No. 20-16868

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs-Appellees,

v.

WILBUR L. ROSS, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANTS

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INTRODUCTION

This is an appeal from a preliminary injunction—now stayed in its entirety by the Supreme Court—in which the district court attempted to inject itself into the day-to-day management and operation of the decennial census. In particular, the injunction *required* the Department of Commerce and the Census Bureau to *violate* an express, binding, and lawful statutory deadline—based on the premise that the agencies acted arbitrarily and capriciously by failing to consider the option of simply violating the statute in order to achieve the court's view of a supposedly more "accurate" census. That was erroneous. The Enumeration Clause vests in Congress "virtually unlimited discretion" to "conduct[] the decennial" census, and Congress in turn largely has delegated that "wide discretion" to the Executive Branch, not the judiciary. *Wisconsin v. City of New York*, 517 U.S. 1, 19, 23 (1996). The agencies did not act arbitrarily or capriciously in respecting one of the few explicit restrictions Congress placed on the exercise of that discretion—namely, the express directive in the Census Act that the "tabulation . . . be completed within 9 months," meaning by December 31, 2020. 13 U.S.C. § 141(b).

Consistent with the Act, the Department and the Bureau have consistently worked to achieve an accurate census *within* the statutory time frame. That task was made more difficult, however, by the COVID-19 pandemic, which prompted the Bureau to develop an aspirational "COVID Schedule" predicated on the express assumption that Congress would extend the December 31 statutory deadline, and

other related statutory deadlines, by 120 days. When it became clear that Congress would *not* amend the statute to provide the requested extensions, the Bureau implemented a new schedule (the "Replan Schedule") designed to achieve accuracy and completeness while comporting with the explicit statutory directives. Under that schedule, field operations would be extended by two months from July 31 to September 30 (later extended to October 5), and the post-processing phase conversely would be compressed from five months to three, to enable timely completion of the census by December 31.

The district court nevertheless enjoined the Bureau from proceeding on the Replan schedule and ordered the "immediate reinstatement of the COVID-19 Plan's deadlines," ER 103—including that field operations continue through October 31, and post processing continue through April 30—target dates which had been adopted on the assumption that Congress would legislate to extend the relevant deadlines. In issuing this injunction, the court did not dispute that the Replan Schedule is the best available means to comply with the statutory deadlines—nor could it have, given that no constitutional or statutory standard exists by which to evaluate that schedule. Nor did it find the express statutory deadlines to be unlawful or merely advisory. The court concluded, instead, that the Bureau had acted arbitrarily and capriciously by establishing a schedule without considering the option of simply ignoring the binding and lawful statutory deadlines.

As the Supreme Court's stay recognizes, this extraordinary order rests on serious legal errors. The Administrative Procedure Act does not vest a court with authority to require an agency to flout a clear statutory requirement. Courts may set aside agency action "not in accordance with law," 5 U.S.C. § 706(2)(A), but have no authority to command agencies to *violate* the law.

Moreover, the Replan Schedule that the district court purported to set aside was not final agency action. In undertaking to review the conduct of the census—a dynamic internal agency process entailing a range of judgments and complex considerations—the court assumed direct oversight of the Bureau's operations. The extent to which the court displaced the Bureau's exercise of judgment is illustrated by the court's declaration that it would be a violation of the injunction even "to *propose* a new data collection schedule that is predicated on an enjoined December 31st date." ER 204 (emphasis added); *see* ER 97, 107, 108. The district court plainly believed that Congress should have extended the statutory deadlines, but that displeasure with Congressional inaction did not authorize it to entertain plaintiffs' "broad programmatic attack on an agency's operations." *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Complaints of that sort must instead be made in "the halls of Congress, where programmatic improvements are normally made." *Id.*

In issuing its order, the district court focused largely on the injuries that plaintiffs would purportedly suffer if field operations did not continue to October 31, the target date in the COVID-19 schedule. But there was no judicially manageable

standard for the district court to make that kind of assessment, because neither the Constitution nor the Census Act articulates any requisite standard of accuracy or completeness. Besides, that assessment was wrong even on its own terms: when field operations finally concluded on October 15, shortly after the Supreme Court stayed the injunction, the Bureau had achieved—thanks to the heroic efforts of its staff—a 99.9% household enumeration rate nationwide and in 49 States, the District of Columbia, and Puerto Rico (and 99.0% in the remaining State), which exceeds recent decennial censuses. Plaintiffs have provided no evidence of irreparable injury that would result in the absence of an injunction, and any injury is outweighed by the frustration of the statutory schedule and by the "[s]erious separation of powers concerns [that] arise when a court seeks to override a congressional directive to an Executive Branch agency." *National Urban League v. Ross*, __ F.3d __, 2020 WL 5940346, at *8 (9th Cir. 2020). The district court's order should be reversed and the injunction vacated.

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. § 1331. *See* ER 287. The district court issued a preliminary injunction on September 24, 2020, ER 1-78, and the government filed a notice of appeal on September 25. ER 278; *see* Fed. R. App. P. 4(a)(1) (60-day time limit). This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court erred in enjoining the Census Bureau from conducting the final phases of the decennial census on a schedule designed to meet the unambiguous and valid statutory deadlines governing the reporting of the census to the President, and subsequent reports to Congress, for purposes of apportionment, and to States, for purposes of redistricting.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Factual Background

1. The Enumeration Clause of the Constitution requires that an "actual Enumeration shall be made" of the population every ten years "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3. In the exercise of that power, Congress has set a series of interlocking deadlines for census operations. The Census Act sets "the first day of April" as "the 'decennial census date,'" 13 U.S.C. § 141(a), and prescribes that "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary [of Commerce] to the President of the United States," 13 U.S.C. § 141(b). After receiving the Secretary's report, the President must calculate "the number of Representatives to which each State would be entitled" and transmit that information

to Congress within one week of the first day of the next Congress's first regular session. 2 U.S.C. § 2a(a).[1] Then "tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State" by March 31, 2021. 13 U.S.C. § 141(c); *see generally Franklin v. Massachusetts*, 505 U.S. 788, 792 (1992) (describing sequence triggered by the submission of the Secretary's report).

