any reports could not be appropriately tailored to avoid such concerns, since
 22 Plaintiffs are not interested in the slightest in individual-level data that is protected by Title 13).
 23 *Id.* Moreover, Defendants did not provide any authority for their extreme claim that they cannot
 24 be obligated to query their database for these reports. *Id.* The parties' discussion on this issue—
 25 and Defendants' lack of any authority for their positions—is encapsulated in a brief email
 26 correspondence. *Id.*

27 **III. ARGUMENT**

28 In its December 13, 2020 Order Denying Motion for Reconsideration and Clarifying

1 Motion to Compel, the Court ruled as follows: “Defendants do not seek reconsideration of the
 2 following requirements in the Order to Compel and thus must comply with these requirements:
 3 Defendants must produce by December 14, 2020 All summary report data responsive to
 4 Plaintiffs’ sufficient-to-show requests regarding data collection processes, metrics, issues and
 5 improprieties (RFP Nos. 2-4, 6-10, 15, 16 and 18).” Dkt. 379 at 8-9.

6 Defendants are squarely and deliberately violating this order.

7 The Court has inherent authority to enforce compliance with its orders. *See Goodyear Tire*
 8 *& Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (“Federal courts possess certain ‘inherent
 9 powers,’ not conferred by rule or statute, to manage their own affairs so as to achieve the orderly
 10 and expeditious disposition of cases.”) (internal citations and quotation marks omitted); *Fraihat v.*
 11 *U.S. Immigration & Customs Enf’t*, No. EDCV 19-1546 JGB (SHKx), 2020 WL 2758553, at *3
 12 (C.D. Cal. May 15, 2020) (“Courts have inherent authority to monitor and enforce their prior
 13 orders.” (citing *Shillitani v. United States*, 384 U.S. 364, 370 (1966))).

14 Defendants’ continued and open defiance of the Court’s ruling—now using arguments
 15 never raised with the Court, and in direct contradiction to their representing to the Court they
 16 *would* produce these materials—is in fact grounds for contempt of court. The “power to punish
 17 for contempts is inherent in all courts” and is available for the violation of court orders.
 18 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Indeed, the “underlying concern that gave
 19 rise to the contempt power . . . was disobedience to the orders of the Judiciary.” *Id.* (brackets
 20 and citations omitted). When civil contempt is at issue, the party moving for a contempt finding
 21 bears the burden of showing by clear and convincing evidence that contemnors violated a
 22 specific and definite order of the court. *Calvillo Manriquez v. Devos*, 411 F. Supp. 3d 535, 540
 23 (N.D. Cal. 2019) (citing *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999)). “The
 24 burden then shifts to the contemnors to demonstrate why they were unable to comply.” *Id.* The
 25 standard “is generally an objective one. We have explained before that a party’s subjective
 26 belief that she was complying with an order ordinarily will not insulate her from civil contempt if
 27 that belief was objectively unreasonable.” *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019).

28

1 Instead, good faith (or the absence thereof) “may help to determine an appropriate sanction.”
2 *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019).

3 There is no good faith rationale for Defendants’ conduct, in violation of very clear, very
4 specific, and very definite orders of the Court. And their meager new excuses to Plaintiffs, for
5 why they are *still* not producing the data, only serve to demonstrate this.

