20A62

IN THE SUPREME COURT OF THE UNITED STATES

WILBUR L. ROSS, JR., SECRETARY OF COMMERCE, ET AL., APPLICANTS

v.

NATIONAL URBAN LEAGUE, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Respondents barely defend the lower courts' rationale that it was arbitrary and capricious for the agencies to decline to plan on violating the statutory deadlines for the census. They instead contend -- wholly apart from the merits -- that a stay will not redress the government's harm because it supposedly was and is impossible to meet the December 31 deadline for the Secretary of Commerce's report to the President. But that plainly was not true either when the Replan Schedule was conceived or when the preliminary injunction was entered. Like the courts below, respondents can pretend otherwise only by relying on earlier predictions and willfully blinding themselves to months of evidence about actual census operations. And insofar as the government may now have additional difficulties in meeting the December 31

statutory deadline, that is only because the extended proceedings in both courts below prevented the government from seeking relief from this Court at an earlier juncture.

Those delays do not mean that respondents may cling to an unwarranted injunction. Every day still matters, for two reasons. First, it may still be possible to meet the December 31 deadline if the agencies immediately shift to post processing and, as before, consider moving some aspects of their analysis that need not be completed by December 31 beyond that date. The census is a dynamic process, and the government should not be prevented from even attempting to meet the December 31 deadline. Second, even if the Bureau proves unable to complete post processing by December 31, being able to get as close as possible to that deadline is necessary to protect the government's ability to meet the statutory framework's subsequent deadlines (including the President's January report to Congress). There is no reason to mandate another 21 days of field operations. The Bureau has already achieved levels of enumeration consistent with other recent censuses. As of October 9, it had achieved an overall rate of 99.9%, with only one State under 99%. See p. 6 & note 1, infra.

The Court should immediately halt the district court's ongoing interference with the census and allow the Bureau's professionals to do their job by concluding a census that is accurate, complete, and delivered as close as possible to the timetable that Congress has prescribed pursuant to its responsibility to "direct" the

"Manner" in which the decennial census will be conducted. U.S. Const. Art. I, § 2, Cl. 3.

ARGUMENT

1. Respondents understandably bury their merits arguments at the end of their response. The court of appeals acknowledged that the district court likely erred in ordering the government not to comply with the December 31 statutory deadline, and respondents do not challenge that conclusion. Like the courts below, respondents do not seriously contend that the statutory deadline is unconstitutional. Nor could they, when the Constitution provides that the census shall be taken in the manner directed by Congress. Respondents also do not seriously contend that the statutory deadline is not binding on the agency. Nor could they, when it uses mandatory language that is unambiguous and unconditional. And critically, respondents, like the courts below, still have identified no way besides the Replan Schedule to meet the statutory deadline yet be more accurate.

Despite all that, respondents double down on the holding of the courts below that the Secretary was legally required to plan on breaching the statutory deadline, based on nothing more than hope that such a breach might later be avoided or excused by Congress. This Court is highly likely to reverse the lower courts' unprecedented finding that the Secretary acted arbitrarily and capriciously by failing to consider acting contrary to law.

a. In ordering the Bureau to violate the December 31 statutory deadline to report the "total population by State[]" to the President, 13 U.S.C. 141(b), the district court relied solely on the APA, which permits a court to set aside agency action that is "not in accordance with law" or "arbitrary" and "capricious," 5 U.S.C. 706. But seeking to comply with a valid statutory requirement is the exact opposite of acting "not in accordance with law," and is certainly not "arbitrary" and "capricious." The district court recognized that the statutory deadline "bind[s]" the agency, Stay Appl. App. 68a, and the court of appeals therefore stayed that portion of the district court's injunction -- but then inexplicably left standing the portion of the injunction that extends field operations, when the only basis for the injunction was the Bureau's failure to consider ignoring the deadline. As the court of appeals recognized and respondents do not contest, the partial stay will have the same effect as the full injunction "as a practical matter," because extending field operations will make it impossible to comply with the deadline. Id. at 173a.

