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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.
24

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

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

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

1 **I. INTRODUCTION**

2 Plaintiffs just want Defendants to follow this Court's orders. Plaintiffs and the public are
3 suffering irreparable injury every day that Defendants follow an accelerated timeline to finish all
4 data collection and processing by December 31. Implementation of that timeline should have
5 stopped on September 5 with the Court's TRO. It has not. Defendants should have ensured that
6 enumerators and census field supervisors had complete, timely, and accurate information about
7 the need to comply with this Court's orders. They have not.

8 The consequence of those failures is rushed completion of field operations in ways that
9 will irretrievably harm the accuracy of the count. That is because the "target" end date has a
10 direct impact on how non-response follow up (NRFU) is conducted. Critical operations and
11 metrics are tied to that date. Defendants know all this. Yet they still failed to properly and
12 clearly disseminate this Court's orders, admitted that census field supervisors were telling
13 enumerators that data collection would end on September 30, posted on their website the same
14 incorrect September 30 end date for *four days* after the Court's September 24 PI order (and
15 *twenty-three days* after the initial TRO ruling), and affirmatively adopted a new "target date" to
16 implement the December 31 deadline. There can be no question that Defendants violated the
17 Court's orders several times over.

18 Despite that, Plaintiffs remain focused on ensuring that Defendants follow the letter and
19 the spirit of this Court's preliminary injunction order, and that the 2020 Census does not suffer
20 from actions taken by Defendants in the field to meet the rushed deadlines they have been
21 enjoined from enforcing since September 5. Although this Court has authority to find
22 Defendants in contempt, and to award a broad range of sanctions, Plaintiffs ask for one thing:
23 full compliance. To that end, and given Defendants' prior violations and general course of
24 conduct in this case, the Court should issue an order (i) compelling compliance with the Court's
25 PI Order, ordering field notification, and amending the PI to prevent further violations, and (ii)
26 requiring Defendants to submit a weekly compliance report to this Court as a measured sanction
27 for violating the Court's orders and to remedy the misinformation and misdirection received in
28 the field as a result of their noncompliance.

1 **II. BACKGROUND**

2 From the very beginning of this case, Defendants have exhibited a callous disregard for
 3 these proceedings—feigning ignorance, refusing to answer basic questions posed by the Court,
 4 acting in an obstructive manner, and failing to comply with this Court’s orders. The Court has
 5 already recounted much of this procedural history in its prior orders. The below is a high-level
 6 summary of certain key issues.

7 *Temporary Restraining Order (“TRO”).* Plaintiffs filed suit on August 18, 2020.
 8 Because data collection was scheduled to continue until September 30 under the Replan, the
 9 parties stipulated to an accelerated briefing schedule that would culminate in a preliminary
 10 injunction hearing on September 17. Dkt. 43. On August 26, this Court held the first case
 11 management conference (“CMC”) and, to assess how quickly a ruling was needed on Plaintiffs’
 12 preliminary injunction motion, ordered Defendants to provide the date upon which the Bureau
 13 planned to wind down field operations. *See* Dkt. 45 at 2. A full week later, on September 2,
 14 Defendants informed the Court they had already begun winding down field operations—nearly a
 15 month before September 30 and three weeks after starting non-response follow up (“NRFU”) in
 16 most of the country. Dkt. 63. This early wind down would have left the Court practically
 17 incapable of granting effective relief after the September 17 hearing to which the parties jointly
 18 agreed. With no other options, Plaintiffs moved for a TRO. Dkt. 66.

19 On September 5, 2020, after full briefing and argument, this Court granted the TRO.
 20 TRO Order at 5, Dkt. 84. The TRO was based, in part, on Associate Director Fontenot’s sworn
 21 testimony that the “Census Bureau begins terminating staff as operations wind down, even prior
 22 to closeout,” that the Bureau had “already begun terminating” staff, and that it “is difficult to
 23 bring back field staff once we have terminated their employment.” Fontenot Decl. ¶ 98, Dkt. 81-
 24 1.. The TRO enjoined Defendants “from implementing the August 3, 2020 Replan or allowing
 25 to be implemented any actions as a result of the shortened timelines in the August 3, 2020
 26 Replan, including but not limited to winding down or altering any Census field operations, until
 27 the Court conducts its September 17, 2020 hearing on Plaintiffs’ PI motion.” TRO Order at 7.
 28

1 Three days later, Defendants voluntarily filed a notice of compliance, describing how
2 they were complying with the Court’s order. Specifically, Defendants explained that “[w]ithin
3 two hours” of the TRO, “Defendants transmitted a message to all Regional Directors, Deputy
4 Regional Directors, Assistant Regional Census Managers, Area Mangers, and Area Census
5 Office Managers attaching a copy of the Order” and expressing the need to comply with it. Dkt.
6 86 at 1. Defendants attached that notification. *Id.* By the next day, Defendants had “transmitted
7 a detailed list of instructions to Regional Directors regarding what steps the field offices must
8 take” to comply—and also attached those documents for the Court’s review. *Id.*

9 However, there was no follow-up that Plaintiffs are aware of—and no indication that the
10 message was actually disseminated to all Census employees. Around this time, the Court began
11 to receive first a trickle and then a flood of emails and filings from Census employees
12 complaining that there were not being told about the Court’s Orders, and that the Census Bureau
13 was not in compliance.

