

1 LATHAM & WATKINS LLP
Steven M. Bauer (Bar No. 135067)
2 steven.bauer@lw.com
Sadik Huseny (Bar No. 224659)
3 sadik.huseny@lw.com
Amit Makker (Bar No. 280747)
4 amit.makker@lw.com
Shannon D. Lankenau (Bar No. 294263)
5 shannon.lankenau@lw.com
505 Montgomery Street, Suite 2000
6 San Francisco, CA 94111
Telephone: 415.391.0600
7 Facsimile: 415.395.8095

8 LATHAM & WATKINS LLP
Richard P. Bress (*pro hac vice*)
9 rick.bress@lw.com
Melissa Arbus Sherry (*pro hac vice*)
10 melissa.sherry@lw.com
Anne W. Robinson (*pro hac vice*)
11 anne.robinson@lw.com
Tyce R. Walters (*pro hac vice*)
12 tyce.walters@lw.com
Genevieve P. Hoffman (*pro hac vice*)
13 genevieve.hoffman@lw.com
Gemma Donofrio (*pro hac vice*)
14 gemma.donofrio@lw.com
555 Eleventh Street NW, Suite 1000
15 Washington, D.C. 20004
Telephone: 202.637.2200
16 Facsimile: 202.637.2201

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Kristen Clarke (*pro hac vice*)
kclarke@lawyerscommittee.org
Jon M. Greenbaum (Bar No. 166733)
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (*pro hac vice*)
erosenberg@lawyerscommittee.org
Ajay P. Saini (*pro hac vice*)
asaini@lawyerscommittee.org
Maryum Jordan (Bar No. 325447)
mjordan@lawyerscommittee.org
Pooja Chaudhuri (Bar No. 314847)
pchaudhuri@lawyerscommittee.org
1500 K Street NW, Suite 900
Washington, D.C. 20005
Telephone: 202.662.8600
Facsimile: 202.783.0857

*Additional counsel and representation
information listed in signature block*

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

19 NATIONAL URBAN LEAGUE, et al.,

20 Plaintiffs,

21 v.

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

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

**PLAINTIFFS' STATEMENT RE:
UNITED STATES SUPREME
COURT'S STAY PENDING APPEAL**

Date: TBD
Time: TBD
Place: Courtroom 8
Judge: Hon. Lucy H. Koh

1 In response to the Court’s Order Re: United States Supreme Court’s Stay and Case
2 Management Conference (Dkt. 339), Plaintiffs respectfully note the following:

3 1. On October 13, 2020, the Supreme Court stayed this Court’s September 24, 2020
4 Order Granting Plaintiffs’ Motion for Stay and Preliminary Injunction (“PI Order”) (Dkt. 208) until
5 disposition of the appeal in the Court of Appeals for the Ninth Circuit and disposition of the petition
6 for a writ of certiorari, if such writ is timely sought (“Supreme Court Order”). Because of the timing,
7 the Supreme Court Order effectively resolves the question of preliminary relief regarding Plaintiffs’
8 Administrative Procedure Act (“APA”) claim. *See Nat’l Urban League v. Ross*, No. 20-16868, Dkt.
9 20 (setting a deadline of November 20 for the answering brief, and an optional reply brief deadline
10 of within 21 days after service of the answering brief). The stay will remain in place until the Ninth
11 Circuit resolves the pending appeal and the Supreme Court either denies a petition for a writ of
12 certiorari or, after granting such a petition, resolves the case on its merits. Given the briefing
13 schedule on appeal, and the time it takes to file and rule on a petition for a writ of certiorari, there is
14 no likelihood that the stay will be lifted before the 2020 Census timelines or before a final judgment
15 in this case. And although no court has yet addressed the Enumeration Clause claim, Plaintiffs do
16 not currently intend to seek preliminary relief with respect to that claim (or any new claims). In
17 short, Plaintiffs believe the focus of this case going forward should be on permanent relief.

18 2. As to permanent relief, the Supreme Court Order provides no meaningful guidance.
19 The unexplained order does not reject any decision made by this Court or the Ninth Circuit on the
20 threshold issues or on the merits.