Aside from this timetable and a few other requirements not relevant here, *e.g.*, 13 U.S.C. § 195 (prohibiting the use of statistical sampling for certain purposes), Congress has given the Secretary "broad authority" to conduct the census. *Department of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019); *see Wisconsin v. City of New York*, 517 U.S. 1, 23 (1996) (noting "the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary"). Although the Act imposes an implicit "duty to conduct a census that is accurate," *Department of Commerce*, 139 S. Ct. at 2569 (quotation omitted), neither the statute nor the Constitution identifies a standard of "accuracy," *cf. Wisconsin*, 517 U.S. at 19-20.

2. The 2020 decennial census is a multi-phase operation of extraordinary complexity. Particularly relevant here are its final two phases: the "Non-Response Followup" and "post processing." As part of Non-Response Followup, the Bureau contacts non-responsive addresses up to six times. ER 161-62. Enumerators also

[1] Congress will convene on January 3, unless that date is altered by law. U.S. Const. amend. XX, § 2.

gather crucial geographic information that may alter the Master Address File—the Bureau's account of every household in the country—such as changes resulting from construction, demolition, or new uses. *See* ER 153-54, 166.

In post processing, the Bureau engages in a sequence of data-processing operations designed to create reliable and usable statistics. *See* ER 165-70. "[T]he steps of the [post-processing] operation generally must be performed consecutively." ER 165. As part of these operations, the Bureau must confirm or correct geographic information in the Master Address File. Because this address information is central to the census, other data-processing operations cannot take place "until the entire universe" of addresses nationwide is determined. ER 166. It is thus necessary to conclude field operations before proceeding with post-processing operations.

The COVID-19 pandemic forced the Bureau to adapt quickly to new challenges, and in March 2020 it suspended field operations for four weeks to protect the health and safety of its employees and the public. ER 175. On April 13, the Secretary announced the adoption of the "COVID Schedule," which made significant adjustments to field operations in light of the pandemic. ER 231-32; *see* ER 175-76. To make the COVID Schedule possible, the Secretary stated that he "would seek statutory relief from Congress," and the COVID Schedule "assumed Congressional action" in the form of a 120-day extension of the statutory deadlines for providing apportionment and redistricting data. ER 176. Based on that assumption, the self-response period and field operations (including the Non-Response Followup) would

have continued until October 31, instead of July 31 as originally planned. *Id.* Likewise, the Secretary's report to the President would be delivered by April 30, rather than December 31, and redistricting data would be provided to States by July 31, rather than March 31. *Id.*

By late July it became clear that the Bureau could not rely on a statutory amendment, and on July 29 the Secretary directed the Bureau's professional staff responsible for developing the original operational plan and the COVID Schedule to develop a new plan to meet the unchanged statutory deadlines. ER 176; *cf.* ER 178. On August 3, those Bureau staff presented a revised schedule, known as the "Replan Schedule," which the Secretary approved and announced that day. ER 176. The press release announcing the Replan Schedule stated that the Bureau was "updat[ing] . . . our plan . . . to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce." ER 227. It emphasized that the Bureau's "operation remains adaptable and additional resources will help speed our work" and that the Bureau "will continue to analyze data and key metrics from its field work to ensure that our operations are agile and on target for meeting our statutory delivery dates." ER 228.

The Replan Schedule was designed to ensure that field operations and post processing were completed in the five months remaining before the statutory deadline. ER 176-80. The new schedule reduced the time for field operations by one

month from the COVID Schedule (concluding on September 30 instead of October 31), which was still two months after the originally planned conclusion of field operations (on July 31). The post processing operations were likewise shortened from five months to three, concluding in time to deliver apportionment data on December 31.

The Bureau has also explained these changes in detail. Alterations to Non-Response Followup were possible "because the design of the 2020 Census allows a more efficient and accurate data collection operation in a shorter timeframe than was possible in the 2020 Census." ER 179. For example, data from six field offices that had begun Non-Response Followup operations in mid-July showed "higher levels of overall staff productivity resulting from the efficiency of the Optimizer (a software program that both schedules work for [the Bureau's] enumerators and then routes them in the most effective routing)." ER 178. In addition, the Bureau provided "monetary bonuses to enumerators who maximize hours worked, and retention bonuses to those who continue on staff for multiple weeks," to achieve "increased hours of work per enumerator, spread across the total workforce, to get the same work hours as would have been done under the original time frame." ER 179. The Bureau was likewise able to discontinue an unnecessary process of randomly reinterviewing certain already-enumerated addresses, because information from the handheld devices used by enumerators "provide . . . a near real-time assessment of enumerator performance," providing the Bureau information about where the

interview took place, the length of the overall interview and time spent on each question, and other information. ER 142; *see* ER 125-26. That information had not been available in prior censuses, which relied on paper questionnaires. ER 142; ER 125. The Bureau also took steps to ensure expeditious and accurate post processing. Among other changes, the Bureau adopted a seven-day workweek for staff "to ensure maximum staff resource usage." ER 180. The Bureau likewise deferred some address processing activities related to state-level redistricting until after the delivery of reapportionment data. ER 179.

With these alterations, the Bureau explained that it "intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities," and committed to "improv[ing] the speed of our count without sacrificing completeness." ER 227; *see* ER 165. Despite this year's unprecedented challenges, the Bureau explained that it was "confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline following the Replan Schedule." ER 180.

B. Prior Proceedings

1. a. Plaintiffs—a group of local governments, Tribal nations, nonprofit organizations, and individuals—filed this suit on August 18, 2020, asserting that the Replan Schedule violates the Constitution, and constitutes final agency action that is arbitrary and capricious under the APA. ER 339-43. On August 25, they moved for a preliminary injunction. ER 16, 44.

