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, JR., et al.,

Defendants-Appellants,

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution vests Congress with the power to direct the manner in which the decennial enumeration shall be taken, and Congress has expressly and unconditionally required a tabulation of the enumeration by December 31. If this Court acts promptly to halt the district court's intrusion on a non-final, non-discrete administrative process, the Census Bureau would be able to complete its work by that deadline, especially given that 99.3% of households nationwide have been enumerated as of October 2, 2020.[1]

Yet the district court has enjoined the Bureau from meeting that deadline. In clarifying its injunction, the court declared: "It's a violation of the order to *propose* a new data collection schedule that is predicated on an enjoined December 31st date." 9/29 Tr. 20:19-21 (emphasis added). The Bureau is thus barred from taking any steps, even contingent ones, to meet Congress's timetable.

The court's ruling rests not only on the mistaken premise that the Bureau may disregard the statutory deadline, but also on the astonishing premise that it is arbitrary and capricious *not* to consider disregarding it. But the Bureau may not lawfully ignore the statutory deadline. Nor does the Administrative Procedure Act, even if it were available, authorize courts to compel an agency to act contrary to law. Plaintiffs offer no serious response to those dispositive points.

[1] https://2020census.gov/en/response-rates/nrfu.html.

Plaintiffs also err in insisting that the Bureau has acknowledged that it cannot meet the statutory deadline with a census that would be accurate. As plaintiffs do not dispute, no court has ever identified standards of required accuracy, and the Supreme Court has 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 v. City of New York,* 517 U.S. 1, 17, 18 (1996). Nor have plaintiffs demonstrated that, if the injunction were stayed, the Bureau would fail to achieve the accuracy levels of prior censuses. To the contrary, record evidence demonstrates that the Bureau developed a schedule it reasonably determined would produce an accurate census, and its projections have been borne out by actual events, despite natural disasters, a pandemic, and unprecedented interference in the day-to-day operations of the census.

Given the high likelihood that the government will ultimately prevail on the merits, the government and the public will suffer irreparable harm absent immediate relief. If the government is required to maintain census field operations until October 31, it will be impossible to meet the December 31 reporting deadline without seriously compromising the data processing that further ensures census accuracy—a deadline that record evidence demonstrates the Bureau otherwise anticipates being able to meet, contrary to plaintiffs' suggestion. On the other hand, plaintiffs fail to identify any reason why, in the event that this Court stays the injunction but ultimately affirms

it, the district court could not order the Bureau to resume field operations. To be sure, that would be an extraordinary order, but no less extraordinary than ordering the Bureau to violate a statute enacted by Congress pursuant to the Constitution. Accordingly, the balance of equites, like the merits, tilts decisively in favor of a stay.

ARGUMENT

A. The District Court's Order Is Premised On Clear Legal Error

1. In ordering the Bureau to violate the Census Act's mandatory December 31 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 "contrary to law" or "arbitrary" and "capricious." 5 U.S.C. § 706. But complying with that statutory requirement is the exact opposite of acting "contrary to law." Nor is it "arbitrary and capricious" for an agency to seek to comply with a statutory deadline whose validity the court did not question, and which the court also acknowledged was "bind[ing]" on the agency. Add.68. It is the court's order, not the Replan, that would cause the Bureau to act "contrary to law." Similarly, plaintiffs do not try to explain how the court could invoke its statutory power to "postpone the effective date of an *agency action*," 5 U.S.C. § 706 (emphasis added), to "stay" a *statutory deadline* set by Congress.

Plaintiffs have likewise identified no case in which a court has invoked its APA powers to order an agency to miss an unambiguous statutory deadline. As discussed in our motion, the decisions cited by the district court (and referenced by plaintiffs,

Opp.14) concern asserted limitations on an agency's ability to take action after a date specified by Congress, or situations where plaintiffs sought to compel agency action subject to a statutory deadline. At most, those inapposite cases say that courts may ex post *permit* agencies to act beyond a specified date—not that they may ex ante *compel* agencies to *disregard* a statutory deadline.

Moreover, the courts in those cases examined the text and structure of the governing statutes to determine whether Congress meant to deprive the agency of authority to act beyond a specified date. Plaintiffs do not attempt that inquiry here. The text of the Census Act is unambiguous and unconditional, providing that "[t]he tabulation of total population by States … shall be completed within 9 months after the census date." 13 U.S.C. § 141(b). When it became apparent that Congress would not extend that deadline, the Bureau adopted a schedule designed to achieve an accurate census within the statutory period. The district court's willingness to disregard Congress's judgment about the statutory deadline is particularly anomalous because that deadline was legislated in the exercise of Congress's "virtually unlimited discretion" under the Constitution to "conduct[] the decennial" census. *Wisconsin*, 517 U.S. at 19.