14 The Census Bureau, via the declarations of James Christy, directly acknowledges some of
15 these problems. In particular, after Plaintiffs and the Court addressed some of the complaints
16 being raised with respect to enumerator terminations, Mr. Christy issued a declaration on
17 September 15, 2020 acknowledging that the Bureau terminated 520 enumerators for “lack of
18 work” on September 7, two days after the TRO. 9/15 Second Christy Decl. ¶ 4.

19 ***Order To Produce The Administrative Record.*** At the same August 26 hearing,
20 “Defendants repeatedly denied the existence of an administrative record.” Nonetheless, the
21 Court instructed Defendants that “[i]f there’s an administrative record, it should be produced.”
22 At the September 4 TRO hearing, Defendants “reiterated their position that no administrative
23 record existed,” but for the first time “disclosed that there were documents considered by agency
24 decisionmakers at the time the Replan was adopted.” Defendants insisted that the court must
25 rule on their threshold arguments before ordering production of the administrative record. After
26 full briefing, the district court rejected their threshold arguments and ordered a phased initial
27 production. In particular, the court ordered that the most crucial portions of the administrative
28 record be produced on September 13 and 16, before the September 17 hearing.

1 Defendants did not comply. On the date of the first production, Defendants reviewed
2 only 25% of the responsive documents, stopped that review 12 hours short of the deadline,
3 claimed privilege over the vast majority of the documents, and later informed the court they
4 would be unable to meet the second deadline as well. This Court found Defendants' failure to
5 comply with its order "unacceptable," and appropriate grounds for "sanctions." Dkt. 132 at 8.
6 But the Court noted that "Plaintiffs do not ask the Court to sanction Defendants at this time." *Id.*
7 So rather than sanction Defendants and order the record produced immediately, the Court instead
8 allowed them to produce a subset of the record (for purposes of the preliminary injunction)
9 comprising only those documents previously provided to OIG. *Id.* at 8-10.

10 ***Order Extending TRO.*** Because of "Defendants' violation of the Court's Order to
11 Produce the Administrative Record," this Court held that a short extension of the TRO was
12 necessary. Dkt. 142 at 17. And, on September 17, the Court extended the TRO until a decision
13 on the preliminary injunction motion or through September 24, whichever came earlier. *Id.*

14 Defendants chose not to submit any voluntarily notice of compliance. After being
15 ordered to do so, Defendants reported that James Christy, the Assistant Director of Field
16 Operations sent a notification to Regional Directors and "Senior Staff in the Field Directorate" of
17 the Court's order, which he attached to the email along with the Guidance previously sent, and
18 had a conference call with "regional data collection managers" to "explain the extension" and
19 "emphasize that the previous guidance remained in effect." And Mr. Christy instructed them to
20 communicate with Area Census Office managers. Dkt. 234-1 ¶¶ 9-10. But again, there was no
21 follow-up that Plaintiffs are aware of, and the flood of emails and filings from Census employees
22 complaining that there were not being told about the Court's Orders, and that the Census Bureau
23 was not in compliance, continued.

24 ***Order Granting Plaintiffs' Motion for Stay and Preliminary Injunction.*** On September
25 24, the Court issued its order granting Plaintiffs' motion for stay and preliminary injunction ("PI
26 Order"). PI Order, Dkt. 208. The Court ordered that the "August 3, 2020 Replan's September
27 30, 2020 deadline for the completion of data collection and December 31, 2020 deadline for
28

1 reporting the tabulation of the total population to the President are stayed,” and Defendants “are
2 enjoined from implementing these two deadlines.” *Id.* at 78.

3 Again, Defendants chose not to file a voluntary statement of compliance. After being
4 ordered to do so, Mr. Christy provided a declaration that makes no mention of any written
5 notification or guidance being provided to the field. *See* Dkt. 234-1. Instead, Mr. Christy states
6 that the next morning he “joined a conference call” with “regional data collection managers” to
7 “discuss” the order and “confirm that it stayed the Replan’s September 30 deadline for the
8 completion of data collection, and to let staff know they should continue working on the NRFU
9 operation.” *Id.* ¶ 11. The agenda from that call that Mr. Christy attaches says nothing about the
10 PI Order. *See* Dkt. 234-2 at Attach. 4. Mr. Christy also states that, five hours later, he “sent an
11 email to all managers working on field operations at Headquarters and in the regions . . .
12 notifying them of our intent to comply with the Court’s Preliminary Injunction” and instructing
13 them to “continue to conduct [NRFU] and other field operations as planned.” Dkt. 219-1 ¶ 3;
14 Dkt. 234-1 ¶ 12. Later that day, Mr. Christy “briefed” the “Regional Directors” and “Chief of
15 Field Division” about the PI, “emphasizing the stay of the Replan’s September 30 deadline and
16 that [he] was awaiting additional guidance.” *Id.* ¶ 13. And he “directed” them to “continue to
17 complete” NRFU and said he would “forward information as soon as it was available.” *Id.*
18 Judging by Mr. Christy’s silence, no additional guidance or information was provided.