The district court first issued a temporary restraining order on September 5, barring the Bureau from "implementing" the Replan Schedule or "allowing to be implemented any actions as a result of the shortened timelines" in that Schedule, including "winding down or altering any Census field operations." ER 117-18. The court then engaged in quasi-adversarial discovery to create what it described as an "administrative record" for the Replan Schedule. ER 15. The government repeatedly explained that the Replan Schedule is not discrete and final "agency action" within the meaning of the APA, and accordingly there is no administrative record associated with it. *See, e.g.*, ER 15-17, 45. The government urged that if the court nevertheless believed that it was reviewing discrete and final agency action and that the action could not be sustained on the basis of the declarations submitted by the government, it should "find against the Defendants on the likelihood of success on the merits prong" and enter a preliminary injunction to enable sufficient time for orderly appellate review. Doc.88, at 3. The court delayed entry of an appealable order, however, and, over the government's repeated objections, *see, e.g.*, Doc.109, at 3-4, extended the temporary restraining order to permit further discovery, ER 94-111. The court ultimately limited the record it had constructed to documents predating the August 3 press release announcing the Replan Schedule. *See* ER 46.

b. On September 24, the district court preliminarily enjoined the government from following key components of the Replan Schedule. ER 1-78. The court began by finding that plaintiffs have Article III standing and that their challenge to the

Replan Schedule does not raise a nonjusticiable political question. ER 21-29. The court further concluded that the Replan Schedule constitutes final agency action, rejecting the government's argument that this suit is a "programmatic attack on the Bureau's efforts to conduct the 2020 Census." ER 29. The court declared that "the Replan is a circumscribed, discrete agency action," because the government "named it the 'Replan'" and summarized it in a PowerPoint, and because "[t]he Secretary directed the Bureau to develop the Replan" and adopted it. ER 31. The court concluded that, as of August 3, "[t]he Bureau ha[d] implemented the Replan" and "[n]o further agency decisionmaking [would] be conducted on the Replan." ER 33-34.

The district court found that plaintiffs are likely to succeed on the merits of their claim that the Replan Schedule is arbitrary and capricious and thus violates the APA. ER 44-73. Because the court had defined the "administrative record" to include only documents created on or before August 3, it declined to consider any submissions regarding the Bureau's ongoing assessments of the Replan's effectiveness. Thus, for example, the court declared that it would not consider a September 5 declaration submitted by Albert E. Fontenot, Jr., the Associate Director for Decennial Census Programs, because it believed the declaration to be a post hoc rationalization for final agency action. ER 46, 54 n.11.

The district court declined to reach plaintiffs' claim that the statutory deadline is unconstitutional, ER 44, and stated that it "agreed that the Census Act's statutory

deadlines bind Defendants," ER 68. The court nevertheless found that the Replan Schedule was likely arbitrary and capricious for five reasons, all of which were premised on non-compliance with the December 31 statutory deadline. ER 46. First, the court found that the government "failed to consider important aspects" of the census because it "adopted the Replan to further one alleged goal alone: meeting the Census Act's statutory deadline of December 31," while "fail[ing] to consider how" to fulfill "statutory and constitutional duties to accomplish an accurate count on such an abbreviated timeline." ER 47. The court relied on predictions by Bureau employees, made before the Replan Schedule was developed or implemented, "that the Bureau could not meet the December 31, 2020 statutory deadline." ER 59. In a departure from its general refusal to consider documents created after August 3, the court also cited a few more recent statements expressing doubt about being able to meet the September 30 deadline for completing fieldwork because of natural disasters and other issues. ER 61.

Second, the court reasoned that the rationale for adopting the Replan Schedule—seeking to satisfy the December 31 deadline—ran "counter to the evidence before the agency," because the President and employees of the Department and the Bureau had previously stated that they would not be able to satisfy the December 31 deadline. ER 59 (quotation omitted); *see* ER 59-60. Third, the court found that the government "failed to consider an alternative" and did not "'appreciate the full scope of [its] discretion'"—again, because the court thought that the

government had given insufficient consideration to missing the December 31 deadline. *Id.* at 64 (quotation omitted). Fourth, the court concluded that the government "failed to articulate a satisfactory explanation for its decision to adopt the Replan," *id.* at 68, because its August 3 press release "never explain[ed] why Defendants are 'required by law' to follow a statutory deadline that would sacrifice constitutionally and statutorily required interests in accuracy," *id.* at 70. Fifth, the court found that the government improperly "failed to consider the reliance interests of [its] own partners, who relied on the October 31 deadline and publicized it to their communities." *Id.* at 71.

Turning to the remaining preliminary-injunction factors, the district court found that plaintiffs likely would suffer irreparable harm without an injunction because an inaccurate census could result in errors in the distribution of federal funds and incorrect apportionment. The court further stated that plaintiffs would need to expend resources to respond to the Replan Schedule, and that local-government plaintiffs will face increased costs because they "rely on accurate granular census data to deploy services and allocate capital." ER 74. The court concluded that the balance of the hardships and the public interest tipped in plaintiffs' favor because "missing a statutory deadline [that the government] had expected to miss anyway[] would be significantly less than the hardship on Plaintiffs." *Id.* at 75.

The district court "stayed" the "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 it further enjoined the government "from implementing these two deadlines." ER 78. The court also denied the government's request for a stay pending appeal. ER 120.

c. On September 28, the Secretary announced October 5 as a revised target date for concluding field operations. U.S. Census Bureau, 2020 Census Update (Sept. 28, 2020)[2]; *see* ER 129, 134. In the Bureau's estimation, that schedule would have allowed the Bureau to resolve at least 99% of addresses in at least 40 and as many as 49 States, with the rest at 96.6% or higher, while also allowing the Secretary to submit the tabulation of population to the President on December 31. *See* ER 221-25. (As it turned out, as of October 5 the Bureau had resolved at least 99% of addresses in 44 States plus D.C., with the rest at 97.6% or higher.[3])

Later on September 28, the district court opined at a hearing that it would be a violation of the injunction even "to *propose* a new data collection schedule that is predicated on an enjoined December 31st date." ER 204; *see* ER 214-15. Following the production of a new "administrative record" about the revised target date and further briefing, the court entered an order clarifying that its injunction requires "immediate reinstatement of the . . . deadlines of October 31, 2020 for data collection

[2] https://www.census.gov/newsroom/press-releases/2020/2020-census-update.html

[3] https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-10-06.pdf

and April 30, 2021 for reporting the tabulation of total population to the President." ER 103.

d. The day after the district court entered the preliminary injunction, the government noticed this appeal and sought a stay pending appeal and an administrative stay from this Court. *See* ER 278. On September 30, a divided motions panel of this Court denied the motion for an administrative stay. *National Urban League v. Ross*, __ F.3d __, 2020 WL 5815054 (9th Cir. 2020). On October 7, a different motions panel stayed the portion of the preliminary injunction that expressly orders the government to violate the December 31 statutory deadline, acknowledging that "[s]erious separation of powers concerns arise when a court seeks to override a congressional directive to an Executive Branch agency," and emphasizing that those concerns were "of great import to our balancing of the equities." *National Urban League v. Ross*, __ F.3d __, 2020 WL 5940346, at *8 (9th Cir. 2020). The panel declined, however, to stay the rest of the injunction—thus requiring the Bureau to continue field operations through October 31, despite appearing to recognize that would as a practical matter preclude meeting the December 31 deadline. *Cf. id.* at *7. The panel concluded that plaintiffs were likely to succeed on their APA claim that the agencies failed to consider disregarding that deadline in pursuit of increased accuracy. *Id.* at *4-5. In so holding, the panel stated that plaintiffs were likely to succeed in demonstrating that the Replan Schedule is final "agency action" subject to review under the APA. *Id.* at *3-4.