Plaintiffs' misplaced reliance (Opp.11-13) on *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), underscores the absence of authority for their novel contention. *Regents* did not suggest that the Secretary of Homeland Security would have had authority to disregard an express statutory

command. Rather, it held that because the agency purportedly had questioned the lawfulness of only one aspect of DACA (the associated benefits), the agency had failed to adequately consider the option of retaining the remainder (forbearance from removal). *Id.* at 1910-15. That reasoning in no way supports the conclusion that an agency must consider *violating* a statutory directive that is concededly binding and lawful.

Plaintiffs mistakenly assert that the district court could order the Bureau to violate Congress's timetable because "Defendants failed to sufficiently consider their (undisputed) constitutional and statutory duties to conduct an accurate census." Opp.16. Like the district court, plaintiffs identify no specific accuracy requirement in the statute, nor any judicially manageable standard for determining that "accuracy"—and tellingly ignore the Supreme Court's explanation that there exists "no real instruction" on that score, *Wisconsin*, 517 U.S. at 18. Instead, citing an inapposite case about "just and reasonable" ratemaking, *WorldCom, Inc. v. FCC*, 238 F.3d 449, 457-64 (D.C. Cir. 2001), plaintiffs urge that "the Census Act's requirement to conduct an 'accurate' census is no more amorphous than the myriad other standards courts use to assess agency compliance." Opp.16. But the fact that agencies must comply with vague standards imposed by Congress *within the statutory framework* does not support plaintiffs' position that courts may invoke a vague standard not even expressly articulated by Congress as the basis for requiring the agency to violate an *unambiguous and unconditional* statutory deadline.

To be sure, while complying with that deadline, the Bureau must act reasonably (which disposes of plaintiffs' strawman about conducting the census in a week with a single enumerator in each State, Opp. 17),[2] but plaintiffs have never even attempted to identify what is unreasonable about the Bureau's current plans, or how the Bureau could achieve a "better" census *within Congress's deadline*. Ultimately, plaintiffs summarily declare (Opp.17) that "application of the statutory deadline in these extraordinary circumstances would be unconstitutional." The district court correctly declined to reach that unprecedented conclusion, Add.44, and plaintiffs provide no explanation of how a deadline enacted by Congress could possibly violate the Constitution's mandate that "[t]he actual Enumeration shall be made … in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl.3; *see Wisconsin*, 517 U.S. at 18.

2. Plaintiffs also fail to come to grips with the district court's error in injecting itself into the protean process of conducting the census's plethora of constituent workstreams, let alone the scheduling of such operations. Plaintiffs mistakenly assert (Opp.9-10) that the Replan is "agency action" under the APA because it is a "rule," and that the government has "never argued otherwise." The government repeatedly and strenuously objected that the schedule was *not* final agency action of *any sort*. *See,*

[2] The statute governing the 1930, 1940, and 1950 censuses required that enumeration be completed in cities over 2,500 people within two weeks, and elsewhere within thirty days. Pub. L. No. 71-13, § 6, 46 Stat. 21, 23 (1929).

e.g., Doc.88, at 3; Add.45-46. Plaintiffs barely attempt (*cf.* Opp.10) to distinguish *Norton* v. *SUWA*, 542 U.S. 55, 62 (2004), which explains that only "circumscribed" and "discrete" agency actions are reviewable, or *NAACP* v. *Bureau of the Census*, 945 F.3d 183, 190 (4th Cir. 2019), which on that basis rejected a challenge to the Bureau's 2018 Operational Plan asserting that it "must be compelled to do more" to "ensure an accurate enumeration in the 2020 Census." As in previous censuses, the Bureau continually monitors and adjusts processes and timelines to react to changing conditions—such as the pandemic (leading to a temporary suspension of field operations) and the lack of an extension (leading to the September 30 and October 5 dates for completing field operations). That a collection of such adjustments could be captured in a single PowerPoint file and labeled a "Replan" (*see* Add.31) does not convert it into discrete and final agency action.

Plaintiffs likewise err in asserting that the injunction does not "require 'hands-on management' by the court." Opp.11. As plaintiffs concede (Opp.5), the census is a massively complex undertaking, including both field operations and downstream post processing. Yet under the district court's injunction, the Bureau must continue field operations until October 31—*no matter what*. Supp.Add.13-14. So even if enumeration activities are, in the Bureau's expert estimation, sufficiently complete before Halloween, the agency would be powerless to adjust its schedules and processes. The court's apparent belief that it should oversee the Bureau's responses to wildfires and even individual enumerator complaints is similarly illogical. *See, e.g.*,

Mot.17; Doc.278-1. That is precisely the sort of "day-to-day agency management" and "pervasive oversight … over the manner and pace of agency compliance" with "broad statutory mandates" that the Supreme Court has explained is impermissible. *SUWA*, 542 U.S. at 66-67.