19 ***October 5 “Target Date” Tweet.*** On September 28, just a few minutes before the
20 beginning of the CMC, Defendants tweeted that the Bureau had set October 5 as the “target date”
21 for the conclusion of self-response and all field operations. Defendants did not warn Plaintiffs or
22 the Court that they intended to take this action. Nor did they provide any information as to when
23 they would begin to terminate enumerators, reduce the quality of operations, and close out
24 offices in reliance on this new “target date”—or indicate whether they had already done so.

25 In marked contrast to how Defendants chose to disseminate this Court’s orders,
26 Defendants widely broadcast this new “target date” with great precision. Just hours after the
27 tweet, Mr. Christy “instructed staff to send a text message to *all* Decennial field staff
28 (Enumerators and CFSS) that read:

1 A federal district court issued a preliminary injunction on 9/24. The
 2 Census Bureau is complying with the Court's Order which moves the
 3 finishing date for NRFU operations after September 30. The Secretary
 announced today that NRFU operations will finish on October 5. We will
 post updated guidance on the content locker.

4 Dkt. 234-1 (\ ¶ 14).

5 **III. ARGUMENT**

6 Defendants have violated this Court's orders. The Court has inherent authority to compel
 7 compliance, and also has authority to find Defendants in contempt and/or to issue appropriate
 8 sanctions for non-compliance. Plaintiffs ask the Court to compel full compliance, and to order a
 9 weekly compliance report as a sanction for prior noncompliance and to ensure future
 10 compliance, but to reserve the more severe remedial options for now in the hope and expectation
 11 that Defendants will fully comply without the resort to more severe measures.

12 **A. Defendants Have Violated This Court's Orders**

13 For the past several weeks, the Court (and Plaintiffs) have been inundated with
 14 communications from Census Field Supervisors and enumerators describing how the Defendants
 15 are prematurely curtailing enumeration across the country.¹ Defendants' response to these
 16 complaints has generally been to explain them away as miscommunications or disgruntled
 17 employees. But now, in the light of the evidence of Defendants' continuing to post September
 18 30 as the end of enumerations, and their attempt to skirt the Court's PI Order by ending
 19 operations five days later, one can see these complaints were well-founded.

20 As an initial matter, Defendants must concede that they violated the PI Order by
 21 continuing to implement the September 30 Replan deadline as late as September 28, 2020,
 22 stating that the "2020 Census will conclude data collection on September 30, 2020." *See* Census
 23 Housing Unit Enumeration Progress by State,

24
 25
 26 ¹ The Court has asked the parties to respond to the numerous communications received
 27 by the Court from concerned citizens working for the Census Bureau. *See* Dkts. 100, 215, 220,
 28 221, 224, 229, 238, 255, 258. Defendants have provided declarations James Christy, the
 Assistant Director of Field Operations, after investigating the various issues raised regarding
 compliance with the Court's injunctive orders. *See* Dkts. 127, 133, 219, 234, 244.

1 [https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-](https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-28.pdf)
 2 [28.pdf](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.	
State	Report date: 9/28/2020 As of 9/27/2020, percentage of housing units:

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9 This statement is from the Bureau’s own website and on a page that has been updated
10 daily. Only after Plaintiffs alerted the Court to this violation did Defendants finally remove the
11 September 30 date. *See* Dkt. 243 ¶ 5.

12 Defendants must also concede that enumerators and census field supervisors are not and
13 never have been receiving complete, accurate, and timely information about the Court’s orders.
14 Defendants’ declarations confirm as much. Certainly, there was not an all-employee text
15 announcement clearly telling employees enumeration should continue through October 31 as
16 under the COVID-19 Plan—in contrast to the text announcing the end of field operations on
17 October 5. Since Defendants appear to have been using the posted September 30 end date (or the
18 new October 5 date), Plaintiffs believe that otherwise unauthorized “closeout” procedures
19 continued to some degree after the TRO and PI. Nothing in Defendants’ various declarations
20 state that “closeout” did *not* continue as it would have under the enjoined deadlines of the
21 Replan.