On October 13, the Supreme Court granted a stay of the district court's injunction in full pending this appeal and any subsequent proceedings in the Supreme Court. *Ross v. National Urban League*, __ S. Ct. __, No. 20A62, 2020 WL 6041178 (2020). The Bureau immediately began winding down field operations, which ended on October 15.[4] At that point, the Bureau had enumerated 99.9% of households nationwide, as well as 99.9% of households in 49 States plus D.C. and Puerto Rico, and 99.0% in the remaining State.[5]

SUMMARY OF ARGUMENT

As the record in this case makes clear, the Census Bureau has at every point acted to ensure the most accurate census possible within the timeframe prescribed by statute. The district court did not question that the schedule adopted on August 3 was reasonably calculated to achieve that goal. Nor did it find that the Bureau acted arbitrarily and capriciously *given* the binding, lawful, and express statutory deadline. It held, however, that the Bureau acted arbitrarily and capriciously in developing a schedule based on the assumption that it must strive to meet the timetable established by Congress. On this basis, the court issued an injunction that, per the court's later clarification, required "immediate reinstatement of the COVID-19 Plan's deadlines of

[4] https://www.census.gov/newsroom/press-releases/2020/2020-census-data-collection-ending.html

[5] https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-10-17.pdf

October 31, 2020 for data collection and April 30, 2021 for reporting the tabulation of total population to the President." ER 103.

But even if each adoption of a schedule change were reviewable as discrete final agency action, as the district court mistakenly believed, its ruling is without basis. The court expressly declined to consider plaintiffs' claim that compliance with the statutory dates would violate the Enumeration Clause, and it had no authority to require the agencies to flout constitutional congressional directives. The court would have preferred that Congress extend the census time frame, as Commerce and the Bureau proposed. But it cannot review congressional inaction by compelling agencies to disregard the law and by micromanaging internal agency milestones and dynamic operations. In doing so, the court permitted the type of "programmatic attack" on an agency's operations that should be made in "the halls of Congress, where programmatic improvements are normally made," rather than by "court decree." *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 64 (2004).

In issuing its order, the district court focused on the injuries that plaintiffs would purportedly suffer if field operations did not continue to October 31. But there was no judicially manageable standard against which to make that assessment, which in any event was wrong, as confirmed by subsequent developments. At the conclusion of field operations on October 15 after the Supreme Court's stay, the Bureau had achieved a 99% enumeration rate in every State, including at least 99.9% in 49 States, and a 99.9% rate nationally. Plaintiffs thus have demonstrated no

harm—much less irreparable harm—connected to the end of field operations. And plaintiffs have provided no evidence of irreparable injury that would result in the absence of an injunction at this point, and any speculative injury they could assert would be outweighed by the frustration of the statutory schedule and by the "[s]erious separation of powers concerns [that] arise when a court seeks to override a congressional directive to an Executive Branch agency." *National Urban League*, 2020 WL 5940346, at *8.

STANDARD OF REVIEW

This Court reviews the district court's grant of a preliminary injunction for abuse of discretion. *DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011). Within this inquiry, "[t]he district court's interpretation of the underlying legal principles . . . is subject to de novo review[,] and a district court abuses its discretion when it makes an error of law." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

ARGUMENT

I. The District Court Fundamentally Erred in Ordering the Census Bureau to Defy Unambiguous and Constitutional Statutory Deadlines.

To obtain a preliminary injunction, plaintiffs were required to demonstrate that they are "likely to succeed on the merits," that they are "likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def.*

Council, 555 U.S. 7, 20 (2008). The last two considerations "merge" where the government is a defendant. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). The "most important" of these considerations is likelihood of success on the merits, and where a plaintiff cannot satisfy this "threshold inquiry," the Court need not consider the remaining factors. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). Because plaintiffs here have no likelihood of success on the merits, and the remaining injunction factors favor the government in any event, the district court erred in entering a preliminary injunction.

A. The Department of Commerce and the Census Bureau Acted Reasonably in Striving to Comply With a Constitutional and Unambiguous Set of Statutory Deadlines

1. The Constitution provides that the "actual Enumeration" of the population shall be conducted "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3. As the Supreme Court has explained, this textual assignment grants Congress "virtually unlimited discretion" to "conduct[] the decennial" census. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). Congress largely has delegated that "wide discretion" to the Executive Branch, *id.* at 23, imposing only an implicit "duty to conduct a census that is accurate," *Department of Commerce v. New York*, 139 S. Ct. at 2551, 2569 (2019) (quotation omitted), without specifying any particular standard of "accuracy," *cf. Wisconsin*, 517 U.S. at 19-20. Indeed, the Census Act does not specify a minimum or maximum duration for the Bureau's field data collection operations; does not set a particular date on which those operations must end; does not mandate any

specific schedule or process for engaging in post-collection data processing activities; and does not prescribe metrics for determining whether census operations (as a whole or in any particular State or area) are "complete."

By contrast, Congress has explicitly specified a series of interlocking deadlines for completion of the census. As relevant here, Congress has expressly required that "[t]he tabulation . . . shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States," 13 U.S.C. § 141(b)—meaning by December 31. *See id.* § 141(a) (establishing April 1 as the "census date"). The Commerce Department and the Census Bureau have never questioned their obligation to meet the sequence of statutory deadlines established by Congress. In responding to the COVID pandemic and Congress's refusal to extend the statutory deadline, the Bureau's conduct was not only lawful but easily satisfies the standards for arbitrary and capricious review. The district court recognized "that the Census Act's statutory deadlines bind" the Bureau. ER 68. The court did not conclude that the deadlines are unconstitutional as applied, expressly declining to reach the merits of plaintiffs' Enumeration Clause claim. ER 44. The court also did not question the Bureau's conclusion that that the Replan Schedule was the best course of action available to the agency in attempting to conduct the most accurate census possible within the time constraints established by Congress. Indeed, neither plaintiffs nor the court have identified *anything* the Bureau did that was unreasonable or arbitrary or capricious—or even anything more the Bureau should have done—*given* its obligation

to meet the statutory deadline. In short, the Bureau has made every reasonable effort to achieve an accurate census within the time frame imposed by binding, constitutional commands of Congress. That simple fact defeats plaintiffs' APA claims and undermines the court's entire rationale for the injunction.