21 As for the threshold issues, this Court rejected Defendants’ arguments regarding the political
22 question doctrine, standing, final agency action, and commitment to agency discretion by law. *See*
23 PI Order 21-44. Defendants pursued only their final agency action argument when seeking a stay
24 from the Ninth Circuit. And the Ninth Circuit soundly rejected that argument too. When seeking a
25 stay from the Supreme Court, Defendants again abandoned their political question and standing
26 arguments—and focused only on final agency action and (to a lesser extent) whether the questions
27 presented had been committed to agency discretion by law. The unexplained decision granting the
28 stay does not suggest any disagreement with this Court or the Ninth Circuit’s disposition of those

1 issues. There are accordingly no grounds for Defendants to renew their already rejected threshold
2 arguments.

3 As for the merits of the APA argument, the Supreme Court Order again says nothing. This
4 Court found multiple APA violations and two separate panels of the Ninth Circuit agreed. Because
5 the Supreme Court stay decision is silent, there is no reason to think that the Court disagreed with
6 this Court or the Ninth Circuit's determination that the APA had been violated (or at least that
7 Plaintiffs were likely to prevail on that argument).

8 The one issue on which the Ninth Circuit departed from this Court's reasoning, and a key
9 focus of the Supreme Court briefing, was the issue of irreparable harm and a balance of the hardships.
10 Specifically, the Ninth Circuit stayed the December 31 portion of this Court's preliminary injunction
11 because it believed the balance of harms weighed in favor of Defendants for two primary reasons:
12 (1) because the December 31 date was still three months away, and (2) because of separation of
13 powers issues given the statutory nature of the reporting deadline. Accordingly, the only portion of
14 the preliminary injunction still in effect when Defendants filed their application for a stay in the
15 Supreme Court was the October 31 deadline for data collection. And as to that date, the primary
16 focus of Defendants' briefing was on the completion rate. According to Defendants, the preliminary
17 injunction should have been administratively stayed because it was essentially no longer necessary
18 as the Census Bureau had already reached 99.9% of households. That is, there was allegedly no
19 longer any irreparable harm. Given that focus, and history, Plaintiffs believe the Supreme Court
20 Order may well have turned on a determination that the balance of harms had shifted between the
21 time this Court granted the PI (on September 24) and when the Court ruled on the stay application
22 (on October 13).

23 3. Although the Ninth Circuit appeal remains pending, that too should have no impact
24 on further proceedings in this Court. As noted above, the PI Order has been superseded. As
25 Plaintiffs argued to the Ninth Circuit and the Supreme Court, a decision granting Defendants' request
26 for a stay would "effectively moot" the appeal. *Nat'l Urban League v. Ross*, No. 20-16868, Dkt.
27 40-1 at 1. The Ninth Circuit panel ruling on the administrative stay said the same. *See Nat'l Urban*
28 *League v. Ross*, No. 20-16868, Dkt. 45 at 17. Accordingly, Plaintiffs' position is that the appeal

1 should be held in abeyance pending resolution of the merits and a decision on permanent relief before
 2 this Court. The parties met and conferred via email on the issue. A few hours ago, Defendants
 3 informed Plaintiffs they do not agree—and, shortly thereafter, filed their opening brief in the Ninth
 4 Circuit. Plaintiffs will, of course, respond in the Ninth Circuit as appropriate. But this case should
 5 proceed in the meantime to final judgment, as per the norm. Any Ninth Circuit decision on the
 6 Court’s PI Order will come too late to be of any significance and, in any event, will be limited to the
 7 closed preliminary injunction record and will not speak to new developments in this case.

8 4. Plaintiffs’ view is that the matter before this Court should move toward an expedited
 9 and final judgment. To that end, Plaintiffs propose the following schedule with deadlines noted
 10 below, focused on seeking an order from the Court on a motion for summary judgment (or, if
 11 necessary, after a bench trial) before the Secretary provides any state population counts to the
 12 President. Defendants previously and repeatedly took the position that this *has* to happen before the
 13 December 31 statutory deadline. But Defendants’ most recent statements suggest that they have
 14 shifted, once again, from their previous statements to the courts, and that they may no longer view
 15 that date as binding.

