LATHAM & WATKINS LLP
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
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Telephone: 415.391.0600
Facsimile: 415.395.8095

LATHAM & WATKINS LLP
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
Genevieve P. Hoffman (*pro hac vice*)
genevieve.hoffman@lw.com
Gemma Donofrio (*pro hac vice*)
gemma.donofrio@lw.com
555 Eleventh Street NW, Suite 1000
Washington, D.C. 20004
Telephone: 202.637.2200
Facsimile: 202.637.2201

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Kristen Clarke (*pro hac vice* forthcoming)
kclarke@lawyerscommittee.org
Jon M. Greenbaum (Bar No. 166733)
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (admitted *pro hac vice*)
erosenberg@lawyerscommittee.org
Dorian L. Spence (*pro hac vice* forthcoming
dspence@lawyerscommittee.org
Ajay P. Saini (admitted *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

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

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' STATEMENT IN ADVANCE OF THE SEPTEMBER 29 HEARING

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

As the Court noted in its September 28, 2020 Order to Produce the Administrative Record (Dkt. 225), two minutes prior to the start of the Court's Case Management Conference, Defendant U.S. Census Bureau tweeted that "The Department of Commerce has announced a target date of October 5, 2020 to conclude the 2020 Census self-response and field data collection operations." @USCensusBureau, https://twitter.com/uscensusbureau/status/1310685274104569856. Defendants were aware that this announcement was forthcoming before the hearing; Plaintiffs and the Court had no time to react and respond. Having now had 24 hours to consider this latest development, and in advance of this afternoon's hearing, Plaintiffs note the following:

1. This case is and has always been about the Replan's accelerated timelines for conducting the 2020 Census. *See* Compl. (Dkt. 1) ¶ 1 ("This lawsuit challenges the unconstitutional and illegal decision by Secretary of Commerce Wilbur Ross, and Census Bureau (the 'Bureau') Director Steven Dillingham, to sacrifice the accuracy of the 2020 Census by forcing the Census Bureau to compress eight and a half months of vital data-collection and data-processing into four and a half months, against the judgment of the Bureau's staff and in the midst of a once-in-a-century pandemic."); Proposed Order (Dkt. 36-1) at 1 ("The U.S. Census Bureau's August 3, 2020 Plan and shortened timeline for accomplishing the 2020 United States Census ("Rush Plan"), is stayed, pursuant to 5 U.S.C. § 705); 9/22/20 Tr. 23:21-24:5 (Dkt. 207) ("So I want to be clear about this. Our APA action challenges the timelines in the Replan.").

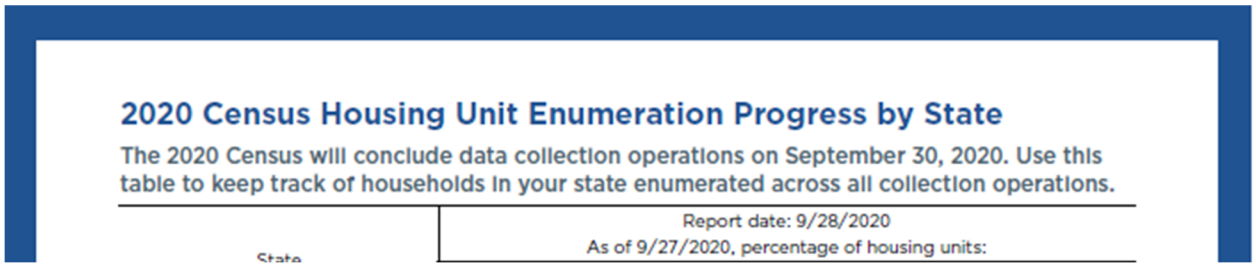
2. This Court's decision granting the stay and preliminary injunction was also all about the Replan's accelerated timelines. As the Court explained, the Replan's timelines shortened the 2020 Census from 71.5 weeks to 49.5 weeks; self-response from 33.5 weeks to 29 weeks; NRFU from 11.5 weeks to 7.5 weeks; and data processing from 26 weeks to 13 weeks. Order Granting Plaintiffs' Motion for Stay and Preliminary Injunction ("PI Order") (Dkt. 208) at 9, 11. The Court found that this "significant compression" of the timelines is what constituted final agency action. *Id.* at 38. And the Court held that Defendants violated the APA by adopting this compressed timeline—for five independently sufficient reasons. *Id.* at 46-74.