2. The district court nevertheless held that the Bureau had acted arbitrarily and capriciously because it adopted the Replan Schedule to "meet[] the Census Act's statutory deadline," ER 47, without considering whether possible gains in completeness from adherence to the COVID Schedule (which was conditioned on a statutory amendment that never materialized) or a similar timetable would outweigh the Bureau's duty to attempt to meet the framework established by Congress. Each of the five reasons offered by the court to justify its ruling is a variation on the conclusion that the agency was insufficiently attentive to the possibility of disregarding the timetable Congress established. *See, e.g.*, ER 47 (in adopting the Replan Schedule to "meet[] the Census Act's statutory deadline," the agency "failed to consider how Defendants would fulfill their statutory and constitutional duties to accomplish an accurate count on such an abbreviated timeline"); ER 64 (agency acted arbitrarily and capriciously by "sacrific[ing] adequate accuracy for an uncertain likelihood of meeting one statutory deadline"); ER 70 (concluding that the agency's announcement of the Replan Schedule "never explains why Defendants are 'required by law' to follow a statutory deadline that would sacrifice constitutionally and statutorily required interests in accuracy").

The district court did not explain how it could be arbitrary and capricious to aim to comply with a binding, constitutional statutory command. Indeed, a statutory deadline is not an "agency action" subject to review under APA standards that can be "postpone[d]" as unreasonable in the first instance. The court may have believed that it was unreasonable for *Congress* not to amend the governing statutes in light of the pandemic. But that cannot render the *agencies'* actions in compliance with the existing statutory scheme arbitrary and capricious.

The APA authorizes courts to review final agency action to determine whether it is "not in accordance with law." 5 U.S.C. § 706(2)(A). It does not authorize a court to require an agency to act "not in accordance with law." In partially granting the government's request for a stay, this Court noted that "[s]erious separation of powers concerns arise when a court seeks to override a congressional directive to an Executive Branch agency." *National Urban League v. Ross*, __ F.3d __, 2020 WL 5940346, at *8 (9th Cir. 2020). If anything, that observation *understates* the seriousness of the separation-of-powers concerns that would arise if courts were, in fact, authorized to issue orders like the one the district court issued here. The order here precludes Congress from exercising its constitutional prerogative to establish the conduct of the census, and precludes the Executive Branch from seeking to comply with constitutional legislative directives. Indeed, the utter lack of authorization for such an order demonstrates that the court should not have entertained this claim from the start. A plaintiff's claims are not redressable where "a federal court lacks the

power to issue" the "relief that would redress her claimed injury." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). Because any injury to plaintiffs here stems from the lawful and binding statutory deadlines set by Congress, which the district court was without authority to set aside, plaintiffs' alleged injuries cannot be redressed without measures that "are beyond the district court's remedial power to issue." *Id.*; *see National Urban League v. Ross*, __ F.3d __, 2020 WL 5815054, at *9-10 (9th Cir. 2020) (Bumatay, J., dissenting).

The district court cited no case in which a court had invoked its power to review agency action under the APA to order an agency to violate an unambiguous and constitutional statutory requirement. The court instead relied on inapposite cases holding either that an agency does not necessarily lose authority to implement a statute when it exceeds statutory deadlines, or that attempts to compel agency action as unlawfully withheld do not succeed simply because an agency has not acted by the date prescribed by statute. ER 64-66. The courts in these cases examined the governing statutes to determine whether the statutory deadline was properly interpreted to deprive the agency of authority to take action after the statutorily prescribed date. In no case did a court conclude that it could authorize—much less require—agency action that clearly was not authorized by Congress itself.

The district court relied, for example, on cases holding that an agency does not necessarily lose authority to implement a statute after it exceeds a deadline. But in those cases the conclusion that agency action was authorized outside the statutory

timeframe turned on the statute itself. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 152, 161 (2003) (relying on "[s]tructural clues . . . in the Coal Act" in finding that the Commissioner of Social Security had authority to assign retirees for the purposes of retiree benefits after the statutory deadline); *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1304-1305 (D.C. Cir. 1991) (finding that the EPA could add hazardous waste sites to the National Priority List after a statutory deadline where "[o]ur own review of the legislative history . . . suggests that Congress would not have wanted to revoke EPA's authority to list sites."); *Newton Cty. Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 112 (8th Cir. 1997) (finding that the statute did not require the Forest Service to suspend implementation of timber sales when it failed to complete a related task by the statutory deadline). Other cases reviewed and found reasonable an agency's failure to abide by a statutory deadline after the deadline had passed. *See National Cong. of Hispanic Am. Citizens v. Marshall*, 626 F.2d 882, 884, 888 (D.C. Cir. 1979) (reviewing, after the fact, OSHA's failure to comply with a statutory timeline for completing an agency rulemaking once it had commenced entirely on the Secretary's initiative). And the remaining cases involved court-imposed deadlines set after agencies missed statutory deadlines. *See, e.g., Environmental Def. Fund v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988).

The district court's reliance on the Supreme Court's decision in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), was similarly misplaced. The court understood the decision to demonstrate that an agency

has an obligation to consider whether it should ignore "binding law" that would otherwise "compel[]" the agency to act. ER 68. But *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. The agency program at issue there—the Deferred Action for Childhood Arrivals (DACA) program—both conferred certain benefits (such as work authorization) and withheld certain adverse actions (such as forbearance in instituting removal proceedings). *Regents*, 140 S. Ct. at 1911. The Court concluded 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; *see id.* at 1912 ("[R]emoving benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke."). That reasoning in no way supports the conclusion that the APA requires an agency to consider violating a statutory directive that the court recognizes to be binding and lawful, much less that a court may compel an agency to disregard that directive.

B. The District Court Identified No Respect in Which the Bureau's Actions Fail to Meet Statutory or Constitutional Standards

In holding that the Census Bureau was required to weigh the duty to respect the statutory time frame against other considerations, the court repeatedly cited the

Bureau's "statutory and constitutional duties to accomplish an accurate count." Add.47; *see* Add.47-48, 64, 66, 68.

