IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

EASTERN DIVISION

THE STATE OF ALABAMA, et al.,

Plaintiffs,

Vs. CASE NO.: 3:21cv211-RAH-ECM-KCN

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

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MOTION HEARING

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BEFORE HONORABLE ROBERT AUSTIN HUFFAKER, JR., HONORABLE CHIEF JUDGE EMILY COODY MARKS, and HONORABLE CIRCUIT JUDGE KEVIN C. NEWSOM, at Montgomery, Alabama, on Monday, May 3, 2021, commencing at 10:00 a.m.

APPEARANCES

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Proceedings reported stenographically;

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(The following proceedings were heard before the Honorable Robert Austin Huffaker, Jr., the Honorable Chief Judge Emily Coody Marks, and the Honorable Circuit Judge Kevin C. Newsom, at Montgomery, Alabama, on Monday, May 3, 2021, commencing at 10:00 a.m.:)

(Call to Order of the Court)

JUDGE HUFFAKER: Good morning, everybody. We have one case on the docket this morning and, of course, it will be a rather lengthy one, as we anticipate it.

First, before we begin, I do want to welcome Judge Newsom to the bench. As district judges, Judge Marks and I have on some occasions an opportunity to get invited to sit with the Circuit, but it's an even rarer occasion when we have a member of the Circuit sit with us. So welcome.

JUDGE NEWSOM: Thank you. Thank you.

JUDGE HUFFAKER: Let's take appearances first before we begin. For the State of Alabama?

MR. LACOUR: Your Honor, Edmund LaCour. I have with me Jason Torchinsky, Barrett Bowdre, Phil Gordon, Brenton Smith, Jim Davis, and Win Sinclair.

JUDGE MARKS: Mr. LaCour, we can't hear you when you've turned away and with your mask. For the court reporter's benefit and ours, if you could speak directly into the microphone.

MR. LACOUR: Edmund LaCour, Jason Torchinsky, Barrett Bowdre, Phil Gordon, James Davis, Brenton Smith, and Winfield Sinclair are counsel of record on the case. And we have a couple other members of the AG's office who are here to observe.

JUDGE HUFFAKER: Okay. For the Census Bureau parties?

MR. ELLIOTT DAVIS: Good morning, Your Honor. Elliott Davis for the U.S. Department of Justice. With me are John

Robinson, also with the Department of Justice; Brad Rosenberg with the Department of Justice; Meghan Maury with the United States Census Bureau; and Michael Cannon of the United States Department of Commerce.

JUDGE HUFFAKER: Good morning to all of you.

I know when we spoke a couple of weeks ago, we said maybe an hour or so per side. We're very fluid with that. We anticipate some engagement and back and forth, so we probably will not be as formal as you may have thought otherwise. But we are live streaming this into the room next door to us, so it's important when you do speak, make sure you're in front of a microphone.

Mr. LaCour, I assume you will take the lead from the State's point of view. When it's your turn to speak, if you'll come up to the lectern and speak. That way we can get you on the video and the microphone.

If while you're, for example, up on the lectern, Mr. Davis, you -- if there's something we want to ask you, if you can speak right there from where you are. Just make sure you speak into the microphone so that we can all see that.

Well, good enough. Mr. LaCour, you've got the floor.

MR. LACOUR: Excellent. Thank you, Your Honors, and may it please the Court. Edmund LaCour on behalf of the State of Alabama. I'll also be representing the individual plaintiffs for purposes of this argument.

As a preliminary matter, the plaintiffs would move to admit as evidence the attachments to our motion for preliminary injunction, our reply in support of that motion, and our reply in support of our request for a three-judge panel as well as the supplemental exhibits that were filed last week. We've not actually seen if there's opposition to that from DOJ, but --

JUDGE HUFFAKER: Any objections?

MR. ELLIOTT DAVIS: This was not -- we understood this was not going to be an evidentiary hearing, this was going to be legal argumentation. And many of the documents in plaintiffs' supplemental exhibit binders are not derived from the Census Bureau, so we would object to those that are not coming from the Census Bureau.

MR. LACOUR: In response, I believe we have one document that comes from Andy Beveridge. He's a demographer. It came from his web site where he had analyzed some census data. If we need to resubmit that, we're happy to do that through some sort of declaration.

Most of the other documents and the supplemental exhibits come either from the production that we got from the defendants in this case or from the census web site. Official government documents. I don't think we necessarily need every one of those in to prevail in this motion. We think there's ample evidence with what we've attached to our motion and to our reply, and also to the reply in support of a three-judge panel.

We could also confer with defendants at the break and perhaps come to some resolution if that would be simpler.

JUDGE HUFFAKER: Why don't you do that? I think that will speed things up. Is that satisfactory to you, Mr. Davis?

MR. ELLIOTT DAVIS: Yes, Your Honor.

JUDGE HUFFAKER: Okay.

MR. LACOUR: I'll begin.