EVENT	DEADLINE
Amended Complaint	October 27, 2020
Focused Discovery Period	October 27, 2020-November 20, 2020
Answer ¹	November 10, 2020
Cross-Motions for Summary Judgment	November 25, 2020
Cross-Oppositions to Motions for Summary Judgment	December 7, 2020
Cross-Replies	December 14, 2020
Hearing on Motions for Summary Judgment	December 17, 2020
Trial	December 21-24, 2020

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 26 ¹ At the last Case Management Conference, Defendants stated that they were still considering
 27 whether to file an answer or motion to dismiss. Plaintiffs believe that Defendants’ motion to
 28 dismiss/pleadings-based arguments have already been raised and resolved through extensive
 briefing in various courts, and that Defendants should now file their Answer. To the extent
 Defendants want to raise any further legal arguments, without fear of waiver, an expeditious
 schedule for motions for summary judgment would allow them to do so.

1 5. Plaintiffs plan to file an amended complaint on Tuesday, October 27, 2020. The
2 amended complaint will, in large part, be identical to Plaintiffs’ original complaint, but will include
3 additional allegations on issues that have become increasingly important in recent weeks. Two are
4 worth briefly flagging here.

5 *First*, through their rush to justify finishing the count for the 2020 Census, Defendants have
6 introduced a new issue in the case regarding the completion rate metrics and processes for data
7 collection. Defendants have repeatedly and expressly utilized increased completion rates with regard
8 to data collection to attack Plaintiffs’ claims and the Court’s PI Order, and to obtain a stay.
9 Ironically, of course, it was the Court’s PI Order that extended the data collection period that allowed
10 Defendants to even make these arguments regarding increased data completion. Nonetheless,
11 Defendants continue to tout, in their opening brief in the Ninth Circuit filed just today, how they
12 were able to reach a 99% completion rate by October 15—which they claim somehow shows this
13 Court should never have issued its PI Order on September 24. The argument is logically unsound
14 and remarkably disingenuous. Defendants told this Court via sworn testimony that they would reach
15 a 99% completion rate in every state by September 30, argued vociferously that data collection
16 should therefore not go a single day past September 30, and insisted that they should be allowed to
17 start winding up Census operations, regardless of completion rates, as early as September 11. If the
18 Court had taken Defendants at their word, the result would have been a disastrous census count—
19 completion rates as of September 30 were under 99% (in some cases dramatically so) *in over a third*
20 *of the states in the nation*. See U.S. Census Bureau, 2020 Census Housing Unit Enumeration
21 Progress by State (Sept. 30, 2020), [https://2020census.gov/content/dam/2020census/news/daily-](https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-30.pdf)
22 [nrfu-rates/nrfu-rates-report-09-30.pdf](https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-30.pdf). And even those numbers were inflated, since at a minimum
23 the wind-down would have started weeks prior. Defendants were forced to count millions more
24 Americans only as a result of this Court’s orders.

25 Defendants’ assertions that the overall final completion count is proof that the Court’s orders
26 should never have issued in the first place raise a number of serious questions—and especially as to
27 the claimed completion rates themselves. In making these arguments, while admitting that some
28 unknown amount of changes have been made to the Bureau’s NRFU processes that coincided with

1 the increase in completion rates, Defendants have squarely put at issue whether the completion rates,
2 metrics, and processes the Census Bureau has employed are accurate and are being correctly
3 portrayed. *See* Appl. for a Stay 7-8 n.3, *Ross v. Nat'l Urban League*, No. 20A62 (U.S. Oct. 7, 2020)
4 (conceding that “operations under the Replan Schedule used fewer follow-up visits from some
5 addresses” and made other “changes” to supplying POP counts and fewer random reinterviews “as
6 a quality check”). Indeed, Justice Sotomayor’s dissent from the Supreme Court Order, the only
7 written opinion from the Supreme Court on this case, flagged this issue—and as the Court knows,
8 dozens of Census field employees have written to the Court to draw attention to questionable
9 practices.