The court's reference to "constitutional duties" is particularly anomalous in light of the court's express statement that it would not address plaintiffs' Enumeration Clause argument. ER 44. Had it addressed that argument, it would have been required to acknowledge the absence of any ground for concluding that the current schedule will produce an outcome that fails to meet a constitutionally (or statutorily) prescribed standard of accuracy. The Supreme Court has stated that there is a "strong constitutional interest in accuracy," *Utah v. Evans*, 536 U.S. 452, 455-56 (2002), and that the Census Act "imposes a duty to conduct a census that is accurate," *Department of Commerce*, 139 S. Ct. at 2569 (quotation omitted). Yet there is no specified standard for the requisite level of accuracy. The Supreme Court has expressly declined to infer "a requirement that the Federal Government conduct a census that is as accurate as possible," explaining that "[t]he Constitution itself provides no real instruction" on what metrics to use to measure "accuracy" in the census. *Wisconsin*, 517 U.S. at 17, 18; *see Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417 (7th Cir. 1992).

The district court did not identify any standard of accuracy in either the Enumeration Clause or the Census Act, and, as noted, did not declare that the statutory deadlines were unconstitutional. Nor could it have; the appropriate degree of "accuracy" in the census is a political question, and "[v]irtually all of the factors" the Supreme Court has noted for identifying such questions dictate that conclusion.

National Urban League, 2020 WL 5815054, at *9 (Bumatay, J., dissenting). For example, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962): Congress has responsibility for conducting the census "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. And no "judicially discoverable and manageable standard[]" exists for evaluating whether a particular census conducted under Congress's authority is sufficiently accurate. *Baker*, 369 U.S. at 217; *see Tucker*, 958 F.2d at 1417 (neither the Enumeration Clause nor the Census Act "contain[s] guidelines for an accurate decennial census" that might suffice for a "judicially administrable standard" of accuracy); *cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (concluding that "[a]ny judicial decision on what is 'fair'" in the context of partisan gerrymandering claims "would be an unmoored determination of the sort characteristic of a political question beyond the competence of the federal courts" (quotation omitted)). The district court thus had no basis to find that the Bureau's plans fell short of some undefined standard of completeness or accuracy, and could not have so found without exceeding its proper judicial role.

Moreover, the district court (correctly) did not question that the Census Bureau has acted reasonably to fulfill its duty to conduct an accurate census *within* the express deadlines set by Congress. There necessarily is a tradeoff between duration and completeness or accuracy; Congress has explicitly specified the former, but refused to impose any explicit standard for the latter, instead delegating to the Executive Branch

the duty to conduct an accurate census within the time constraints that the statute imposes. That is precisely what the Bureau did here; as it explained in announcing the Replan Schedule, that Schedule was designed to "improve the speed of our count without sacrificing completeness," to "meet a similar level of household responses as collected in prior censuses," and to "achieve an accurate count" while completing "data collection and apportionment counts by our statutory deadline." ER 227-28. And reality has vindicated the Bureau's efforts: by October 5, when the Bureau planned to end field operations, 99.7% of households nationwide had been enumerated, with that number rising to 99.9% by the time field operations finally ended after the Supreme Court's stay.

Despite the lack of any judicially manageable standard, the district court repeatedly stated that the Bureau had "sacrificed adequate accuracy" in adopting the Replan or chosen to "generate results that were . . . 'fatally' or 'unacceptably' inaccurate," ER 64; *accord* ER 49-51, 58-59. In doing so, the district court referenced the Bureau's internal objective of achieving a 99% enumeration rate in each State, ER 11, 15, 55-56, and relied on predictions by Bureau staff before the Replan Schedule was developed or implemented, ER 48-53, 59-61. But the district court did not explain how those internal judgments by subordinate officials at the Bureau could be converted into a constitutional or statutory standard of completeness or accuracy. It is for Congress, and the Secretary exercising delegated discretion, to determine the manner in which the census is to be conducted, including the tradeoffs between the

available time for census operations and accuracy or completeness. *See Wisconsin*, 517 U.S. at 19, 23. And had the court also fully considered the views of the Bureau in the course of the development and implementation of the Schedule, it would have learned that in developing the Schedule the Bureau "evaluated the risks and quality implications of each suggested time-saving measure and selected those that [it] believed presented the best combination of changes to allow [it] to meet the statutory deadline without compromising quality to an undue degree." ER 176; *see* ER 176-80. The court similarly declined to consider the statistics reflecting the extent to which the schedule in fact permitted the Bureau to achieve its goals. For example, while only 63% of households had responded to the census as of August 3 (when the Bureau announced the schedule adjustment), ER 228, by the end of September 24 (when the court entered the preliminary injunction), the Bureau had enumerated 97.0% of all households nationwide.[6] That figure climbed daily, and as noted above, the Bureau ultimately achieved a 99.7% enumeration rate nationally and 99% in 44 States by October 5, when the Bureau would have ended field operations absent the injunction[7]; and a 99.9% enumeration rate nationally as well as in 49 States (and

[6] https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-25.pdf

[7] https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-10-06.pdf

99.0% in the sole outlier) by October 15, when field operations concluded.[8] Those rates are comparable to or exceed recent censuses. For example, the 2010 census enumerated approximately 99.6% of households nationwide, and in the 2000 census, only 45 States reached 99% enumeration. ER 122.[9] The court's reliance on statements that predated the development and implementation of the Replan Schedule underscores the absence of any basis for the court's assertions that the Bureau abdicated its responsibilities and also reflect the court's error in isolating one moment in a dynamic process as "final agency action" such that it could override Congress's expressly mandated timetable.

C. In Directing the Conduct of the Census, the District Court Did Not Review Discrete Final Agency Action and Instead Issued Programmatic Relief

1. As the previous discussion illustrates, the district court's errors stemmed in part from the mistaken premise that the adoption of the Replan Schedule was the kind of discrete action reviewable under the APA. Without regard to the overall design and conduct of the Census, the court isolated a schedule change as discrete

[8] https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-10-17.pdf.

[9] As the cited declaration explains, the Bureau did not publish NRFU enumeration rates in prior censuses. However, a "good approximation" of past NRFU results can be obtained by applying the inverse of the percentage of households for which the Bureau used count imputation (a statistical technique that fills in results for non-responsive households). ER 122-23. For example, count imputation was used for 0.4% of households in the 2010 census, which equates to a 99.6% enumeration rate—three-tenths of a point lower than the 2020 census. *Id.*

action that it could properly review, and faulted the Bureau for failing to develop the type of administrative record that would accompany such an action. And it then proceeded to regard all events subsequent to the adoption of the schedule as "post hoc" and therefore irrelevant to orders that it would issue to direct the remaining months of the census.