The decennial census is one of the federal government's most important undertakings, because where people are counted determines where massive amounts of money and power will flow. In the words of the Bureau's chief redistricting and voting rights official, the census counts are quote, used to change how the real world interacts with itself and with its government, close quote. And for that reason, the results, quoting again, must reflect what is seen in the real world, close quote.

Indeed, even minuscule changes can have outsized effects. Just ask the State of New York. A week ago the apportionment count was released, and had just 90 more people been counted in New York or 26 fewer people counted in the State of Minnesota, New York would have kept a congressional seat and Minnesota would have lost it.

Just as small changes matter when we're dividing power up among the states, they matter when we're dividing up within the states as well. That's precisely why, in 1975, Congress passed PL 94-171, which mandated that the secretary cooperate

with the states to provide them redistricting data. And that's also why, in 2016, the State of Alabama, as it had in the past, participated in this PL 94 process by submitting to the secretary -- and this is quoting from 141(c) -- quote, a plan identifying the geographic areas for which specific tabulations of population are desired, close quote.

And the secretary --

JUDGE NEWSOM: Can I ask you a quick question?

So the language of that statute, 141(c), that says "are desired," sort of the tabulations that are desired. So the State sort of has to opt in to this process, which I gather sort of -- sort of syncs up with the jurisprudence in the Supreme Court that says, there's nothing that requires the State to use census data to redistrict. We get it that oftentimes states do, but there's nothing that requires the State to do it. All of this, I think, bears to some extent on standing for your client, because -- both from an injury perspective and from a traceability perspective.

You know, why is it, if you're not required to use the data, that there is -- that an injury has been caused by anything that the Census Bureau is doing with the data?

MR. LACOUR: Couple of reasons, Your Honor. First, we have been given an informational right to opt in and receive this data. And as the Department of Justice has pointedly reminded us, this is the gold standard. That's coming from

Karcher, the U.S. Supreme Court's 1982 -- I believe it's 1982, but from the Supreme Court's decision in *Karcher*. And as the department has also stated repeatedly in their briefing here and in Ohio, this is the data that they're going to use -- the Voting Rights Division is going to use to enforce the Voting Rights Act, which could include enforcement actions against us. So we could launch out on our own and come up with our own internal census at great cost to the State, but it would likely leave us in a worse position if we're to be back in front of this Court opposite the Voting Rights Division of DOJ in just a year or so, or plaintiffs, for that matter, private plaintiffs who might challenge us.

But, Your Honor, the fact that we don't have to use that data doesn't mean -- that we don't have to participate in that program doesn't let the defendants off the hook if we choose to. And not every state does participate, but we chose to. There's this process set up to give us this right to the data.

That's why it's sort of a back-and-forth system where we come up with a plan. We have specified, here are the census blocks where we would like specific tabulations of population. Here are other areas for which we would like the specific tabulations of population. The secretary doesn't have to just take it. It's an iterative process where the secretary can say, we need some changes here or there. But once it's approved,

then we have a reliance interest. We have a right to that data.

I don't think the Department of Justice has made any argument that we don't have some right to tabulations of population. In the standing portion of their brief on 141(c) and tabulations of population, they dispute whether the tabulations they're going to provide us are up to snuff. Their position is, really, you're going to get data, and it's going to be in a table and it has some relation to population, so you have no informational harm here. You've got all you're entitled to; therefore, you have no standing.

But they don't pretend --

JUDGE MARKS: Isn't this exactly the situation that was contemplated for the enactment of Section 201 in the Alabama Constitution that provides for Alabama -- if you are not full -- if the census data is not full and satisfactory, Alabama can take its own census?

MR. LACOUR: Your Honor, I think we could. At this -- I mean, in theory, it would be possible to conduct our own census. It's not entirely clear that that provision has even been triggered yet since the census has not been completed.

But even assuming that it has been triggered and we have this ability now to conduct our own census, we also had a right to rely on the defendants here to provide that data for us. And the fact that we could now try, in record time, to count everyone in Alabama, at great cost to the State, again,

it's just a different type of harm caused by --

JUDGE NEWSOM: Although, in fairness, your objection -- you've made very clear in the briefs that it is differential privacy itself that constitutes the harm. So you knew about that in December of 2018. So you're right that your own census, you know, would come at some expense and some time, but it's not as if you would need to have started it right now. I mean, presumably, if you realized in 2018 at the very latest that differential privacy was going to be folded into the census data, and you knew you wouldn't like it, then you could have started then; right?

MR. LACOUR: A few points about that, Your Honor.

First, December of 2018, it was not clear that the Bureau was going to be violating 141(c) and not telling us where people actually were. That decision to make the -- to skew the block-level population was not finalized until November 24th, 2020. And so that is an independent harm. It wasn't clear until then that we were going to be left with -- that the Bureau was going to really claim the tremendous power to move people around and, with them, again, move power and move money.

JUDGE NEWSOM: So what does it mean, then, in your brief -- you say it several times, but it seemed to me most pointed at page 40 of your opening brief or motion: "To be sure, the Bureau has yet to set the privacy-loss budget it will use. That decision is still in the works. But the privacy-loss

budget, the epsilon is immaterial. Plaintiffs claim that the application of differential privacy itself, no matter the epsilon, is unlawful. That decision is ripe for review."