10 *Second*, Defendants’ Supreme Court filings and changed position make clear that the data
11 processing aspect of the census has become even more critical, and Defendants’ truncation of that
12 process has become even more extreme. Defendants’ ever-changing positions regarding the time
13 required for data processing demonstrates that Defendants have not provided this Court with accurate
14 information regarding data processing timelines. *Compare* Dkt. 131-7 at 10 (“Post-processing must
15 start by October 1, 2020”), *and* Dkt. 131-8 ¶ 107 (“[W]e wish to be crystal clear that if the Court
16 were to extend the data collection period past September 30, 2020, the Census Bureau would be
17 unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020
18 and redistricting data prior to April 1, 2021.”), *with* Dkt. 233 at 147-48 (“The latest date to begin
19 post data collection processing that allows Census Bureau to deliver state counts for apportionment
20 to the Secretary of Commerce by December 31, 2020 is October 6, 2020.”). Current statements by
21 Defendants indicate that the Census Bureau has now abandoned the December 31, 2020 statutory
22 deadline—the principal argument raised by Defendants throughout all court proceedings in this case.
23 *See* U.S. Census Bureau, Transcription of News Briefing by U.S. Census Bureau to Provide Updates
24 on 2020 Census Operations at 19 (Oct. 21, 2020), [https://www.census.gov/content/dam/
25 Census/newsroom/press-kits/2020/20201021-transcript-2020-census-op-brief.pdf](https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/20201021-transcript-2020-census-op-brief.pdf) (Associate
26 Director Fontenot acknowledging that the Census Bureau “did not say we were going to be able to
27 meet the December 31 deadline. We said we’re working to come as close as possible to the
28 December 31 deadline”). Defendants’ shifting arguments, and inability to complete adequate data

1 processing procedure before December 31, establish without question Plaintiffs' APA and
2 Enumeration Clause claims in this case.

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Dated: October 23, 2020

LATHAM & WATKINS LLP

By: /s/ Sadik Huseny
Sadik Huseny

Steven M. Bauer (Bar No. 135067)
steven.bauer@lw.com
Sadik Huseny (Bar No. 224659)
sadik.huseny@lw.com
Amit Makker (Bar No. 280747)
amit.makker@lw.com
Shannon D. Lankenau (Bar. No. 294263)
shannon.lankenau@lw.com
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Telephone: 415.391.0600
Facsimile: 415.395.8095

Richard P. Bress (*pro hac vice*)
rick.bress@lw.com
Melissa Arbus Sherry (*pro hac vice*)
melissa.sherry@lw.com
Anne W. Robinson (*pro hac vice*)
anne.robinson@lw.com
Tyce R. Walters (*pro hac vice*)
tyce.walters@lw.com
Gemma Donofrio (*pro hac vice*)
gemma.donofrio@lw.com
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, D.C. 20004
Telephone: 202.637.2200
Facsimile: 202.637.2201

*Attorneys for Plaintiffs National Urban League;
League of Women Voters; Black Alliance for
Just Immigration; Harris County, Texas; King
County, Washington; City of San Jose,
California; Rodney Ellis; Adrian Garcia; and
the NAACP*

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28

Dated: October 23, 2020

By: /s/ Jon M. Greenbaum

Kristen Clarke (*pro hac vice*)
kclarke@lawyerscommittee.org
Jon M. Greenbaum (Bar No. 166733)
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (*pro hac vice*)
erosenberg@lawyerscommittee.org
Ajay Saini (*pro hac vice*)
asaini@lawyerscommittee.org
Maryum Jordan (Bar No. 325447)
mjordan@lawyerscommittee.org
Pooja Chaudhuri (Bar No. 314847)
pchaudhuri@lawyerscommittee.org

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
Telephone: 202.662.8600
Facsimile: 202.783.0857

Attorneys for Plaintiffs National Urban League; City of San Jose, California; Harris County, Texas; League of Women Voters; King County, Washington; Black Alliance for Just Immigration; Rodney Ellis; Adrian Garcia; the NAACP; and Navajo Nation

Wendy R. Weiser (*pro hac vice*)
weiserw@brennan.law.nyu.edu
Thomas P. Wolf (*pro hac vice*)
wolft@brennan.law.nyu.edu
Kelly M. Percival (*pro hac vice*)
percivalk@brennan.law.nyu.edu

BRENNAN CENTER FOR JUSTICE
120 Broadway, Suite 1750
New York, NY 10271
Telephone: 646.292.8310
Facsimile: 212.463.7308