The court's decision cannot be reconciled with the Supreme Court's explanation that to qualify as an "agency action," 5 U.S.C. § 551(13), the matter at issue must be a "circumscribed, discrete agency action[]" that exhibits a "characteristic of discreteness." *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 62-63 (2004); *see Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891, 893 (1990). This requirement "precludes" a "broad programmatic attack" on an agency's operations; complaints of that sort must instead be made in "the halls of Congress, where programmatic improvements are normally made," rather than remedied by "court decree." *Southern Utah*, 542 U.S. at 64 (quotation omitted). That is precisely the situation here. Plaintiffs asked the district court to re-direct the staggeringly complex operation of the decennial census on the ground that the Census Bureau should have adhered to the COVID Schedule, which had been predicated on a Congressional extension of governing deadlines. That is a complaint to be made in "the halls of Congress."

The district court concluded that the Replan Schedule constituted discrete "agency action" because the schedule had a name (the Replan Schedule), was summarized in a PowerPoint slide deck, and was described in a press release. ER 31.

But a name and a summary do not transform a schedule change into discrete agency action. The term "Replan Schedule" thus "does not refer to a single . . . order or regulation, or even to a completed universe of particular . . . orders and regulations"; it instead "refer[s] to the continuing (and thus constantly changing) operations" of the Bureau, which means that it is "no[t] . . . an identifiable 'agency action.'" *Lujan*, 497 U.S. at 890.

That is plainly the case here. The Replan Schedule, like the COVID Schedule and the 2018 Operational Plan that preceded it, was not a circumscribed, discrete agency action. *See NAACP v. Bureau of the Census*, 945 F.3d 183, 191 (4th Cir. 2019) (rejecting challenge to the 2018 Operational Plan because it failed to challenge discrete "agency action"). Rather, it was a collection of individual judgments by the Bureau about how to conduct the dauntingly complex operations of the decennial census, all subject to constant revision based on new data, time and resource constraints, and changes in conditions on the ground.

The aspirational COVID Schedule—adopted to address changing conditions on the ground not foreseen by the original operational plan—itself underwent various dynamic revisions in response to new developments. In July, for example, the Bureau altered which of its field offices would begin a "soft launch" of Non-Response Followup operations "[a]s the plan developed" in response to continued challenges related to the COVID-19 pandemic. ER 178. In addition, "as the pandemic controls began to be lifted, and [the Bureau's] concerns over lack of action on" a statutory

extension grew, the Bureau decided to begin Non-Response Followup operations in all areas "that could meet the safety, health, and staffing requirements" "in advance of the initial planned start date" under the COVID Schedule. *Id.*

The press release announcing the Replan Schedule, too, noted that the details of census operations are subject to continuous revision. The press release explained that the Bureau was "updat[ing] . . . our plan . . . to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce." ER 227. It emphasized that the Bureau's "operation remains adaptable and additional resources will help speed our work" and that the Bureau "will continue to analyze data and key metrics from its field work to ensure that our operations are agile and on target for meeting our statutory delivery dates." ER 228. And both the Replan Schedule and the COVID Schedule addressed far more than just the dates for Non-Response Followup and post processing; those schedules adjusted myriad other internal Bureau operations that form part of the census. *E.g.*, ER 176-77 (discussing the "Group Quarters" and "Service Based Enumeration" operations). Moreover, the Bureau announced on September 28 that it intended to conclude field operations on October 5, and that this shift would enable the Bureau to meet its December 31 deadline while increasing enumeration rates in some lagging States. ER 221-25.

In sum, a target date for completing field operations is a provisional aspiration that formed part of a constellation of other determinations. As the Fourth Circuit

explained in rejecting other claims regarding the adequacy of plans for the 2020 census, a challenge to the interrelated decisions that make up the "design choices" of the census does not challenge "agency action" under the APA. *NAACP*, 945 F.3d at 191. Indeed, not only do none of the myriad schedule and operational changes constitute agency action, but they plainly are not *final* either, because they do not represent the "'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). That is still further reason the district court erred in subjecting the Replan schedule to APA review.

2. As the Fourth Circuit also recognized, treating the complex of operations that make up the decennial census as agency action "inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations." *NAACP*, 945 F.3d at 191; *see also Center for Biological Diversity v. Veneman*, 394 F.3d 1108, 1112 (9th Cir. 2005) (a court's decision to "enter general orders 'compelling compliance with broad statutory mandates' … result[s] in 'injecting the judge into day-to-day agency management' and raises the 'prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives.'" (quoting *Southern Utah*, 542 U.S. at 66-67)).

The district court paid lip service to these principles, insisting that it was not undertaking "to manage the Bureau's day-to-day operations or to enforce free-floating standards of 'sufficiency.'" ER 30. But the court's conclusion that the Bureau should have preferred one schedule over another and that it gave insufficient consideration to

unspecified standards of accuracy or completeness marked just such an intervention. The Bureau, not the district court, bears responsibility for the multifarious operations entailed in conducting the census. The court did not question that the Replan Schedule was designed to achieve the best results within the allotted time frame, but it substituted its own judgment as to the necessary length of field operations, and did so by dismissing the statutory deadline and without even considering the actual progress made and results produced under the Replan Schedule. *Cf. Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

Similarly, when the Bureau announced that it intended to adjust the end date of field operations to October 5 based on its success in completing Non-Response Followup operations and data suggesting that it could achieve its internal goals by that date and still comply with the December 31 deadline, the district court insisted that any effort by the Bureau to comply with Congress's directives was impermissible, and clarified that its order required the Bureau to remain in the field until October 31. ER 97, 107, 108; *see* ER 204 ("It's a violation of the order to *propose* a new data collection schedule that is predicated on an enjoined December 31st date." (emphasis added)). Thus, regardless of the Bureau's own judgments about when its operations were complete or the best allocation of its resources between field operations and post

processing, the Bureau would be prevented from making further adjustments to its operations without the court's permission.