It strikes me that that decision was ripe for review in December of 2018.

MR. LACOUR: Your Honor, for one thing, again, the 141(c) claim was not ripe for review until November of 2020. Second, even if it had been clear to plaintiffs at that time --

Let me walk that back. I don't think it's necessarily fair to say that plaintiff should have known in December of 2018 just how badly differential privacy was going to skew our data. The first demonstration data didn't come out until October of 2019. The version 4.0 didn't come out until November of 2020. That's the version that we had Tom Bryan use to produce his report where it shows that you have tens of thousands of Alabama children living in census blocks all by themselves and where you see race demographics shifting wildly. So it wasn't clear by any means back in December of 2018 how ill fitted differential privacy was going to be for protecting census data.

JUDGE NEWSOM: So I think I get that. Then what do you mean when you say, "Plaintiffs claim that the application of differential privacy itself, no matter the epsilon, is unlawful. That decision is ripe for review." What decision was it that was ripe for review? What decision are we talking about?

I mean, I had assumed that you meant the decision to

use differential privacy at all. That's what that passage seems to communicate to me. But that happened in 2018, without regard, you say, to how sort of goofy things were going to get thereafter.

MR. LACOUR: Correct, Your Honor. But, again, the -- while it may have been clear the decision had been made at that point, it was not yet clear just how damaging that was going to be to anyone. And if it had succeeded beyond their wildest dreams and, I think, beyond what we now understand is mathematically possible, then perhaps there would have been some obligation for plaintiffs to come forward and challenge it.

But we also see plenty of arguments coming from the defendants here saying, well, we're too soon. Because they haven't actually -- we're in the penultimate version, but the last version, it's going to be really great. So let's wait until the data has already come out.

Of course, the glaring problem with that approach is that we're not going to be able to compare the final version with the true numbers, because we're never going to see the true numbers unless this Court grants us some sort of relief. We will only know the population numbers that the Bureau decides to tell us. Which I think sort of dovetails back into the 141(c) argument. It's hard to imagine that Congress would have granted the Bureau that tremendous amount of power to move population from one place to another, as we said in our motion for

preliminary injunction.

JUDGE MARKS: Is there any privacy-loss budget setting that would be acceptable?

MR. LACOUR: I am skeptical that there would be. There's a document that is in -- it's a Census Bureau email -- I can find the cite in my notes -- where back in July of 2020, they were finding that even with a privacy-loss budget of 500, they're still seeing large deviations. And perhaps they've figured out how to fix that, but with the 12.3 number that they've settled on, we're still seeing significant deviations.

And to your point, Your Honor, about the -- or to return to one of my points, as long as they're going to be skewing the population counts at the block level, they're clearly in violation of 141(c). So --

JUDGE MARKS: Well, that suggests, then, when you say differential privacy is an unlawful statistical method, that you are saying it doesn't matter where the epsilon is set. It is inherently illegal under any circumstances, which would mean this was cognizable back in 2018.

MR. LACOUR: Not necessarily, Your Honor. I think it might be helpful to think about sort of two separate claims. We have the 141(c) statutory claim, and I think there is also a very serious arbitrary and capricious problem with what they've done.

JUDGE MARKS: But that's under the APA; correct?

MR. LACOUR: Correct. But if the decision is arbitrary and capricious, then it becomes an unlawful -- and if it's the statistical method that they're intending to use, then it becomes an unlawful statistical method.

Now, it's unlawful because they're using it to violate 141(c). But setting that aside, let's say they decided to hold block-level population invariant and, as Dr. Abowd has made clear in his declaration, supplemental declaration, doing so would cause every other characteristic in the PL 94 data to deviate dramatically from the true numbers.

The decision to adopt this approach was arbitrary and capricious because the entire basis for it is a misreading of Sections 8 and 9, the privacy requirements in the Census Act, and because the sort of reconstruction and reidentification attack that is sort of the foundation for moving forward with this doesn't show in any way that the 2010 methods, the traditional methods, were improper or were not up to the task; rather, we think it confirms that the 2010 methods succeeded.

Because even with the tremendous resources of the Census Bureau and spending weeks and months trying to perform this reconstruction attack, the best they could do at the end of the day was come up with this 17 percent figure. And they say that's -- that they reidentified 17 percent of census respondents. That's an irresponsible claim because they don't know which of those one out of six they actually settled on.

What they've really done is come up with a way to guess the race and ethnicity of someone for whom you already know their age and their sex and their census block. As John Abowd said, the harm is, well, now you can guess the race and ethnicity. Well, with a one-in-six probability. That's a roll of the dice.