Attorneys for Plaintiffs National Urban League; City of San Jose, California; Harris County, Texas; League of Women Voters; King County, Washington; Black Alliance for Just Immigration; Rodney Ellis; Adrian Garcia; the NAACP; and Navajo Nation

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21
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24
25
26
27
28

Mark Rosenbaum (Bar No. 59940)
mrosenbaum@publiccounsel.org
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
Telephone: 213.385.2977
Facsimile: 213.385.9089

Attorneys for Plaintiff City of San Jose

Doreen McPaul, Attorney General
dmcpaul@nndoj.org
Jason Searle (*pro hac vice* forthcoming)
jasearle@nndoj.org
NAVAJO NATION DEPARTMENT OF JUSTICE
P.O. Box 2010
Window Rock, AZ 86515
Telephone: (928) 871-6345

Attorneys for Navajo Nation

Dated: October 23, 2020

By: /s/ Danielle Goldstein
Michael N. Feuer (Bar No. 111529)
mike.feuer@lacity.org
Kathleen Kenealy (Bar No. 212289)
kathleen.kenealy@lacity.org
Danielle Goldstein (Bar No. 257486)
danielle.goldstein@lacity.org
Michael Dundas (Bar No. 226930)
mike.dundas@lacity.org
CITY ATTORNEY FOR THE CITY OF LOS ANGELES
200 N. Main Street, 8th Floor
Los Angeles, CA 90012
Telephone: 213.473.3231
Facsimile: 213.978.8312

Attorneys for Plaintiff City of Los Angeles

Dated: October 23, 2020

By: /s/ Michael Mutalipassi
Christopher A. Callihan (Bar No. 203010)
legalwebmail@ci.salinas.ca.us
Michael Mutalipassi (Bar No. 274858)
michaelmu@ci.salinas.ca.us
CITY OF SALINAS
200 Lincoln Avenue
Salinas, CA 93901
Telephone: 831.758.7256
Facsimile: 831.758.7257

1
2 Dated: October 23, 2020

Attorneys for Plaintiff City of Salinas
By: /s/ Rafey S. Balabanian
Rafey S. Balabanian (Bar No. 315962)
rbalabanian@edelson.com
Lily E. Hough (Bar No. 315277)
lhough@edelson.com
EDELSON P.C.
123 Townsend Street, Suite 100
San Francisco, CA 94107
Telephone: 415.212.9300
Facsimile: 415.373.9435

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4
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8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
Rebecca Hirsch (pro hac vice)
rebecca.hirsch2@cityofchicago.org
**CORPORATION COUNSEL FOR THE
CITY OF CHICAGO**
Mark A. Flessner
Stephen J. Kane
121 N. LaSalle Street, Room 600
Chicago, IL 60602
Telephone: (312) 744-8143
Facsimile: (312) 744-5185

Attorneys for Plaintiff City of Chicago

15 Dated: October 23, 2020

By: /s/ Donald R. Pongrace
Donald R. Pongrace (*pro hac vice*)
dpongace@akingump.com
**AKIN GUMP STRAUSS HAUER & FELD
LLP**
2001 K St., N.W.
Washington, D.C. 20006
Telephone: (202) 887-4000
Facsimile: 202-887-4288

Dario J. Frommer (Bar No. 161248)
dfrommer@akingump.com
**AKIN GUMP STRAUSS HAUER & FELD
LLP**
1999 Avenue of the Stars, Suite 600
Los Angeles, CA 90067-6022
Phone: 213.254.1270
Fax: 310.229.1001

*Attorneys for Plaintiff Gila River Indian
Community*

1
2
3
4
5
6
7
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9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: October 23, 2020

By: /s/ David I. Holtzman
David I. Holtzman (Bar No. 299287)
David.Holtzman@hkllaw.com
HOLLAND & KNIGHT LLP
Daniel P. Kappes
Jacqueline N. Harvey
50 California Street, 28th Floor
San Francisco, CA 94111
Telephone: (415) 743-6970
Fax: (415) 743-6910

Attorneys for Plaintiff County of Los Angeles

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: October 23, 2020

LATHAM & WATKINS LLP

By: /s/ Sadik Huseny
Sadik Huseny