22 The communications sent to the Court include numerous Census employee complaints
23 that now make sense. For example, a supervisor in Texas instructed enumerators that counting
24 would cease by September 30 even *after* the PI Order was issued on September 24, stating that
25 “[e]ven though the courts have made a decision; nothing has changed. Our deadline to count
26 everyone is still September 30, 2020. . . . The facts are, we are still moving forward with original
27 plan to finish by September 30, 2020.” Dkt. 214 at 3. The Bureau’s declarant, Mr. Christy,
28 confirmed this occurred. *See* Dkt. 219-1 ¶ 6. This can no longer be explained away as an errant,

1 one-off event, since the Bureau continued to advertise a September 30 end date and was
2 preparing to evade the Court’s order with a five-day extension.

3 Similarly, complaints of employees being prematurely terminated after the injunction are
4 borne out by Defendants’ declaration showing that the Bureau terminated 520 enumerators on
5 September 7—two days after the Court’s TRO Order—due to “Lack of Work.” Dkt. 133-1 ¶¶ 4,
6 6. It appears that it was not until September 16 that Defendants specifically told the field that
7 “lack of work” terminations were enjoined. Dkt 234-2, att. 1.

8 Census employees also reported directly to the Court about their concerns over accuracy.
9 These, too, appear well-founded. *See* AR DOC_0008779. Indeed, it is passing strange how
10 Defendants have never explained how they can claim 99% completion in areas where there has
11 been far less time in the field than the COVID-19 Plan and where there are significantly fewer
12 enumerators than planned. Indeed, the bulk of the employee complaints are from employees in
13 the field who clearly do not believe their areas have been 99% counted already. Whether each of
14 these employee communications to the Court or to Plaintiffs reveals a direct violation of this
15 Court’s orders is something Plaintiffs have not been in a position to fully investigate. But the
16 examples above confirm a pattern of continuing violations. *See* Dkts. 127, 133, 219, 234, 244.

17 All of this, of course, leads to the most flagrant violation, and the impetus for this
18 Motion: the Bureau’s September 28 “tweet” that October 5 is the new “target date” to end self-
19 response and field operations in order to implement the December 31 deadline. That
20 announcement was posted on the Bureau’s website and texted to *all* census field staff (including
21 enumerators and census field supervisors), who were each told that “NRFU operations will finish
22 on October 5.” And to Plaintiffs’ knowledge, Defendants *still* have not rescinded that directive.
23 This is a highly damaging, deliberate, and continuous violation of the Court’s preliminary
24 injunction order.

25 Indeed, the Court itself stated at the September 29 hearing that it believed, based on the
26 evidence before it at that time, that Defendants are currently in violation of the Court’s PI Order:

27 From what I can see of what I’ve looked at, the Defendants are implementing
28 that December 31st deadline by creating this target date of October 5th, and I

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think that’s been enjoined. And I think a target date for data collection that is predicated on an enjoined date is a violation of my order.

9/29 Tr. at 31:7-12.

The PI Order plainly states that Defendants are “enjoined from implementing” both the September 30 deadline for data collection and the December 31 deadline for reporting the tabulation of total population to the President. PI Order at 78. Yet that is precisely what the Bureau’s September 28 announcement does. As the record produced by Defendants makes clear, the October 5 “target date” was selected *in order to meet* the Replan’s December 31 end date this Court enjoined. This is now readily apparent, from materials Defendants previously redacted. *See, e.g.*, Dkt. 256-1 at 1-2 (email exchange between Secretary Ross and Mr. Jarmin); Dkt. No. 233 at 139 (stating that October 5 date was intended to meet an “apportionment delivery date of December 31, 2020”).

Yesterday evening, Defendants submitted an unredacted document that shows that Plaintiffs were very right to worry that Defendants’ 1-sentence tweet and press release meant a continuation of the truncated timelines enjoined by the Court. As the Court knows, Defendants mentioned nothing about the enjoined December 31, 2020 deadline when sending out their message about the new end of field operations. And as highlighted above, the Court flagged that its review of materials before it indicated that Defendants were “implementing that December 31st deadline by creating this target date of October 5th, and I think that’s been enjoined.” 9/29 Tr. at 31:8-10. The redacted and now unredacted email exchange with the Secretary of Commerce is stark on this issue:

Yes sir, we need to finish field work on 10/5 if we are to have enough time (and assuming all goes well) to finish the processing of the resident population, federally affiliated overseas and, [REDACTED]

Thanks

Ron S Jarmin, PhD., Deputy Director

U.S. Census Bureau
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From: Wilbur Ross [REDACTED] >
Sent: Monday, September 28, 2020 3:52 PM
To: Ron S Jarmin (CENSUS/DEPDIR FED) <Ron.S.Jarmin@census.gov>; Albert E Fontenot (CENSUS/ADDC FED) <Albert.E.Fontenot@census.gov>; James T Christy (CENSUS/LA FED) <James.T.Christy@census.gov>; Timothy P Olson (CENSUS/ADFO FED) <Timothy.P.Olson@census.gov>; Enrique Lamas (CENSUS/DEPDIR FED) <Enrique.Lamas@census.gov>
Cc: Kelley, Karen (Federal) <KKelley@doc.gov>; Steven Dillingham (CENSUS/DEPDIR FED)

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<steven.dillingham@census.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: Thank you and question

Thank you for the excellent briefing this afternoon. As I prepare to make the decision, I would like to make sure that I understood correctly that your team's opinion is that [REDACTED]
[REDACTED] Please confirm at your earliest convenience as I understand [REDACTED]
[REDACTED] Thank you again.