And that cannot mean that you've reidentified anyone. One, because it simply doesn't make sense. If I told you I can guess someone's race correctly one out of six times, I don't think anyone in common parlance would say that you've reidentified that person or learned anything that's particularly relevant about them. But --

JUDGE MARKS: Well, as I understand it, your argument in that regard is differential privacy is based on a worst-case scenario that is very unlikely. And because of that, the methods used in the 2010 census are adequate, and the Census Bureau should default to those methods; is that correct?

MR. LACOUR: Default to those methods or methods that are similarly preservative of accuracy.

JUDGE MARKS: But isn't that up to the Census Bureau to decide? They're the ones tasked by Section 8 and Section 9 with maintaining the privacy of respondents to the census. Isn't that something that we should all defer to them to determine?

MR. LACOUR: Not, Your Honor, when they have so clearly

misread the law.

And I'll explain why this is a clear misreading. So they come up with this worst-case scenario where -- I mean, the reconstruction attack was able to identify -- was able to predict somebody's race correctly one out of six times, which, again, cannot be a reidentification. But then in Dr. Abowd's declaration, he expounds on this attack and says, well, if --

Let's assume for a minute you have this near-omniscient attacker who has access to perfect age, perfect sex, and perfect address characteristics for everyone in the 2010 census. And, again, no one has that except for the Census Bureau. But let's assume for a second that this near omniscient being has come down and wants to figure out someone's race and ethnicity. They're still only going to be right 58 percent of the time.

And here's why that's fatal, I think, to this whole decision to embark on differential privacy. Because the numbers that they produced in 2010 and the numbers they intend to produce in 2020, even after differential privacy, are going to show certain things, like, in this census block, 75 percent of people are white. In this town of 500 people, 75 percent of people are Black.

If you have that information, which any of -- this near-omniscient attacker would have, all he has to do is say, oh, you live in the census block that's 75 percent white. I'm going to guess that you're white, and I'll be right 75 percent

of the time.

Alternatively, he could spend months reconstructing the database and make a guess that's actually far worse. Which shows either -- which shows, we think, that the attack conclusively failed, or it shows that under their own reading of Sections 8 and 9, when they produce any characteristic data sometime this summer or into the fall -- hopefully sooner -- that they're going to be violating Sections 8 and 9.

And they've said here that they will hold the largest racial group in any census area of 500 people or more within an accuracy -- an average accuracy of 99.5 percent. Well, again, if I'm that near-omniscient attacker and I really want to know someone's race and ethnicity, I can just look at the data they're already going to put out.

And that goes back to the fundamental point that simply being able to make a somewhat educated guess -- or in the instance where you've run this very expensive reconstruction reidentification attack, a somewhat miseducated guess -- about someone's race cannot be a violation of Sections 8 and 9, or everything the Bureau -- every tabulation of characteristics that the Bureau has put out since Sections 8 and 9 were on the books is potentially in violation. And what they intend to do this time, even after differential privacy, is going to be a violation. And in the census context, the Supreme Court has said multiple times, we look to history and practice. And

there's a reason why we haven't seen this reading before.

JUDGE HUFFAKER: Counsel, let me ask you this. Is it your position that there is no circumstance, no epsilon, no degree of variants versus invariants in which differential privacy would actually work to your satisfaction?

MR. LACOUR: Yes, Your Honor. I think the record proves that.

JUDGE HUFFAKER: And as I understand the epsilon, you really have two extremes: You have zero, and you have infinity --

MR. LACOUR: Correct.

JUDGE HUFFAKER: -- on the two extremes. I forget which one is which, but on one extreme you could have complete accuracy but no data scrambling. On the other extreme you have complete data scrambling and total inaccuracy. So wouldn't you be satisfied or the State be satisfied in a circumstance where it set -- where complete accuracy but no data scrambling?

MR. LACOUR: Yes. That would be phenomenal. I think at that point, though, it's not clear if you could even call that differential privacy. That would just be giving us --

JUDGE MARKS: Well, that just sounds like raw data; correct? And Alabama has never received the raw data. Isn't that accurate?

MR. LACOUR: Important distinction between raw data and tabulations. Raw data -- if you look at the *Baldrige*

decision -- I think that was the 1982 decision from the U.S. Supreme Court -- the Census Bureau itself draws a distinction between raw data and aggregate statistics.

So they never turn over raw data. Even if you're not going to be able to identify somebody with it, they're not going to turn over a list of addresses because that's raw data. What they do have the authority to do is to aggregate that data and produce statistics in some numerical form.

So even if there was no perturbation whatsoever, or the epsilon was set up to infinity, you wouldn't be getting raw data. You would be getting these aggregate statistics for each of the census blocks where we would know --

And, again, it's not a whole lot of data about any given person in the PL 94 data. I think this is particularly important when we're talking about what defendants are actually able to accomplish in the next 12 weeks or so. We get voting age population, so whether someone is 18 or older or whether they're 17 or under; we get race; we get ethnicity; and then we just get the number of people in a given block.

So that is not the data that was used to perform the reconstruction attack. I think this is an important point. The SF 1 data, which comes out later, which is much more granular and is going to have more specific age data in it and additional information, there's no statutory deadline on that data. And that's the data that has the greatest sort of propensity to

allow someone to make a linkage between the aggregate statistics published by the Bureau and some outside data that the attacker might purchase or otherwise possess.