Neither respondents nor the courts below have identified any case in which a court has invoked its APA powers to order an agency to miss an unambiguous statutory deadline, or faulted an agency for failing to consider alternatives that would miss such a deadline. Nor have they identified a case where the reason for breaching a clear and express statutory requirement is an implicit duty (here, to achieve an "accura[te]" census under a standard that, by

respondents' own admission, "[t]he district court never adopted or applied," Opp. 38). That agencies have missed deadlines in the past, see Opp. 40, in no way suggests that a court may order the government to violate an otherwise valid statutory deadline.

Respondents' reliance (Opp. 39-40) on Department of Homeland Security v. Regents, 140 S. Ct. 1891 (2020), is misplaced. Regents did not suggest that the Acting Secretary of Homeland Security would have acted arbitrary and capriciously had she declined to consider disregarding an express statutory command. Rather, it found that, to the extent that the agency questioned the lawfulness of only one aspect of DACA (the associated benefits), it was required to consider the option of retaining a different portion of DACA (forbearance from removal), the legality of which was not at issue. Id. at 1910-1915. That reasoning in no way supports the conclusion that the APA requires an agency to consider violating a statutory directive that is concededly binding and lawful.

b. Respondents assert (Opp. 41-44) that there is nothing in the administrative record to support the conclusion that the Replan Schedule was designed to achieve an accurate census. That assertion is belied by the factual record. The government has consistently considered accuracy and worked to achieve an accurate census, including when it adopted the Replan Schedule. Indeed, the Replan Schedule was designed to "improve the speed of [the Bureau's] count without sacrificing completeness," and, when the Bureau announced the schedule, it committed to reach response rates

comparable to those of other recent censuses. Stay Appl. App. 117a-118a.

The claim that the government failed to take accuracy into account is based on a cramped understanding of the factual record. As the government has explained (Stay Appl. 34-35), the district court largely declined to consider declarations submitted after August 3. But that incorrectly ignores substantial evidence regarding the development of the Replan and its actual implementation -- including the fact that the Bureau has actually achieved enumeration rates on par with recent censuses. As of October 9, the Bureau had enumerated 99.9% of all households, and over 99% of households in 49 States -- and the only State under 99% is Louisiana, which is at 98.2% and has supported the government in the district court and the court of appeals.[1] These rates compare favorably with those in recent censuses. The 2010 census had an overall enumeration rate of 99.6%, and the 2000 census had an overall rate of 99.45%. D. Ct. Doc. 323-1, at 4 (Oct. 8, 2020). And in 2000, only 45 States reached a 99% enumeration rate. Ibid.

Respondents have purportedly "significant" but undefined "questions" about these numbers, Opp. 31, and offer unsubstantiated and speculative criticisms of the Bureau's method of conducting the census, see, e.g., Opp. 31, 42 n.11. But as the government has

[1] U.S. Census Bureau, U.S. Dep't of Commerce, 2020 Census Housing Unit Enumeration Progress by State (Oct. 10, 2020), https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-10-10.pdf.

explained (Stay Appl. 7 n.3), changes from previous enumeration procedures have been minor and do not, as respondents assert, "adversely impact accuracy," Opp. 31. To the contrary, as Associate Director Fontenot recently explained, "the Census Bureau is watching quality indicators closely" and "has no indication at this point that the data it has collected in the [Non-Response Followup] operation is of inferior quality to prior censuses." D. Ct. Doc. 323-1, at 5. In light of "the wide discretion bestowed * * * by Congress upon the Secretary." Wisconsin v. City of New York, 517 U.S. 1, 23 (1996), respondents are not entitled to continually challenge ongoing decisions made during the census, and the judiciary is not equipped to micromanage day-to-day operational metrics and decisions related to the census.[2]

Even if there were some undefined standard of census accuracy that were subject to minimal judicial review, this Court has never required perfection or even a minimum level of adequacy -- let alone indicated when concerns about accuracy should compel the

[2] Indeed, respondents' assertion that their challenge "does not require hands-on management by the district court," Opp. 36, is completely counter to the ongoing proceedings. Since issuing the preliminary injunction, the district court has repeatedly ordered the Bureau to respond to emails regarding minute details of census operations sent by enumerators (who are not parties to or otherwise involved in the litigation below) to the court's email address. As of October 9, the Bureau estimated that it had spent over 128 staff hours responding to these inquiries from the court, which "has impaired [the] ability" of senior Bureau leadership "to monitor key operations such as * * * data quality programs and efforts to ensure fiscal and administrative compliance." D. Ct. Doc. 326-1, at 4-5 (Oct. 9, 2020).