Yes sir, we need to finish field work on 10/5 if we are to have enough time (and assuming all goes well) to finish the processing of the resident population, federally affiliated overseas and, if requested, unlawful aliens in ICE Detention Centers by 12/31. Other PM related outputs would be pushed to 1/11/2021.

Thanks

Ron S Jarmin, PhD., Deputy Director

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<steven.dillingham@census.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: Thank you and question

Thank you for the excellent briefing this afternoon. As I prepare to make the decision, I would like to make sure that I understood correctly that your team's opinion is that if we stay in the field beyond October 5, we would not be able to meet the statutory deadline of December 31. Please confirm at your earliest convenience as I understand you would like to make an announcement today. Thank you again.

The unredacted exchange reveals troubling issues about Defendants' plans to currently not count undocumented immigrants in ICE Detention Centers, and brings into question exactly how Defendants are intending to define "completeness." But for the instant purposes of this TRO—and Defendants' current and continuing violation of the Courts' Order—it shows clear as day that circumventing the Court's Order enjoining the December 31, 2020 date is the driving force behind Defendants' actions. Ending field operations early so that Defendants can implement the Replan's December 31 deadline plainly violates the Court's order.

Defendants' suggestion that their conduct was merely "contingency planning in the event that that [December 31] deadline comes back into effect," 9/29 Tr. 25:4-6, does not excuse the violation. It makes it worse. Defendants were of course free to create as many contingency plans as they wished. But they were not free to violate the Court's PI Order in the hope that it would be vacated on appeal. The proposition of law is almost too obvious to state: until this

1 Court's order is stayed or vacated on appeal, Defendants are bound by it.² What Defendants
2 have done is not contingency planning; it is lawlessness.

3 Nor does Defendants' myopic focus on the September 30 date help them. This case is and
4 has always been about the Replan's accelerated timelines for conducting the 2020 Census.³ This
5 Court's decision granting the stay and preliminary injunction was also all about the Replan's
6 accelerated timelines. As the Court explained, the Replan's timelines shortened the 2020 Census
7 from 71.5 weeks to 49.5 weeks; self-response from 33.5 weeks to 29 weeks; NRFU from 11.5
8 weeks to 7.5 weeks; and data processing from 26 weeks to 13 weeks. Order Granting Plaintiffs'
9 Motion for Stay and Preliminary Injunction ("PI Order") (Dkt. 208) at 9, 11. The Court found that
10 this "significant compression" of the timelines is what constituted final agency action. *Id.* at
11 38. And the Court held that Defendants violated the APA by adopting this compressed timeline—
12 for five independently sufficient reasons. *Id.* at 46-74. The Court's stay and preliminary
13 injunction was intended to remedy those violations.

14 Defendants could not possibly have thought that moving the end date for field operations
15 by *five days* would be consistent with this Court's order. The overall accelerated timeline
16 remained exactly the same. And as Defendants' counsel explained previously, shifting the internal

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18 ² See *Maness v. Meyers*, 419 U.S. 449, 458–60 (1975) ("We begin with the basic proposition that
19 all orders and judgments of courts must be complied with promptly. If a person to whom a court
20 directs an order believes that the order is incorrect the remedy is to appeal, but, absent a stay, he
21 must comply promptly with the order pending appeal."); *Pasadena City Bd. of Ed. v. Spangler*,
22 427 U.S. 424, 439 (1976) ("It is for the court of first instance to determine the question of the
23 validity of the law, and until its decision is reversed for error by orderly review, either by itself or
24 by a higher court, its orders based on its decision are to be respected, and disobedience of them is
25 contempt of its lawful authority, to be punished." (citation omitted)); *United States v. Grant*, 17
26 F.3d 397, at *1 (9th Cir. 1994) (unpublished) ("Absent a stay, district courts have the authority to
27 enforce their orders . . . while an appeal of the underlying enforcement order is pending.").

28 ³ 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 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.").