B. A Stay Is Necessary to Halt an Injunction That Requires the Census Bureau to Defy a Congressional Deadline

Plaintiffs do not dispute that the injunction requires the Bureau to violate a statutory deadline, or that missing that deadline would be irreparable. Instead, they seem to invoke a form of harmless error, urging that "Defendants cannot meet the statutory deadline—they never could—so a stay will do nothing to alleviate the only harm they assert." Opp.8. That overlooks ample record evidence demonstrating the Bureau's belief that it could meet that deadline—*if* it obtains immediate relief from the injunction. *E.g.*, Doc.284-1, ¶¶2, 26; Doc.233 at 130. For their contrary assertion, plaintiffs chiefly rely on documents that predate the development of the Replan, some of which were made while lobbying Congress for an extension that never came. *See* Supp.Add.16-17 (cataloguing statements from April 13 to July 27).

But in developing the Replan, 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." Add.107, ¶82; *see* Add.107-11, ¶¶82-91. The Replan took advantage of various efficiencies in the design

of the 2020 census and the Non-Response Followup, such as software that maximizes enumerator effectiveness, and used financial incentives "to get the same work hours [from enumerators] as would have been done under the original timeframe." Add.109-10, ¶¶85-88. Plaintiffs provide no response to the efficacy of those measures.

Plaintiffs similarly err in their discussion of the efficiencies achieved in post-processing operations, once more relying on statements that preceded the Replan, and complaining that the Bureau has "never explained how data processing operations that originally required *six* months can be completed in less than *three*." Opp.7. But the record itemizes several measures allowing for completing an accurate census with a shorter post-processing period. The Bureau sought (*inter alia*) to "ensure maximum staff resource usage," adopted a "seven-day/week production schedule," and deferred certain address-processing activities beyond December 31. Add.110-11, ¶89. And the Bureau explained that it "is confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline following the Replan Schedule." Add.111, ¶91. The Bureau later explained how it could complete post processing in time for the deadline if it finished field operations on October 5 by deferring until after December 31 certain steps related to implementing a Presidential Memorandum addressing apportionment counts. Doc.284-1, ¶¶2, 26; *see, e.g.*, Doc.37-1 at 1 (explaining that the Replan would enable "completion of data collection and apportionment counts by our statutory deadline of December 31, 2020"); Add.111,

¶91; Doc.233 at 130 (September 25 email explaining that "clos[ing] out field work on 10/5 … allows us to meet the 12/31 deadline should that be reinstated on appeal").

On the other side of the balance, a stay will not cause irreparable harm to plaintiffs (in the form of an allegedly inaccurate census). As an initial matter, plaintiffs' insistence that the Bureau itself does not believe it can achieve an accurate census is incorrect. The Bureau recognizes that the shortened time frame could affect accuracy. *See* Supp.Add.17-18; *see also* Add.111, ¶90; Add.113, ¶100. But it has never concluded that these obstacles are insurmountable. The Replan was designed to achieve an accurate census, and real-world results have vindicated that design. Indeed, the Bureau found that "[t]he productivity rate for ... enumerators" was "substantially above" the rate it had anticipated. Add.105, ¶75. And as noted, 99.3% of households nationwide had been enumerated through October 2, with 38 States plus D.C. and Puerto Rico all at or above 99%,[3] and the Bureau expects to reach that benchmark for several other States by the end of October 5.

Moreover, plaintiffs' alleged harms from a stay would be fully reparable. In the unlikely event that the injunction is later affirmed on appeal, the Bureau could reopen field operations for another 25 days and then redo post processing. That would come at great cost, but it demonstrates that plaintiffs' asserted harm is not *irreparable*. It would also delay the census, but such delay is not a cognizable harm *to plaintiffs*, who

[3] *Supra* n.1.

have demanded that it be delayed by months. Missing the statutory deadline, by contrast, could never be remedied. Concluding field operations immediately remains the only available option for meeting that deadline, and neither plaintiffs nor the district court have ever suggested otherwise. Especially given the government's strong likelihood of success on the merits, the government and the public should not be forced to incur the harm of a court-ordered violation of a deadline mandated by Congress.

CONCLUSION

The Court should grant a stay pending appeal.

Respectfully submitted,

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OCTOBER 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,594 words according to the count of Microsoft Word.

/s/ Brad Hinshelwood
BRAD HINSHELWOOD

CERTIFICATE OF SERVICE

I hereby certify that, on October 3, 2020, I electronically filed the foregoing reply with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Brad Hinshelwood
BRAD HINSHELWOOD