6 First, Defendants’ argument that they should not be required to create new materials, or
7 have to apparently write source code in order to retrieve the summary data reports from their
8 database, is without any merit. Defendants never raised this issue in the motion to compel
9 briefing (including in their motion for reconsideration)—the only argument they ever raised was
10 that it would take some time to run an appropriate Title 13 review to make sure the aggregate
11 summary report data did not accidentally contain individualized information. Dkt. 371 at 8-9.
12 They have thus waived it. But they never raised it because it is contrary to law. No one writes
13 source code to query a database. Obviously, some work needs to be done to put forth the
14 parameter of a database query, so that the right report comes out—and this happens daily, as
15 anyone knows who works with databases, especially those containing large amounts of data (i.e.,
16 the date range, the requisite substantive fields, if necessary the requisite geographic fields, the
17 data sources, and so on). “Coding” such a query is straightforward: the Bureau’s 30(b)(6)
18 deponent plainly testified that various data that Plaintiffs seek are readily available from the
19 Bureau’s databases. *See, e.g.*, Makker Decl., Ex. 3, Dec. 17, 2020 Adams Depo. Tr. (rough) at
20 41:7-43:4, 76:16-78:12, 101:17-102:3. And it is black letter law that easily querying a database
21 in such fashion is required, when sought—as made clear by cases before this very district, and
22 Court. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, No. 12-CV-0630-LHK (PSG), 2013 WL
23 4426512, at *3 (N.D. Cal. Aug. 14, 2013) (“Courts regularly require parties to produce reports
24 from dynamic databases”); *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 683 (N.D. Cal. 2006)
25 (denying third party Google’s motion to quash government subpoena which required production
26 of information from databases, despite the need for Google to “create new code to format and
27 extract query and URL data from many computer banks”); *In re eBay Seller Antitrust Litig.*, No.
28 C 07-1882 JF (RS), 2009 WL 3613511, at *2 (N.D. Cal. Oct. 28, 2009) (“The Federal Rules of

1 Civil Procedure clearly contemplate the production of information from dynamic databases.”).
 2 Defendants should have already been querying these databases for information responsive to
 3 Plaintiffs’ RFPs from the get go, rather than forcing Plaintiffs to seek a 30(b)(6) deposition to
 4 determine that such information exists in the Bureau’s databases.

5 Second, Defendants’ argument that they can defy the Court’s orders because Plaintiffs
 6 should ask for this information in an Interrogatory—and be satisfied with whatever response
 7 Defendants give—is equally meritless. Once again, Defendants never raised this argument in
 8 connection with the motion to compel briefing, and thus waived it. But it also provides a
 9 remarkable insight into Defendants’ bad faith conduct with respect this this issue. With
 10 Defendants not producing any material, and the fact discovery deadline of January 7 and initial
 11 expert report deadline of January 14 fast approaching, Plaintiffs felt compelled to use a few of
 12 their limited Interrogatories to try and separately obtain a portion of the data that Defendants
 13 refused to provide. Just last night—after the Court set this schedule on Plaintiffs’ motion to
 14 compel and for sanctions—Defendants provided their responses to those Interrogatories. Makker
 15 Decl., Ex. 4. Here is a snippet:

16 Interrogatory No. 4. Identify the number and percentage of total housing units/addresses that, as of
 17 the date You ceased field operations in 2020, 2010, and 2000, were enumerated/closed out as to each
 18 State, ACO, CFS, and CT through each of the following methods: [19, 20, 21] (1) household response
 19 data (obtained either by self-response or in-person direct enumeration through NRFU); [22, 23, 24]
 20 (2) use of proxies (excluding vacant and delete/nonexistent), including number of visits prior to proxy
 21 enumeration; [25, 26, 27] (3) use of AR; [28, 29, 30] (4) “pop count only” enumerations; [31, 32,
 22 33] (5) enumerations or determinations as vacant; [34, 35, 36] (6) enumerations or determinations as
 23 delete/nonexistent; [37, 38, 39] (7) enumerations that do not contain name and/or date of birth; [40,
 24 41, 42] (8) enumerations using fictitious names (e.g., ADULT ONE); [43, 44, 45] (9) enumerations
 25 with a “pop count” of 0 or 1 and information entered as “refused” or “don’t know”; [46, 47, 48] (10)
 26 enumerations of closed cases that were reopened in the close-out phase of NRFU; [49, 50, 51] (11)
 27 enumerations where the geo-location data does not match the housing unit/address; and [52, 53, 54]
 28 (12) all actual and potential unresolved housing units/addresses (and actual or planned imputation).
 Your response should also identify by produced Bates-number/other markings all Documents or
 Things on which Your response is based and [55] the three Persons most knowledgeable about the
 content of Your response.