JUDGE NEWSOM: Can I ask you a question, sort of piggybacking on a question that Judge Marks asked you earlier? She said what you really want is for the Census Bureau to revert to the methods that it was using in 2010. And you said yes, or methods similarly protective of accuracy or something like that. I don't want to put words in your mouth. That was basically right?

MR. LACOUR: More or less, Your Honor.

JUDGE NEWSOM: So what does that mean exactly, similarly protective of accuracy? How much accuracy -- and I guess this is also sort of dovetailing with Judge Huffaker's question. How much accuracy is enough?

And the reason I ask is if your answer is perfect accuracy, then that's one thing. But if your answer is anything shy of perfect accuracy, I start wondering whether or not we've, like, veered off into "political question doctrine land" because I don't know what the judicially manageable standard is anymore.

MR. LACOUR: Well, I can say, Your Honor, that there is a judicially manageable standard for population accuracy, and that's the one Congress put in 141(c). That is the invariant that they have to stick with. That's a clear on/off switch.

JUDGE NEWSOM: Just so I'm following, so sort of your

sort of ordinary understanding, interpretation of tabulation of population means sort of put into table form the actual people who live in this block or county or whatever; right?

MR. LACOUR: Yes.

JUDGE NEWSOM: So how, then, is data swapping consistent with that kind of rigorous understanding of tabulation of population? Because at least as I understand it -- and I may well not understand it perfectly -- data swapping is going to involve the same numbers of people, but the characteristics may be masked or scrambled a little bit; right?

MR. LACOUR: Yes.

JUDGE NEWSOM: So why is that a tabulation of population under your sort of really rigorous sort of accuracy maximizing understanding? I get it that the number is accurate, but the characteristics may not be.

MR. LACOUR: Right. Well, because Congress said tabulations of population, not tabulations of population by race or tabulations of population by ethnicity or age. So that is sort of the one bare minimum, which makes sense. I mean, PL 94 was sort of an outgrowth of the redistricting revolution the Supreme Court launched in *Baker v. Carr* where, all of a sudden, one person, one vote became critical for the states.

And this goes back to why DOJ's build-your-own-census argument is so contrary to the statute. The whole point of this was to allow the states who wanted to to work with the secretary

and get good population data for one person, one vote purposes. So we don't think they have any discretion in that realm.

They do have a lot of discretion when it comes to the characteristics. But at the same time, they still can't do something that's arbitrary and capricious. So if they said, we are going to take all race in Alabama and just swap everyone's race so that the State goes from majority white to majority Asian, I mean, that would be very protective of privacy, but it would be so vastly beyond anything that would be required under Sections 8 and 9 of the Census Act as to be arbitrary and capricious. So they get a lot of deference.

We simply offer the 2010 methods because they've been used, they're tried and true, and we think that defendants' own evidence confirms that they worked phenomenally well. If they have something else they would prefer that is not arbitrary and capricious, then they can certainly use that, too. We're not here telling them there's only one way to fix this, but we do think there are ways to fix this in a timely manner.

JUDGE HUFFAKER: Well, explain that to me. What is the way to fix this in timely manner, and what is that time line?

MR. LACOUR: Your Honor, the time line we laid out in the reply brief would be essentially declare that 141(c) requires block-level population to remain accurate, as the Bureau stated it should be back in September of 2020, and then that they provide the data by July 31st, which would be, I

think, 89 days from today.

JUDGE MARKS: Where did that date come from, July 31st?

MR. LACOUR: That was three months after the anticipated delivery of the apportionment data. So the statutory scheme contemplates -- so the apportionment data, which, again, was reported to the president just last week, it's supposed to be reported December 31st, and then 141(c) makes clear that the redistricting data typically follows three months later. That's the time line they've always been able to comply with in the past.

So we think that three months was eminently reasonable to allow them to dust off the old 2010 methods if they need to, come up with something else that provides us with PL 94 data, while saving for another day what sort of protections they need to provide to the SF 1 and the SF 2 data, which, again, have no statutory deadline requirements attached to them. And we think that they have failed to meet the very heavy burden of showing that that would be impossible.

In the case that they cite, American -- it's a D.C. Circuit case from 2017. I'm going to try to find it if I can. But -- I apologize, Your Honors. A lot of moving pieces in this case.

In any event --

JUDGE MARKS: Well, you-all say they should be able to do it.

MR. LACOUR: Yes.

JUDGE MARKS: But the Census Bureau has submitted an affidavit saying that's actually not true. We can't do it. It would actually -- if we were to revert to the 2010 methods of ensuring privacy, it would make it much more difficult and would take us much longer to get the data to Alabama. So how does that improve your situation?

MR. LACOUR: So a few points, Your Honor. We would dispute that for several reasons.

First, the case I was looking for is *American Hospital Association v. Price*, which defendants have referred to a few times in their brief. It's the one that says don't order us to run faster, jump higher than we're able to.