Bureau to consider violating the Census Act's statutory deadlines. See Stay Appl. App. 143a (Bumatay, J., dissenting) ("By requiring the Bureau to prioritize an elusive standard of accuracy over and above the interest in completing the census in a timely manner, as prescribed by Congress, the court substitutes its own policy determination for those set by Congress and delegated to the Secretary."); see also Stay Appl. 31-32. In any event, the extent of enumerations for the 2020 census is more than adequate to permit field operations to conclude immediately without unduly affecting accuracy.

c. Indeed, respondents' focus on internal census procedures and metrics simply underscores the district court's error in finding that the Replan Schedule was discrete, final agency action reviewable under the APA. See Stay Appl. 32-35. Respondents fail to explain why the announcement of a timeline -- without a finalized plan -- constituted final agency action. And they never explain why announcing a schedule and summarizing a shift in the course of the census transforms a dynamic, ever-changing process into the final "'consummation' of the agency's decisionmaking process." Bennett v. Spear, 520 U.S. 154, 178 (1997) (citation omitted); see Stay Appl. 34. Contrary to respondents' assertion (Opp. 36), the Bureau's internal deadlines have always been dynamic in nature.[3] That fact underscores both the absence of final and

[3] Similarly, contrary to respondents' argument (Opp. 28-29), it is not a given that, absent the district court's injunction, field operations would have ceased on September 30. It

discrete agency action and the need for the federal courts to permit the Bureau to continue making last-minute adjustments needed to maximize its ability to achieve an accurate and timely enumeration.

2. The balance of the equities tilts strongly in favor of a stay because the government and the public will suffer direct, irreparable injury absent an immediate stay, and there is no corresponding risk of injury to respondents given the status of the census. Cf. Nken v. Holder, 556 U.S. 418, 434-435 (2009).

a. Respondents primarily argue that the government has not shown irreparable harm because it is unlikely to meet the December 31 deadline in any event. Their argument essentially boils down to the assertion that because the courts below took weeks to rule on the preliminary injunction and the government's stay application, this Court is powerless to act and respondents are entitled to retain the benefit of an unjustified preliminary injunction. That is not what equity requires, particularly where the government has exceptionally strong merits arguments, see Klutznick v. Carey, 449 U.S. 1068 (1980), and where the decision below ensures that the government will be unable to "effectuat[e]" valid statutory deadlines, Maryland v. King, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (citation omitted). Respondents' attempt (Opp. 27) to

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was always possible to extend field data collection if necessary to improve response rates, as the Secretary did on September 28. Cf. Opp. 30 (quoting potential for "extended" field operations under the COVID Schedule if completion rates were not "acceptable") (citation omitted).

blame the government for "[a]ny delay" on the way to this Court flies in the face of the record, see Stay Appl. 14-15, 39, and ignores the twelve days it took the court of appeals to rule on the government's stay application (including a week after one panel had already issued reasoned opinions about the merits of the legal arguments and the stay factors).

Despite the various outdated and often out-of-context statements that respondents repeatedly invoke, the government has explained how it was able to perform field operations in less time and to shift its target dates for concluding post processing, such that an October 5 date for concluding field operations would still allow for the submission of an accurate report to the President by December 31. The Bureau adopted efficiencies and schedule modifications to allow the steps necessary to ensure data integrity to be completed in time for the Secretary to submit his report by December 31, including by postponing certain steps necessary to fully implement the Presidential Memorandum until after December 31. See Stay Appl. 6-7 & n.2, 18-19. With every additional passing day, meeting the December 31 deadline becomes increasingly difficult, but not necessarily impossible. The conduct of the census is an ongoing and dynamic process, and the Bureau may be able to achieve efficiencies in post processing as it conducts that stage of the census -- just as it did during field data collection. See Stay Appl. App. 109a-110a. On the other hand, leaving the preliminary injunction in place would ensure that the government

can neither meet nor even get close to the December 31 deadline. While respondents assert that "[t]he court of appeals' decision stayed the only portion of the district court's order that even arguably precluded them from meeting [the December 31] deadline," Opp. 25, they do not contest that requiring the government to comply with the court's October 31 deadline is the practical equivalent of ordering the government to violate the December 31 deadline, see Stay Appl. 21-22.