1 **OBJECTION:** Defendants incorporate by reference the above objections.

2 Defendants further object to Plaintiff's characterization of this interrogatory as one
 3 interrogatory, when in fact it contains at least 12 "discrete subparts" for *each* of the three censuses
 4 about which Plaintiffs are seeking information. Fed. R. Civ. P. 33(a)(1). The request to identify
 5 the total number of housing units enumerated on a given date in a given area by each of the 12
 6 methods Plaintiffs specify is a distinct inquiry. And because the request asks this information for
 7 three different censuses, the interrogatory contains 36 subparts. And the request to identify the
 8 people knowledgeable about the substance of the response is a separate inquiry still. Defendants
 9 will therefore consider this interrogatory to count as 37 interrogatories for purposes of the 10-
 10 interrogatory limit established by the Court's scheduling order, ECF 357.

11 Defendants separately object to this interrogatory to the extent it calls for producing
 12 information that is not readily available from Census Bureau's data systems, including information
 13 at a level of geography lower than the ACO. To derive such information would require drafting
 14 new computer code. Drafting such code is unduly burdensome, particularly given the expedited
 15 timeframe permitted for Defendants' interrogatory responses, and disproportionate to the needs of
 16 the case. Further, 13 U.S.C. §§ 8 and 9 preclude the release of data without fully vetted
 17 confidentiality protections. The Census Bureau has determined that sub-ACO-level data, such as
 18 data at the census tract level, must go through a robust disclosure-avoidance process. Because this
 19 process is itself onerous and likely to mask the data, drafting any code to derive such data would
 20 be unnecessary and disproportionate to the needs of the case.

21 *See id.*

22 The response evidences Defendants' self-help and bad faith conduct. After refusing to
 23 provide the Court-ordered materials to Plaintiffs for weeks, and insisting that Plaintiffs will only
 24 get some of the information regarding completion/enumeration metrics through Interrogatories,
 25 Defendants (1) unilaterally decide that a single interrogatory is in fact 37 separate interrogatories
 26 (which they then use, later in their interrogatory response, to refuse to answer the interrogatories
 27 from Plaintiffs regarding the Presidential Memorandum or data processing anomalies as beyond
 28 the 10 interrogatories authorized by the Court), and (2) provide a small portion of the data alone,
 29 at only the highest sub-state level of geographic scope: the ACO level (of which there are 248).

30 Defendants do provide, with their interrogatory response, detailed Excel spreadsheets
 31 (many thousands of lines long) that have some of that ACO-level data (but no lower). And that
 32 also reveals Defendants' gambit. As an initial matter, it puts the lie to Defendants' claim that
 33 they cannot possible query their database to provide the summary data reports ordered by the
 34 Court—they can, and they did, at the level and scope they preferred, last night ... just before this

1 motion was scheduled to be filed. And they never did before—no such summary data reports
 2 were ever produced prior to last night, as an attachment to Defendants’ Interrogatory Responses.

3 Moreover, they provide just a tiny (and incomplete) window into *exactly* why Defendants
 4 need all such reports, at each of the geographic levels of scope, asked for by Plaintiffs and
 5 ordered produced by the Court. As the Court may recall, on September 22, 2020—just prior to
 6 the Court’s ruling on Plaintiffs’ motion for a preliminary injunction, Defendants (without leave)
 7 filed a declaration by Albert Fontenot (ECF No. 196-1), wherein Mr. Fontenot stated, among
 8 other things as follows:

12 data collection prior to September 30, 2020. As of September 21, 2020 we are finished with 88.8%
 13 of the NRFU field work and 95.8% of the housing units in the nation have been enumerated - and
 14 those numbers increase daily. Additionally, 4 states have 99% or more of their housing unit
 15 enumeration completed. A total of 49 states, plus Washington D.C. and the Commonwealth of
 16 Puerto Rico, have completed 90% or more of the housing units.