The court's enforcement of its injunction and temporary restraining orders underscored the extent of its intrusion into the day-to-day operations of the census. While the TRO was in effect, the district court effectively made itself a clearinghouse for complaints from any one of the over 200,000 enumerators in the field, and ordered the Bureau to respond to employment complaints that it received. Doc.127, at 1, 2; ER 271-74. It also required the Bureau to address complaints submitted by individual enumerators about alleged software glitches that predated the temporary restraining order. Doc.127, at 1, 2; ER 272-74. And it required the Bureau provide it with information about how the Bureau was responding to wildfires in Western states. Doc.127, at 3; ER 274.

The court continued that pattern of intrusive oversight after issuing its preliminary injunction. The court posted to the public docket a plethora of messages it received from enumerators and others, many anonymous. Doc.214, 220, 221, 222, 229, 230, 231, 235, 238, 248, 249, 250, 252, 254, 257, 262, 268, 270, 271, 272, 273, 276, 281, 285, 287, 294, 301, 309, 315, 316, 317, 318, 319, 324, 325, 327, 328, 332, 333, 335, 336, 338. Some of these messages contained information from the Bureau's internal systems that the Bureau is required by law to keep confidential. *See* ER 248, 264. The court repeatedly directed Bureau staff to respond to these often vague complaints, often on extraordinarily short timeframes and without regard to the

burden that such responses places on the personnel charged with administering the census. Doc.215, 220, 221, 224, 229, 238, 255, 258, 263, 269, 274, 289, 291, 302, 322, 337. Through these orders, the district court required the Bureau to address matters such as the return of unused electronic devices, ER 243-44; complaints about the travel, termination, or pay of specific enumerators, ER 238-39, 239-40, 254, 255, 256, 259, 265-66; vague concerns about lack of completion in certain areas, ER 250, 251, 254, 255, 260, 261; and complaints that statements made by the Secretary in an interview were not accurate (based on the enumerator's erroneous understanding of Bureau policies), ER 239. Addressing these granular complaints about census operations and explaining how those operations were consistent with the district court's view of the Bureau's responsibilities absorbed substantial resources that otherwise would have been directed to completing the census, ER 236, and illustrate the sort of "day-to-day agency management" and "pervasive oversight by federal courts" that the requirement of discrete agency action prevents. *Southern Utah*, 542 U.S. at 66-67.

II. The Remaining Injunction Factors Favor the Government

For the reasons discussed above, plaintiffs have no likelihood of success on the merits. As a result, this Court "need not consider" the other preliminary injunction factors. *Garcia*, 786 F.3d at 740. In any event, the district court's assessment of the equities was mistaken at the time, and is all the more anomalous in light of the Bureau's ultimate success in enumerating 99.9% of households nationwide.

The district court believed that plaintiffs had demonstrated irreparable harm flowing from a potentially less accurate census, including potential loss of federal funds and political representation from undercounting. ER 74. As noted, the court made this assessment without regard to evidence on the implementation of the Schedule. Plaintiffs' alleged harms—and the district court's analysis—focused on the possible effects of ending field operations before October 31. *E.g.*, ER 24-26, 74-75. The Bureau completed field operations on October 15 having enumerated 99.9% of households nationwide, as well as 99.9% of households in 49 States plus D.C. and Puerto Rico, and 99.0% percent in the remaining State.[10] That is on a par with prior decennial censuses. *See supra* pp. 30-31, 31 n.9. The assertion that field operations were required to continue until October 31 in the name of some undefined notion of "completeness" is thus clearly incorrect, and plaintiffs can demonstrate no harm from the conclusion of field operations before the October 31 end date targeted by the COVID Schedule.

The district court briefly suggested that plaintiffs might also suffer harms resulting from decreased accuracy of the now-ongoing post-processing operation. *See* ER 26 (suggesting that some plaintiffs might suffer a representational injury from "rushed data processing"). But whether post processing will result in any inaccuracies is speculative; the results of that process will not be known until the Bureau completes

[10] https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-10-17.pdf

its work. As the motions panel observed in staying the injunction in part, there is no indication of immediate irreparable injury to plaintiffs "from governmental attempts to meet the December 31 date," and any alleged injuries that result from post-processing efforts can be addressed if and when they occur. *National Urban League*, 2020 WL 5940346, at *7. But such speculation of future injury certainly cannot be a basis for finding irreparable harm to uphold *this* injunction.

General claims of decreased accuracy would, in any event, not be a basis for finding irreparable harm. To the extent that plaintiffs allege possible injury related to a change in apportionment or federal funding, they can show irreparable injury only by demonstrating that (1) there likely would be *differential* inaccuracies that affect the communities they represent relative to other communities in their States and across the country, and (2) such differential effects are likely to have an actual impact on apportionment and federal funding. But plaintiffs have demonstrated no such likelihood and thus face only an inadequate abstract "possibility" of irreparable injury. *Winter*, 555 U.S. at 22.

On the other side of the balance, the district court failed to appreciate the gravity of the injury to the government—and, therefore, to the public interest, *see Nken v. Holder*, 556 U.S. 418, 435 (2009)—resulting from its injunction. The injunction's requirement that field operations be extended through the end of October, to say nothing of the court's micromanagement of census operations over the course of nearly six weeks, prohibited the Bureau from exercising its expert

judgment in how to conduct the census and impeded its ability to most efficiently allocate its resources to achieve an accurate enumeration while striving to meet the statutory deadline. The court reasoned that its order would simply cause the government to "miss[] a statutory deadline [it] had expected to miss anyway." ER 75. But the Bureau had developed a reasonable schedule to meet the statutory deadlines, *see* ER 221-25; ER 218-19, and the district court provided no basis to second-guess that schedule. Nor did the court grapple with the fact that even apart from the *per se* harm of missing the December 31 deadline, each additional day of delay jeopardized the subsequent deadlines, such as the President's delivering the apportionment to Congress and the Bureau's providing the States redistricting data, *see* 2 U.S.C. § 2a(a); 13 U.S.C. § 141(c).

At all events, any speculative harms to plaintiffs cannot outweigh the "[s]erious separation of powers concerns [that] arise when a court seeks to override a congressional directive to an Executive Branch agency," which are of "great import to [the] balancing of the equities." *National Urban League*, 2020 WL 5940346, at *8.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants state that they know of no related case pending in this Court.

s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Ninth Circuit Rule 32-1(a) because it contains 10,359 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

s/ Brad Hinshelwood
Brad Hinshelwood

ADDENDUM

TABLE OF CONTENTS

2 U.S.C. § 2a

§ 2a. Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

13 U.S.C. § 141
§ 141. Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which

information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1) If--

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census--

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.