3. The remedy the Court adopted was tailored to those APA violations. The Court stayed the Replan's "September 30, 2020 deadline for the completion of data collection and

December 31, 2020 deadline for reporting the tabulation of the total population to the President," and "enjoined" Defendants from "implementing these two deadlines." PI Order at 78.

4. The legal effect of staying the Replan's accelerated timelines was to "reinstate the rule previously in force." *Organized Village of Kake v. USDA*, 795 F.3d 956, 970 (9th Cir. 2015) (*en banc*); *see Dep't of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1916 n.7 (2020) (affirming district court judgment vacating recession and restoring DACA program); *NAACP v. Trump,* 298 F. Supp. 3d 209, 245–46 (D.D.C. 2019). The rule previously in force was the COVID-19 Plan which, the Court explained, provided 71.5 weeks for the 2020 Census—as well as a specific number of weeks for self-response, NRFU, and data processing. PI Order 6-7; see also Plaintiffs' Response to Allegations of Noncompliance with Preliminary Injunction at 1 (Court's PI Order "reimposes the Bureau's own prior October 31 deadline for self-response and NRFU") (Dkt. 218).

5. Defendants have been and continue to implement the shortened timelines from the Replan in violation of the Court's orders. Plaintiffs intend to file a separate motion addressing these violations. But for current purposes, Defendants note the most recent. Defendants violated the PI Order by continuing to implement the September 30 Replan deadline by, among other things, declaring as recently as *yesterday* that the "2020 Census will conclude data collection on September 30, 2020." *See* 2020 Census Housing Unit Enumeration Progress by State, https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-28.pdf


2020 Census Housing Unit Enumeration Progress by State

The 2020 Census will conclude data collection operations on September 30, 2020. Use this table to keep track of households in your state enumerated across all collection operations.

Report date: 9/28/2020
As of 9/27/2020, percentage of housing units:

State

This statement is from the Bureau's own website and on a page that has been updated daily. Only after Plaintiffs alerted the Court to this violation did Defendants finally remove the September 30 date.

6. Yesterday's announcement of an October 5 "target date" to end self-response and field operations is only the latest in that string of violations. The Court's stay and preliminary injunction was intended to remedy the multiple APA violations found—which were all focused on the Replan's accelerated timelines. To the extent Defendants (wrongly) believed that they had free rein to end data collection any time they wanted, so long as it wasn't on September 30, they should have asked this Court for clarification. *See Institute of Cetacean Research v. Sea Sheperd Conservation Society*, 2017 WL 1057644, at *2 (W.D. Wash. March 17, 2017) ("The Supreme Court teaches that when questions arise as to the interpretation or application of an injunction order, a party should seek clarification or modification from the issuing court, rather than risk disobedience and contempt" (internal citations and quotations omitted)). Moreover, Plaintiffs note that the declaration from James T. Christy filed earlier today states that Defendants already notified all Census field staff—via text message—that NRFU operations will end on October 5. Dkt. 234 (Christy Decl. ¶ 14). The fact that Defendants never used such means of communications prior to now—i.e., to make sure all field staff were aware of this Court's prior orders—but only use it to announce a violation of the Court's order, is problematic in and of itself.

7. If any ambiguity still remains, this Court should immediately clarify the scope of the preliminary injunction. Defendants are enjoined from "implementing the Replan's accelerated timelines." And, given Defendants' recent actions, the Court should also make express what is already implicit in the PI order and what was spelled out in the TRO: Defendants cannot "implement or allow to be implemented any actions as a result of the accelerated timelines in the Replan, including but not limited to winding down or altering any Census field operations." Order Granting Motion for Temporary Restraining Order at 7 (Dkt. 84). Because Plaintiffs understand that "closeout procedures" pegged to the new October 5 "target date" are imminent, any such clarification should be effective immediately.

7. All of the above is squarely within the scope of this Court's remedial authority. As discussed during yesterday's hearing, the traditional remedy for an APA violation is a stay (and, ultimately, vacatur), which does not preclude the agency from issuing a new order in compliance with the APA's procedural requirements. *See Monsanto v. Geertson Seed Farms*, 561 U.S. 139,

159-65 (2010). But that does not mean that the agency can turn around the next day and issue the same decision, or allow the agency to effectively implement its prior invalid rule with a non-substantive tweak that does not remedy any of the defects found. And it certainly does not give an agency license to engage in self-help that would defeat emergency relief needed to prevent irreparable harm. The Secretary's tweet of a new "target date" violates all of those precepts.