14 *Id.* ¶ 13. The summary data report Excels Defendants produced last night, at the ACO level
 15 alone, indicates that, as of September 21, 2020, numerous ACOs had not come anywhere close to
 16 achieving a 95.8% completion rate. Makker Decl., ¶ 7. For example, the Window Rock,
 17 Arizona ACO (3110), which is home to Plaintiff Navajo Nation, had reached only 63.6%
 18 completion. *Id.* The Shreveport, Louisiana ACO (2991) had reached only 61.2% completion.
 19 *Id.* These completion rate disparities between ACOs demonstrate why Plaintiffs urgently need
 20 more granular data at the tract level to understand precisely where undercounts and differential
 21 undercounts of hard-to-count populations occurred:

2	ACO	Date	Measure Names	Nation	RCC	ad Cr	Measure Val
15143	2376 - Philadelphia-Penn	9/21/2020	Total Completed as % of Current Followup Workload	National	2399 - Philadelphia	NRFU	0.781553554
15287	2902 - Jackson	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.739923811
15290	2904 - Birmingham	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.715351003
15293	2905 - Huntsville	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.779373418
15296	2906 - Mobile	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.742948131
15299	2907 - Charleston	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.766235938
15302	2908 - Columbia	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.787063849
15341	2976 - Pensacola	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.746749441
15356	2981 - Columbus	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.679830397
15362	2983 - Douglasville	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.774393898
15368	2985 - Gwinnett County	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.750491078
15386	2991 - Shreveport	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.611503335
15395	2994 - Durham	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.766407219
15401	2996 - Greenville, NC	9/21/2020	Total Completed as % of Current Followup Workload	National	2999 - Atlanta	NRFU	0.787367764
15419	3108 - Maricopa West	9/21/2020	Total Completed as % of Current Followup Workload	National	3199 - Dallas	NRFU	0.788253265
15425	3110 - Window Rock	9/21/2020	Total Completed as % of Current Followup Workload	National	3199 - Dallas	NRFU	0.63635035
15434	3156 - Colorado Springs	9/21/2020	Total Completed as % of Current Followup Workload	National	3199 - Dallas	NRFU	0.760683328
15446	3160 - Billings	9/21/2020	Total Completed as % of Current Followup Workload	National	3199 - Dallas	NRFU	0.786488769
15497	3178 - Fort Bend Co.	9/21/2020	Total Completed as % of Current Followup Workload	National	3199 - Dallas	NRFU	0.79985729

1 *Id.* At the lower levels of geographic scope—continuing all the way through the data collection
 2 termination date of October 15—Plaintiffs are quite certain they will find significant areas of
 3 undercount, and differential undercount, showing how Defendants’ decision to truncate the
 4 Census did not bear a reasonable relationship to an actual, accurate Census. It is this data that
 5 Defendants very much do not want to produce.

6 In addition, the new summary report data Excels produced by Defendants last night also
 7 shows that in the run-up to Defendants’ first planned early termination of the NRFU operation,
 8 September 30, enumerator productivity was especially high. Makker Decl., ¶ 8 The below
 9 snapshot shows selected ACOs with productivity rates (closed cases per hour) above 2.0
 10 between September 26 and September 30. *Id.* Those highlighted show more than a 0.5 increase
 11 in the productivity rate versus the cumulative rate (i.e., the overall rate for all of NRFU as of the
 12 date). *Id.* For example, the Harris Co. East ACO, part of Plaintiff Harris County, showed more
 13 than a 0.6 increase in productivity on September 29. *Id.* Such spikes in productivity evidence
 14 that enumerators were heavily pressured to close cases before the end of NRFU.