But what the D.C. Circuit also said in that case was that agencies bear a, quote, heavy burden to demonstrate the existence of an impossibility. The burden serves to prevent an agency from shirking its duties by reason of mere difficulty or inconvenience.

So I think there is some reason to be skeptical of their protestations here. I'll run through several of them.

The first is the multiple different time lines that other courts have been hearing about from them, from the Northern District of California all the way to the Southern District of New York and the U.S. Supreme Court. They told the Northern District of California in the *National Urban League*

litigation, which was in some ways a mirror image of our delay claim here, that they had to produce this apportionment data in a timely manner as close to the statutory deadline as they could and that they had these statutory obligations.

And then after the Southern District of New York in the case involving President Trump's apportionment memo held that the memo could not be implemented, they told the U.S. Supreme Court, we need a decision as quickly as possible because the date for the president to receive this apportionment data is fast approaching, December 31st. And, indeed, they got a ruling from the Court before the end of 2020.

Then we fast forward about another month, and we're told that the apportionment data is not coming until April 30th. In February, of course, they announce redistricting data is not coming until September 30th. And then two weeks after that, after Ohio had sued over that delay and after we had sued over that delay, we get a declaration filed in Ohio, in the Southern District of Ohio, saying, well, actually, we can get this to you six weeks sooner than we realized.

JUDGE HUFFAKER: Counsel, let me ask you this. I understand it's somewhat of a moving target. You have on the one hand your request for July 31. Census Bureau as late as, what, late September, and maybe now the actual production date may be somewhere in between. But from a downstream repercussion on the State's end, what's the distinction between July 31

versus a mid-August production deadline versus a September, end-of-September deadline? If we were to buy into one of these deadlines, what's the distinction between those three?

MR. LACOUR: So, Your Honor, I think, one, the July 31st is just sensible because, again, it falls more than three months after the apportionment data came forward. Now we've been told August 16th.

And this is not in the record, but we can find a way to get it into the record if the Court finds it to be pertinent. The legislature has taken into account this August 16 date, and the plan currently is to try to move forward on an expeditious time line with data that comes August 16th. Anything that comes later than that is going to cause serious problems there.

Now, if you also look at the declarations we have attached to our motion and to our reply, there are other potential issues and costs that would be associated with a lengthy delay. Once the lines are redrawn -- once the lines are redrawn, we have the boards of registrars from various counties that are going to need to start assigning those people into particular areas. That's typically a pretty laborious manual process with large heavy stacks of paper where they're going one by one.

And so the risks of -- one, there's just a substantial likelihood that some might not be able to get it done in a short amount of time. Second, in the rush there may be inaccuracies

that would be introduced.

Finally, we are -- qualifying to run in these races with these districts that we're not yet able to draw is in late January. Absentee voting starts in March. Candidates need to be able to start gathering signatures from their potential voters if they intend to run outside of the Republican or Democratic primary. Even those who are running in the primaries need to know who their potential voters are going to be so they can court them and solicit their support.

JUDGE MARKS: Well, the defendants have said there are options for the Alabama plaintiffs in those cases, and that other states have responded by enacting legislation that will push back election dates, that will permit for use of the same maps, redistricting maps, for an extended period of time. Why can't Alabama help itself in similar ways?

MR. LACOUR: I think that would be a strange way to think about any typical dispute between a plaintiff and a defendant: That we're harming you, we're violating the law, but you can sort of cure your own harm in some way, and so, therefore, you're not harmed. If someone punched a hole in my roof and there was water pouring through, it doesn't really moot out my case if I have the money to go stay at the Holiday Inn.

JUDGE MARKS: Right. But in this instance, it's more of a tree has fallen on your roof. There are things that are beyond the defendants' control that has caused these delays.

They've told us that with the pandemic, natural disasters, they have really struggled to get their work completed on time because of things beyond their control. Shouldn't Alabama respond in a similar way?

MR. LACOUR: Well, I think, Your Honor, that's why we're not asking for the data in three -- like after this hearing or in three days or three weeks. We're saying three months. I mean, even if we could get it in mid-August, I think we could still work with that, but pushing it beyond that is going to cause serious harms to us.

JUDGE HUFFAKER: Are there not already bills pending in the State House to push some of these deadlines? For example, the primary, which is, I think, May of next year. Are there not already bills floating around that could be acted upon before the end of the legislative session?

MR. LACOUR: I believe there may have been a bill introduced. I don't think it has moved forward. And my understanding is the legislative session is set to conclude I believe today or tomorrow. So -- I mean, I guess there's always a prospect of a special session, but I don't think that that speculative scenario is enough to moot out our case.

JUDGE NEWSOM: Can I ask you a question, just shifting gears a little bit? We've talked a lot about redistricting, the use of this data for redistricting. You also have claims alleging sort of funding -- funding fallout and vote dilution.