8. The district court's decision in *New York v. United States Department of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), makes exactly this point. There, the court vacated Secretary Ross's decision to add a citizenship question to the 2020 Census *and* granted an injunction. The court explained that vacatur alone was insufficient to redress the plaintiffs' injuries for two reasons. *First*, "Secretary Ross could theoretically reinstate his decision by simply reissuing his memorandum under a new date or by changing the memorandum in some immaterial way." *Id.* at 676. An injunction was needed to make the "vacatur effective, as it prevents Secretary Ross from arriving at the same decision without curing the problems identified" in the court's decision. *Id.* Second, an injunction would "make it easier for Plaintiffs to seek immediate recourse," which was "critical" given the expedited timing. *Id.* The court accordingly enjoined the defendants "from adding a citizenship question to the 2020 census questionnaire based on Secretary Ross's" existing "memorandum or based on any reasoning that is substantially similar to the reasoning contained in that memorandum." *Id.* at 676-77. And the court enjoined the defendants from "adding a citizenship question to the 2020 census questionnaire unless the Secretary" remedied the violations found—which the court specifically listed. *Id.* at 677; *see also State v. Ross*, 358 F. Supp. 3d 965, 1050 (N.D. Cal. 2019) (endorsing and adopting the same reasoning). The same relief is warranted here.

9. Defendants, for their part, vehemently deny that this is new final agency action subject to independent APA review. But they cannot have it both ways. Either they (purport) to have engaged in reasoned decisionmaking and issued a new final agency action subject to judicial review, or they admit that this is just a new attempt to implement the shortened timelines in the Replan. If the former, Plaintiffs will welcome the opportunity to challenge the "new" decision on its merits or lack thereof. If the latter, Defendants have violated the PI Order and this Court should

make absolutely clear that any further action in this respect (short of reviewable final agency action) will be treated as such.

Dated: September 29, 2020

LATHAM & WATKINS LLP

By: /s/ Melissa Arbus Sherry
Melissa Arbus Sherry

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 (admitted *pro hac vice*)
rick.bress@lw.com
Melissa Arbus Sherry (admitted *pro hac vice*)
melissa.sherry@lw.com
Anne W. Robinson (admitted *pro hac vice*)
anne.robinson@lw.com
Tyce R. Walters (admitted *pro hac vice*)
tyce.walters@lw.com
Genevieve P. Hoffman (admitted *pro hac vice*)
genevieve.hoffman@lw.com
Gemma Donofrio (admitted *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

Dated: September 29, 2020

By: /s/ Jon M. Greenbaum

Kristen Clarke (*pro hac vice* forthcoming)
kclarke@lawyerscommittee.org
Jon M. Greenbaum (Bar No. 166733)
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (admitted *pro hac vice*)
erosenberg@lawyerscommittee.org
Dorian L. Spence (*pro hac vice* forthcoming)
dspence@lawyerscommittee.org
Maryum Jordan (*pro hac vice* forthcoming)
mjordan@lawyerscommittee.org
Ajay Saini (admitted *pro hac vice*)
asaini@lawyerscommitee.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 (admitted *pro hac vice*)
weiserw@brennan.law.nyu.edu
Thomas P. Wolf (admitted *pro hac vice*)
wolf@brennan.law.nyu.edu
Kelly M. Percival (admitted *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

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: September 29, 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: September 29, 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

Attorneys for Plaintiff City of Salinas

Dated: September 29, 2020

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

Rebecca Hirsch (admitted *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

Dated: September 29, 2020

By: */s/ Donald R. Pongrace*

Donald R. Pongrace (*pro hac vice* pending)
dpongrace@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

Dated: September 29, 2020

By: */s/ David I. Holtzman*
David I. Holtzman (Bar No. 299287)
David.Holtzman@hklaw.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, Melissa Arbus Sherry, 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: September 29, 2020

LATHAM & WATKINS LLP

By: */s/ Melissa Arbus Sherry*
Melissa Arbus Sherry