Even if the Bureau proves unable to complete post processing by December 31 due to belated relief from the injunction, finalizing post processing as close as possible to that deadline will still be necessary to preserve the government's ability to comply with the statutory framework's subsequent deadlines. Every passing day imposes more harm to the President's ability to meet his January statutory deadline for reporting the apportionment, and to the ability to meet contingent redistricting deadlines. Respondents do not meaningfully grapple (Opp. 26 n.4) with the effects that the district court's order would have on States' apportionment and redistricting; Louisiana and Mississippi have identified 24 state deadlines that the injunction puts at risk. Stay Appl. 23. Indeed, in a number of States, "the delays would mean deadlines that are established in state constitutions or statutes will be impossible to meet." D. Ct. Doc. 204-7, at 3-4 (Sept. 23, 2020) (emphasis added). Needless to say, any difficulties that the government might have in meeting the

redistricting deadline, see Opp. 25-26, would be seriously compounded by permitting the injunction to stand and requiring the government to further delay its ability to produce redistricting data -- without any valid legal justification.

Respondents also assert (Opp. 21) that there can be no harm in forcing census operations into "the same timeline * * * that the Bureau itself adopted in the COVID-19 Plan." But the foundation of that timeline was the assumption that Congress would extend by months all of the statutory deadlines associated with the conduct of the census. By late July, political realities had undermined that assumption, making it eminently reasonable to reconsider the timeline. Because Congress still has not moved the deadlines, requiring the agencies to miss them by weeks or months would pose not only real-world harm but also the "[s]erious separation of powers concerns" that the court of appeals acknowledged. Stay Appl. App. 173a-174a.

b. Respondents are not likely to suffer any substantial and cognizable harm if this Court enters a stay. The Bureau has achieved a household enumeration rates on par with recent censuses, see p. 6 & note 1, supra, and respondents have provided no evidence that a census that is equivalent to other recent censuses would cause them irreparable harms -- or, for that matter, any of the injuries that they alleged as the basis for this suit. Respondents try to raise doubts about the quality of census data and suggest that the Bureau should continue field work to achieve nominally

higher enumeration rates. Opp. 29-30. But as discussed above, record evidence supports the Bureau's conclusion that data collected in this census is of the same quality as that collected in prior censuses.

Indeed, respondents do not argue that they are likely to suffer apportionment injuries if a stay is entered. And their purported loss-of-funding injuries have no factual basis at this juncture; their reliance on predictions about the Replan Schedule -- predictions that time has disproved -- and a statement from this Court that an undercount of 2% can result in a State's loss of federal funds (Opp. 33) do not amount to a showing of irreparable harm, where the Bureau has achieved an overall household enumeration rate of 99.9% and where the only State that is below 99% opposes the continuation of field data collection.

Finally, even if respondents could demonstrate that they would suffer harm if this Court enters a stay, that would not impose irreparable harm on respondents. If further proceedings were to result in a final judgment in respondents' favor, the Bureau could reopen field operations for a brief period and then redo post processing if necessitated by that judgment. While that would undoubtedly be time-consuming and costly, any costs would fall on the government -- and thus should be of no concern to respondents.

* * * * *

It would not only be inequitable, but would impose irreparable public harm, to require the Bureau to continue engaging in field

data collection, notwithstanding that the 2020 census is proceeding as completely and accurately as other recent censuses. The Court should grant a stay to enable the Bureau to resume its lawful efforts to comply with Congress's statutory direction about when the decennial census must be concluded and when apportionment figures must be reported to Congress.[4]

CONCLUSION

The preliminary injunction should be stayed pending appeal and, if the court of appeals affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. The injunction also should be administratively stayed during this application's pendency.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

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[4] Allowing the Bureau to conclude field operations would moot the government's appeal in Trump v. New York, No. 20-366, which would permit the Court to vacate the injunction entered by the district court in that case and relieve the Court of any need to expedite that appeal.