Can you explain to me why those aren't speculative? It's hard for me to figure out how we could yet know who's going to win, who's going to lose, whose votes will be diluted, whose votes will be enhanced, who will get more money, who will get less money. How can we know any of that stuff yet?

MR. LACOUR: So two responses to that, Your Honor. The first would be that this is an unusual situation where the government has announced ahead of time, we are going to harm some of you in some way, but we're not going to know exactly how until we hit our random number generator, and then we're going to pick you and not you or you. And I'm not aware of any other cases like that where the harm is certain, it's just not certain exactly -- and it's specific, but it's just not clear who it's going to fall on yet. This is not a generalized grievance. There will be people who are going to end up in diluted districts, because they're going to be skewing both population counts, and there is also, of course, the potential for VRA issues because of how they're going to be skewing the race counts.

We analogize this to a roulette pistol in our brief. I don't think you have to wait until it fires in order to bring your claim. That would sort of create a perverse ability for the government to protect itself from irreparably harming people simply by introducing a little bit of randomness into where the harm, this specific, concrete harm, is going to fall.

But the second is I think this shows exactly why Section 209, which is the note to 141(c) and provides the cause of action for challenges to unlawful statistical methods that could affect congressional districts, confers an important informational right onto both the State and to members of Congress like Representative Aderholt, as well as to individual plaintiffs who are undoubtedly persons aggrieved under that statute. And we would analogize that informational right to the types of rights found at *FEC v. Akins;* the kind of rights referred to in the Eleventh Circuit's en banc *Godiva Chocolatier* case where there is information the government possesses and needs to turn over to certain individuals, and not for just -- not based out of just idle curiosity. It's sort of obvious how redistricting data is going to potentially affect people who live in these districts that are going to be drawn based on either lawful or unlawful population counts. So we think they all have this sort of informational harm standing as well that would allow this Court to stop the use of those unlawful statistical methods.

Indeed, that was the point of 209, was this recognition that once the cake is baked, it's going to be really hard to undo these things. Once they have failed to gather the lawful data, or once they have it in this instance but have scrambled it and put it out there in a way that it's not clear they're going to be able to unscramble it later, it's sort of

too late.

And so we want plaintiffs to be able to make these challenges. Just like the FOIA plaintiff going to court doesn't have to say, if I get these 100 emails, it is obviously clear how I'm going to be benefited. You don't know what's in the emails. That's why you have to go through FOIA to get them.

Same thing here. We don't know, indeed, we will never know how many people were actually counted in any given census block unless we get some sort of relief, which is why 209 exists in the first place.

JUDGE NEWSOM: The hard thing for me -- and now I'm just circling back to a question I asked earlier. It seems like every line of questioning that we go down sort of tees up this problem in my mind.

So, like, in response, say, to the question I just asked you about vote dilution and funding, you said, well, we can't know, until the numbers shake out and the number generator decides to benefit someone and skew someone else, like, who it is -- you know, who it is that's going to lose. But it's important that plaintiffs be able to bring these claims because it's, like, sort of the methodology itself is going to harm somebody; right?

There again, I just sort of come back to the question I asked earlier: If that is, in fact, your claim, that the methodology itself is going to harm somebody, and we can't wait

until that harm is imminent to know exactly who's going to get harmed, then it just seems to me like the claim should have been brought in 2018.

At that point, you knew this was a roulette wheel; right? Somebody's going to get skewed. Somebody's going to get benefited. We might not know who yet, but we're sort of like able to make the claim now.

It's just like -- I get it that we're sort of caught between, like, too soon and too late. But if the answer to too soon is, well, it's sort of the methodology itself, it's like hard wired in this differential privacy thing, that's the objection, then it sort of does feel like, well, in that case, then we're too late because you knew all that stuff in 2018.

MR. LACOUR: I would dispute that on at least two grounds. First, I think the fact that we are already a month past when redistricting data is due and the Bureau is still trying to iron out the kinks in differential privacy, it confirms they are building the airplane mid flight. They're still taking feedback on errors that are appearing in version 5.0, and we're not going to get to see a 6.0. So it was not clear back in 2018 that this was going to fail in such a dramatic way.

I think that's why you see in the amicus briefs here, every party who's shown up as a friend of the Court who actually has to use this data is tremendously worried about it. We have

some computer scientists who have come along and said, well, our theories work really great. I would point out, however, that even as Dr. Abowd has recognized, Cynthia Dwork and these other creators of differential privacy tend to assume the epsilon is set at 1 at the highest, or at .1 would be even better. Of course, they're setting it at 12.3, which is many, many, many orders of magnitude higher than anyone who uses -- who has sort of developed differential privacy would suggest you should set the epsilon. So by their own standards, this --

I'll try to return to your question.

JUDGE NEWSOM: That's fine.

MR. LACOUR: Got off on a little bit of a tangent here.

I mean, I think it really does demonstrate, again, through a bait and switch that's happened here, they said the 2010 methods are not good enough because the all -- the nearly all-knowing attacker is going to have access to pretty good guesses about the respondents' characteristics. But then they use differential privacy in a way where that all-knowing attacker is going to have pretty good and maybe even better guesses about a lot of these people because, again, it is not tailored to protecting those individuals who are most at risk of having their data uncovered.