2	ACO	Date	Cases Completed for Day	Enumerator Hours Worked for Day	Productivity Rate for Day	Cumulative Cases Completed	Cumulative Enumerator Hours Worked	Cumulative Productivity Rate
6187	2262 - Gardiner	9/26/2020	162	68	2.382352941	377616	195414.25	1.932387224
6212	2287 - Rochester	9/26/2020	2391	1182.75	2.021559924	339343	125073.5	2.713148669
6282	2579 - Minneapolis	9/26/2020	3075	328	9.375	137465	66498.25	2.067197257
6293	2904 - Birmingham	9/26/2020	6892	3428	2.01050175	291440	134905.25	2.160331047
6296	2907 - Charleston	9/26/2020	6943	2989.5	2.32246195	357548	137409.75	2.602056986
6297	2908 - Columbia	9/26/2020	3663	1635.5	2.239682054	265570	112393.75	2.362853806
6310	2976 - Pensacola	9/26/2020	5636	2678.5	2.104162778	286496	115750.75	2.475111392
6322	2988 - Baton Rouge	9/26/2020	4300	1940	2.216494845	220275	98996	2.225089903
6330	2996 - Greenville, NC	9/26/2020	8223	2786.75	2.95074908	316725	136189.5	2.325619817
6434	2262 - Gardiner	9/27/2020	167	61.25	2.726530612	377783	195475.5	1.932636059
6437	2265 - Parsippany	9/27/2020	50	22	2.272727273	123928	59227	2.092424063
6459	2287 - Rochester	9/27/2020	2423	1051.5	2.304327152	341766	126125	2.709740337
6544	2908 - Columbia	9/27/2020	2872	1426.5	2.013319313	268442	113820.25	2.358473119
6569	2988 - Baton Rouge	9/27/2020	3560	1762.5	2.019858156	223835	100758.5	2.221499923
6571	2990 - New Orleans	9/27/2020	192	52.25	3.674641148	178867	94279.5	1.897199285
6577	2996 - Greenville, NC	9/27/2020	6254	1922.25	3.253478996	322979	138111.75	2.338533832
6732	2370 - South Point, OH	9/28/2020	691	320	2.159375	246989	117113.5	2.108971212
6793	2910 - Atlanta	9/28/2020	3648	1748	2.086956522	198833	99944.25	1.989439112
6824	2996 - Greenville, NC	9/28/2020	6266	2449.75	2.557812022	329245	140561.5	2.342355481
6863	3186 - Houston West	9/28/2020	79	19.75	4	161033	72294.5	2.22745852
6869	3192 - San Antonio West	9/28/2020	24	4.5	5.333333333	103313	60282.75	1.713807018
6903	3283 - Santa Ana	9/28/2020	117	3	39	187515	92865.25	2.019216015
6921	2255 - New Haven	9/29/2020	1444	581.75	2.482165879	160004	86380.25	1.852321567
6932	2266 - South Plainfield	9/29/2020	1526	651	2.344086022	123720	70017	1.766999443
6954	2288 - Brooklyn 3	9/29/2020	777	371	2.094339623	140775	79853	1.762926878
6963	2297 - Burlington	9/29/2020	267	123.25	2.1663286	159695	75341.5	2.119615351
7037	2907 - Charleston	9/29/2020	9791	3609.25	2.712751957	377505	146301	2.580330962
7063	2988 - Baton Rouge	9/29/2020	3923	1945.25	2.016707364	230758	104504.75	2.208110158
7071	2996 - Greenville, NC	9/29/2020	6837	2660.75	2.569576247	336082	143222.25	2.346576737
7072	2997 - Raleigh	9/29/2020	2808	1354.75	2.072707142	230511	95393	2.416435168
7104	3180 - Harris Co. East	9/29/2020	407	151.75	2.682042834	138128	67193	2.055690325
7110	3186 - Houston West	9/29/2020	18	8	2.25	161051	72302.5	2.227461014
7150	3283 - Santa Ana	9/29/2020	106	47.25	2.243386243	187621	92912.5	2.019330015
7176	2263 - Concord	9/30/2020	1323	564.25	2.344705361	25318	120824.75	2.13126657
7179	2266 - South Plainfield	9/30/2020	1071	507.25	2.111384919	124791	70524.25	1.769476457
7284	2907 - Charleston	9/30/2020	9430	3661.25	2.57562308	386935	149962.25	2.580216021
7317	2995 - Fayetteville	9/30/2020	15589	2524.5	6.175084175	314057	145636.25	2.156448
7318	2996 - Greenville, NC	9/30/2020	7950	2826	2.813163482	344032	146048.25	2.355605083
7381	3267 - Fullerton	9/30/2020	75	6.75	11.11111111	159692	85749.5	1.862308235