1 dates merely takes from one hand and gives to the other. 9/14 Tr. at 70:23. The intimation that
 2 Defendants were entirely free to stop data collection on October 1 is particularly specious in light
 3 of Defendants’ repeated and recent statements, in court and under oath, that they *could not* meet
 4 the statutory deadline if field operations continue even a day beyond September 30. *E.g.*, Appeal
 5 No. 20-16868, Dkt. 4-1, Stay Mot. 20; Appeal No. 20-16868, Dkt. 4-2, Add.149-50 ¶ 24; Add. 113
 6 ¶ 100. In the words of government counsel, it would be “impossible.” 9/8/20 Tr. 9:6-10, Dkt. 98.⁴

7 **B. This Court Has Inherent Authority To Compel Compliance With Its Orders**

8 The Court has inherent authority to enforce compliance with its orders. *See Goodyear Tire*
 9 *& Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (“Federal courts possess certain ‘inherent
 10 powers,’ not conferred by rule or statute, to manage their own affairs so as to achieve the orderly
 11 and expeditious disposition of cases.”) (internal citations and quotation marks omitted); *Fraihat v.*
 12 *U.S. Immigration & Customs Enf’t*, No. EDCV191546JGBSHKX, 2020 WL 2758553, at *3 (C.D.
 13 Cal. May 15, 2020) (“Courts have inherent authority to monitor and enforce their prior orders.”
 14 (citing *Shillitani v. United States*, 384 U.S. 364, 370 (1966)). For instance, in *Laflamme v. New*
 15 *Horizons, Inc.*, 605 F. Supp. 2d 378 (D. Conn. 2009), a plaintiff who had previously obtained a
 16 preliminary injunction argued that the defendant had only slightly changed its behavior and moved
 17 for an order to compel compliance. The district court, noting that it was “apparent that [the
 18 parties] continue to disagree,” explained that nonetheless the “Court already ruled on that
 19 [preliminary injunction] request,” and Defendants had made only minor adjustments. *Id.* at 398.
 20 Thus, “[l]est there be any doubt about the effect of this previous ruling,” the district court granted
 21 the motion “and order[ed] Defendants to comply with the terms” of the injunction. *Id.* at 399; *see*
 22 *also Bd. of Trustees of Bay Area Roofers Health & Welfare Tr. Fund v. Westech Roofing*, No. C-
 23 06-04819, 2011 WL 5403453, at *2-5 (N.D. Cal. Nov. 8, 2011) (granting motion to compel
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25 _____
 26 ⁴ And Defendants have affirmatively disavowed the notion that the October 5 “target date” tweet is
 27 new agency action subject to judicial review. Which—together with the clear evidence in the
 28 documents produced that meeting the enjoined December 31 deadline was the impetus for the
 October 5 “target date”—makes the case law governing the agency’s ability to issue new rules in
 compliance with the APA inapposite. *See Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 159-65
 (2010).

1 compliance, where party had repeatedly failed to make timely payments of monthly contributions
2 to a trust fund, as required by injunction).

3 Courts have also not hesitated to order the government to comply with existing orders in
4 similar circumstances. In *International Ladies' Garment Workers' Union v. Donovan*, the D.C.
5 Circuit vacated a rule by the Secretary of Labor, which the Secretary—after unsuccessfully
6 moving for a stay—sought to evade by issuing an “emergency” rule temporarily reinstating the
7 terms of the vacated rule. 733 F.2d 920, 921 (D.C. Cir. 1984). The plaintiffs “then returned to the
8 District Court, and filed a motion to compel compliance” with the prior decision, and “issue relief
9 enforcing the mandate.” *Id.* Although the district court believed it lacked authority to do so, the
10 D.C. Circuit disagreed, explaining that the “request for enforcement of the court’s mandate”
11 implicates “the interest of the judicial branch in seeing that an unambiguous mandate is not
12 blatantly disregarded by parties to a court proceeding”—an interest “that the District Court
13 certainly was empowered to protect.” *Id.* And the court emphasized that invocation of this
14 authority “is particularly appropriate in a case such as this where an administrative agency plainly
15 neglects the terms of a mandate.” *Id.*; *see id.* at 923 (noting that “the Secretary has now, in effect,
16 implemented the stay on his own” and “reimplemented precisely the same rule that this court
17 vacated as ‘arbitrary and capricious’ in its first decision”).

18 This Court should similarly compel Defendants to comply with its preliminary injunction
19 motion. At its most basic, the Court should repeat the scope of its preliminary injunction and order
20 Defendants to follow it. But given Defendants’ prior non-compliance, as well as resulting
21 confusion in the field, the Court should take two additional steps.

22 *First*, the Court should order Defendants to fully, clearly, and immediately communicate
23 the scope of the preliminary injunction order to *all* Decennial field staff (Enumerators and CFSs)
24 by text message. That is precisely how Defendants chose to alert them of the Secretary’s decision
25 to end field operations early, on October 5. This Court’s orders deserve the same expedient and
26 effective response. *See Calvillo Manriquez v. Devos*, 411 F. Supp. 3d 535, 540-41 (N.D. Cal.
27 2019) (requiring Department of Education to notify class members of noncompliance with
28 injunction); *Al-Adahi v. Obama*, 672 F. Supp. 2d 114, 118 (D.D.C. 2009) (ordering, after

1 government inadvertently failed to tape-record a Guantanamo Bay hearing in violation of
 2 injunction, that government must post a transcript of the hearing for public to more easily access).