1 *Id.* Additionally, Defendants' data shows that days showing extremely high productivity in
 2 ACOs all appear close in time to the Bureau's various end dates for NRFU (September 30,
 3 October 5, and October 15), further indicating that enumerators were under extreme pressure to
 4 close cases as the end of NRFU approached:

2	ACO	Date	Cases Completed for Day	Enumerator Hours Worked for Day	Productivity Rate for Day	Cumulative Cases Completed	Cumulative Enumerator Hours Worked	Cumulative Productivity Rate
5	2579 - Minneapolis	9/25/2020	8085	191.25	42.2745098	134390	66170.25	2.030973134
6	3173 - Dallas	10/5/2020	42	1	42	136181	79226.5	1.71888194
7	3283 - Santa Ana	9/28/2020	117	3	39	187515	92865.25	2.019216015
8	2569 - Evansville	10/13/2020	68	3.75	18.13333333	239543	116440.25	2.057218187
9	3186 - Houston West	10/15/2020	18	1.5	12	163735	73492	2.227929571
10	3267 - Fullerton	9/30/2020	75	6.75	11.11111111	159692	85749.5	1.862308235
11	2579 - Minneapolis	9/26/2020	3075	328	9.375	137465	66498.25	2.067197257
12	2269 - Fairlawn	10/5/2020	1241	133	9.330827068	168712	96401.75	1.750092711
13	3195 - Williamson Co.	10/4/2020	122	16.75	7.28358209	282308	130217	2.167981139
14	2907 - Charleston	10/15/2020	1370	206.5	6.634382567	443587	183698	2.414762273
15	2569 - Evansville	10/12/2020	59	9	6.555555556	239475	116436.5	2.056700433
16	2996 - Greenville, NC	10/14/2020	143	22.5	6.355555556	366125	154078	2.376231519
17	2995 - Fayetteville	9/30/2020	15589	2524.5	6.175084175	314057	145636.25	2.156448
18	2290 - Staten Island	10/14/2020	173	30.25	5.719008264	80583	49595.75	1.62479648
19	2988 - Baton Rouge	10/14/2020	619	113.25	5.465783664	251502	117732.25	2.13622011
20	3166 - Cleveland Co.	10/15/2020	423	78.25	5.405750799	282728	136577	2.070099651
21	3192 - San Antonio West	9/28/2020	24	4.5	5.333333333	103313	60282.75	1.713807018
22	2569 - Evansville	10/14/2020	64	12.5	5.12	239607	116452.75	2.057546945
23	2268 - Newark	10/5/2020	284	59.5	4.773109244	143891	89304	1.611249216

13 *Id.* While this data indicates that enumerator productivity spiked around the dates of
 14 Defendants' curtailments of the NRFU process, more granular data will likely show even larger
 15 spikes in hard-to-count communities. Again, it is this data that Defendants very much do not
 16 want to produce.