3 *Second*, the Court should amend the preliminary injunction going forward to prevent
 4 further attempts at circumvention during the limited time remaining to conduct the 2020 Census.
 5 In *New York v. United States Department of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), the
 6 court vacated Secretary Ross’s decision to add a citizenship question to the 2020 Census *and*
 7 granted an injunction. The court explained that vacatur alone was insufficient to redress the
 8 plaintiffs’ injuries for two reasons. *First*, “Secretary Ross could theoretically reinstate his decision
 9 by simply reissuing his memorandum under a new date or by changing the memorandum in some
 10 immaterial way.” *Id.* at 676. An injunction was needed to make the “vacatur effective, as it
 11 prevents Secretary Ross from arriving at the same decision without curing the problems identified”
 12 in the court’s decision. *Id.* *Second*, an injunction would “make it easier for Plaintiffs to seek
 13 immediate recourse,” which was “critical” given the expedited timing. *Id.* The court accordingly
 14 enjoined the defendants “from adding a citizenship question to the 2020 census questionnaire
 15 based on Secretary Ross’s” existing “memorandum or based on any reasoning that is substantially
 16 similar to the reasoning contained in that memorandum.” *Id.* at 676-77. And the court enjoined
 17 the defendants from “adding a citizenship question to the 2020 census questionnaire unless the
 18 Secretary” remedied the violations found—which the court specifically listed. *Id.* at 677; *see also*
 19 *State v. Ross*, 358 F. Supp. 3d 965, 1050 (N.D. Cal. 2019) (endorsing and adopting the same
 20 reasoning). The same relief is warranted here. *See Hoffman ex rel NLRB v. Beer Drivers &*
 21 *Salesmen’s Local Union No. 888*, 536 F.2d 1268, 1275-76 (9th Cir. 1976) (permitting modification
 22 of injunction in light of party’s failure to comply with terms of injunction prohibiting unfair labor
 23 practices).

24 **C. This Court Has Authority To Award Sanctions**

25 The “power to punish for contempts is inherent in all courts” and is available for the
 26 violation of court orders. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Indeed, the
 27 “underlying concern that gave rise to the contempt power . . . was disobedience to the orders of
 28 the Judiciary.” *Id.* (brackets and citations omitted). When civil contempt is at issue, the party

1 moving for a contempt finding bears the burden of showing by clear and convincing evidence
2 that contemnors violated a specific and definite order of the court. *Calvillo Manriquez v. Devos*,
3 411 F. Supp. 3d 535, 540 (N.D. Cal. 2019) (citing *F.T.C. v. Affordable Media*, 179 F.3d 1228,
4 1239 (9th Cir. 1999)). “The burden then shifts to the contemnors to demonstrate why they were
5 unable to comply.” *Id.* The standard “is generally an objective one. We have explained before
6 that a party’s subjective belief that she was complying with an order ordinarily will not insulate
7 her from civil contempt if that belief was objectively unreasonable.” *Taggart v. Lorenzen*, 139
8 S. Ct. 1795, 1802 (2019). Instead, good faith (or the absence thereof) “may help to determine an
9 appropriate sanction.” *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019).

10 For all the reasons set forth above, the Court could hold Defendants in contempt for
11 violating “specific” and “definite” orders of the Court. In fact, this case thus bears an
12 unfortunate resemblance to a recent civil contempt decision in this District. There the
13 Department of Education, facing an order enjoining it from engaging in certain loan collection
14 efforts, admitted that the Department had erroneously done just that. *See Calvillo Manriquez v.*
15 *Devos*, 411 F. Supp. 3d 535, 538-39 (N.D. Cal. 2019). The court found that the Department’s
16 “efforts to comply with the preliminary injunction were limited to sending electronic mail
17 messages to their third-party companies that service the loans,” many of which did “not even
18 mention the existence of the preliminary injunction.” *Id.* at 539. The Department “sent no
19 follow-up emails and took no further action.” *Id.* Indeed, the Department’s compliance report
20 was “silent as to the normal actions one would expect from an entity facing a binding court
21 order: multiple in-person meetings or telephone calls to explain the preliminary injunction and to
22 confirm that the contractors were complying with the preliminary injunction.” *Id.* Faced with
23 these egregious failures, the court held the Department in contempt.

24 That said, Plaintiffs are not asking the Court to hold Defendants in contempt at this time.
25 Nor is contempt the only sanction available for Defendants’ misconduct. As the Court
26 recognized previously, Defendants’ violation of the Court’s order to produce the administrative
27 record could have been the basis for sanctions. Dkt. 132, at 8. The same is true of Defendants’
28 latest violations of the Court’s PI Order. The Court has inherent authority to impose appropriate

1 sanctions for violation of a court order. *Chambers*, 501 U.S. at 44–46 (citations and internal
2 quotation marks omitted); *see also Primus Automotive Financial Services, Inc. v. Batarse*, 115
3 F.3d 644, 649 (9th Cir. 1997) (“[t]he district court has ‘broad fact-finding powers’ with respect
4 to sanctions, and its findings warrant ‘great deference’” (internal citation omitted)); *Penthouse*
5 *Int’l, Ltd. v. Playboy Enters.*, 663 F.2d 371, 386 (2d Cir. 1981) (federal courts “possess[] broad
6 inherent power to protect the administration of justice by levying sanctions in response to
7 abusive litigation practices.”); *Griffin v. County School Board*, 363 F.2d 206, 210 (4th Cir. 1966)
8 (school board in civil contempt for authorizing distribution of tuition grants, even though grants
9 were distributed before court could act to issue injunction against appropriation, where school
10 board knew that injunction had been sought and acted “to thwart the impact of any adverse
11 decree which might ultimately be forthcoming”); *Merrimack River Savings Bank v. City of Clay*
12 *Center*, 219 U.S. 527, 535-36 (1911) (“irrespective of any such injunction actually issued the
13 willful removal beyond the reach of the court of the subject-matter of the litigation ... is, in and
14 of itself, a contempt of the appellate jurisdiction of this court”). To grant such relief, the Court
15 need only find “bad faith or conduct tantamount to bad faith,” such as where “recklessness [is]
16 combined with an additional factor such as frivolousness, harassment, or an improper purpose.”
17 *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001). For all the reasons set forth above,
18 Defendants’ string of reckless and deliberate violations designed to evade and circumvent this
19 Court’s orders warrant such a finding.

20 But here too, Plaintiffs are not asking the Court to impose severe sanctions. This Court
21 has broad discretion in how best to shape sanctions. *See* 1 Sanc. Fed. Law of Lit. Abuse § 28
22 (2019) (“The court is vested with broad discretion to fashion an appropriate inherent power
23 sanction to redress abusive litigation practices.”); *Shepherd v. Am. Broad. Companies, Inc.*, 62
24 F.3d 1469, 1475 (D.C. Cir. 1995) (“[I]nherent power sanctions available to courts include fines,
25 awards of attorneys’ fees and expenses, contempt citations, disqualifications or suspensions of
26 counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence.”).
27 Plaintiffs seek a measured and tailored sanction for the sole purpose remedying the
28

1 misinformation and misdirection received in the field as a result of Defendants' noncompliance
2 and to ensure future compliance. To that end, Plaintiffs request the following:

3 *First*, Defendants should be required to submit a weekly compliance report to this Court
4 providing "a detailed explanation of all steps [they] ha[ve] taken to ensure that" the violations
5 found "shall not occur in the future" and that this Court's order is being complied with. *Al-Adahi*
6 *v. Obama*, 672 F. Supp. 2d 114, 118 (D.D.C. 2009). The reports should track the three
7 categories of issues enumerators and other field employees have been complaining about: (1) any
8 communications made to field staff regarding the end date for self-response, field operations, or
9 data collection more generally; (2) any termination of census employees (enumerators, CFSs,
10 partnership specialists) for reasons other than cause; and (3) any changes to the operations or
11 metrics for marking a household unit "complete," including reduction in the number of visits and
12 earlier use of administrative records. All three are tied directly to the accelerated timeline and
13 made necessary by Defendants' repeated attempts to rush enumeration to an early and
14 incomplete end in violation of the letter and spirit of this Court's orders. And there is ample
15 support in the case law for such targeted relief. *See, e.g., Calvillo Manriquez*, 411 F. Supp. 3d at
16 538-39 (similar relief in contempt context); *Gayle v. Meade*, --F. Supp. 3d--, 2020 WL 304132,
17 at *24 (S.D. Fla. June 6, 2020) (requiring that "ICE shall perform an internal review" each week
18 and "shall submit weekly reports" on compliance with injunction); *Fraihat v. U.S. Immigr. &*
19 *Customs Enf't*, No. 19-1546, 2020 WL 2758553, at *6-7 (C.D. Cal. May 15, 2020) (requiring
20 government to produce "[r]ecords showing the extent of compliance with the [court's
21 preliminary injunction] order to issue a new Performance Standard" for handling ICE detainees
22 with COVID risk factors and "[r]ecords regarding monitoring and enforcement of facility-wide
23 compliance" with various COVID plans).

24 *Second*, given the history of vague assertions, failures to communicate this Court's
25 orders, and shifting stories as to what is being done to comply, the reports should be
26 accompanied by a declaration from Census Bureau Director Steven Dillingham unequivocally
27 confirming ongoing compliance with the Court's order.

28

1 *Third*, Defendants should be required to reopen any cases closed based on reduced
2 operations or metrics (such as reduced contact attempts) tied to the September 30 Replan
3 deadline or the October 5 “target” date. This relief is an appropriate sanction that is needed to
4 return to the *status quo ante*. And it parallels this Court’s earlier TRO. That is, if Defendants
5 would not have closed out a household on September 28 under the COVID-19 Plan, but did so
6 based on the October 5 “target date,” they must reopen and attempt to accurately enumerate that
7 household.

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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: September 30, 2020

LATHAM & WATKINS LLP

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