17 Third, Defendants' argument that Title 13 immunizes all summary report data at the CFS
 18 or Census Tract level is unsupported and meritless. Defendants' last argument is to seek refuge
 19 behind Title 13, with the unfounded claim that they cannot possibly produce summary data
 20 reports at the narrower geographic scope level without violating Title 13. Once again,
 21 Defendants never raised this argument at the motion to compel stage, and once again it is
 22 waived. All Defendants said, at the motion to compel stage, was that it would take time for them
 23 to review these reports for potential Title 13 slippage. But when the Court first ordered them, on
 24 December 10, to produce the data by December 14, Defendants' only response was: ok. They
 25 agreed, and said they would. Dkt. 376-1 at 4. The Court then ordered them a second time to
 26 produce all such reports. Dkt. 379 at 5. Defendants' response only makes sense in that they
 27 knew they could produce all such reports within 4 days (which also comports with the testimony
 28 from their 30(b)(6) deponent that these queries take two days at most), and that Title 13 did not

1 block such aggregated reports. Of course it does not—which is why Defendants could not cite a
 2 single case to Plaintiffs.

3 * * *

4 The Court has inherent authority to impose appropriate sanctions for violation of a court
 5 order. *Chambers*, 501 U.S. at 44–46 (citations and internal quotation marks omitted); *see also*
 6 *Primus Automotive Financial Services, Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (“[t]he
 7 district court has ‘broad fact-finding powers’ with respect to sanctions, and its findings warrant
 8 ‘great deference’” (internal citation omitted)); *Penthouse Int’l, Ltd. v. Playboy Enters.*, 663 F.2d
 9 371, 386 (2d Cir. 1981) (federal courts “possess[] broad inherent power to protect the
 10 administration of justice by levying sanctions in response to abusive litigation practices.”). To
 11 grant such relief, the Court need only find “bad faith or conduct tantamount to bad faith,” such as
 12 where “recklessness [is] combined with an additional factor such as frivolousness, harassment, or
 13 an improper purpose.” *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001).

14 For all the reasons set forth above, Defendants’ string of reckless and deliberate
 15 violations designed to evade and circumvent this Court’s orders warrant such a finding. And the
 16 Court has broad discretion in how best to shape sanctions. *See* 1 Sanc. Fed. Law of Lit. Abuse §
 17 28 (2019) (“The court is vested with broad discretion to fashion an appropriate inherent power
 18 sanction to redress abusive litigation practices.”); *Shepherd v. Am. Broad. Companies, Inc.*, 62
 19 F.3d 1469, 1475 (D.C. Cir. 1995) (“[I]nherent power sanctions available to courts include fines,
 20 awards of attorneys’ fees and expenses, contempt citations, disqualifications or suspensions of
 21 counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence.”);
 22 *Richmark Corp v. Timber Falling Consultants*, 959 F.2d 1468, 1481 (9th Cir. 1992) (affirming
 23 \$10,000 contempt fine per day for failing to comply with discovery orders ordering responses to
 24 requests for production and interrogatories).

25 Plaintiffs respectfully request that the Court order the following:

- 26 1. Production, within two days of the Court’s order, of all summary
 27 report data responsive to Plaintiffs’ sufficient-to-show requests
 28 regarding data collection processes, metrics, issues and
 improprieties (RFP Nos. 2-4, 6-10, 15, 16 and 18).

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- 2. A declaration from the Census Bureau employee(s) responsible for producing these materials, providing detailed explanations of the reports being delivered and how they were compiled, and unequivocally confirming compliance with the Court’s order and production of the summary status reports responsive to Plaintiffs’ 11 sufficient-to-show RFPs.
- 3. A fine in the amount of \$5000, or an amount the Court deems appropriate, for each day that passes, after the deadline, where Defendants have not produced the entirety of the materials.
- 4. Any and all other sanctions and relief the Court deems appropriate so that Plaintiffs are not prejudiced by Defendants’ egregious, ongoing behavior

Plaintiffs do not move or ask, at this time, for attorneys’ fees or costs—in line with their decisions in the past to not complicate straightforward issues regarding the Court’s enforcement of its orders. Plaintiffs continue to reserve on that issue until the end of the case, where as appropriate Plaintiffs can present, and the Court can assess, the overall sweep of this case and Defendants’ conduct throughout.

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ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: January 5, 2021

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