I think Professor Ruggles has this great example of the couple who lives on Liberty Island by the Statue of Liberty. There are only two of them who live there. They're both white

and I believe in their sixties. And when data was produced about them in the 2010 census, it indicated that they were both Asian and that they were in their fifties.

They're the kind of people who would receive protection under swapping, but it's not even clear if they're necessarily going to get some of the protection of differential privacy because we're not attacking -- we're not trying to cure the right problem here through differential privacy.

Trying to return to your question, Your Honor.

JUDGE NEWSOM: You get my point; right? I mean, here's what I think happened. You can tell me that this is wrong.

In response to your motion, the defendants said, no final agency action, not imminent, not right, whatever. And you said in response -- page 40 that I read to you earlier -- no, no, no. It's differential privacy itself. That's the harm. That decision to impose differential privacy is ripe for review and, the way I read it, was ripe for review in December of 2018. At which point they respond by saying, aha, laches. So it's sort of like it's either not final agency action or laches. And so it just seems like we're kind of, like, in this infinite sort of loop. And I think that's as much a problem maybe for them as it is you, but I think it's a problem for everybody. And it's a problem for me trying to understand sort of when the claim accrues and is ripe.

MR. LACOUR: Well, keep in mind, Your Honor -- and it's

a point I've made earlier, so forgive me if I'm belaboring it -- the 141(c) skewing of the actual population counts claim did not accrue until November of 2020. That's when they announced that they were going to hold state-level population invariant and household and group-quarters facilities invariant, but that they were going to skew the block-level population data.

And that did not arise in 2018. That was not clear. Rather, as late as September 2020 -- and this is Exhibit 2 to our reply brief -- they said that they had -- they were legally mandated to provide error-free disclosure of block-level population under PL 94. That's what we think, too. And so we had no reason to think they were going to do something different.

But then two months elapsed, and right around Thanksgiving of 2020, they said, the board has met and, actually, that garbage about legal invariants -- holding block-level population invariant, that's a thing of the past.

JUDGE MARKS: So if block-level population numbers are invariant, would you have a cause of action?

MR. LACOUR: We would not have a 141(c) cause of action, because they would not be violating it at that point. They would be providing tabulations of population at all of the pre-agreed upon substate geographies. But I think we would still have an arbitrary and capricious argument.

And, Judge Newsom, to return to your concerns about

when that would have accrued, I think thinking about this in a laches context could be helpful because the Court needs to do equity here. And when it was not even clear how differential privacy was going to work, and it was not clear back then that even an epsilon of 500 was going to be creating serious problems, then I think it would have been potentially premature for a plaintiff to come forward and say, this is arbitrary and capricious. This is going to inject way more error into the characteristic data than is possibly required under Sections 8 and 9.

I mean, we're talking about an experimental theory that has never been implemented in this sort of setting before. And I think their position -- DOJ's position said plaintiffs should have known more about how this would work than John Abowd himself. I think that's totally unreasonable and inequitable.

JUDGE HUFFAKER: It seems to me your concern, when you really boil it down, is not so much differential privacy itself, but it's the internal factors of what's a variant and what's held invariant, and then of most recent, what the epsilon is. Am I wrong in thinking that?

MR. LACOUR: Your Honor, I mean, I would say there -- yes. I mean, for 141(c), the invariants are important because they are going to blatantly violate the statute. If we want to talk about how to read 141(c), I'm happy to get into that, but I think the Bureau's reading of it in September 2020, which,

again, agrees perfectly with ours, is the correct reading. That's how they've always interpreted it. They've never claimed this authority before to report some other population numbers to us that don't reflect the actual count.

So the invariant is an issue there. Now, the skewing of the characteristics is relevant for sort of our sovereign interests in making sure we comply with the requirements of the Voting Rights Act, and also the potential harms to us when plaintiffs are given additional claims and lawsuits to bring against us because we're going to know from the Bureau that we're drawing with second-rate data. And so --

And then, finally, the arbitrary and capricious claim because, again, the reconstruction attack that is the foundation of the Bureau's purported need to implement differential privacy actually confirms that they didn't need to ever implement it at all. So if there are other options on the table that provide much better data to the states, and which is what the Bureau -- that's the primary purpose. They have other purposes, but as Mr. Whitehorne said, they're not a for-profit company. They're not a think tank. They're here to help the real world interact with itself and with its government. If they are shirking that responsibility to implement an untested and really unworkable system, then that's arbitrary and capricious and that harms us.

JUDGE MARKS: It sounds like we're moving into the APA. Are you saying that the arbitrary and capricious standard is

something we look at under your APA claims, or are you saying that that's the standard we apply for your 141 claims?

MR. LACOUR: It is relevant for the APA claim. The only way it's really relevant for the 141(c) claim, I think, is when the Court orders a remedy. I mean, I think it's sort of implicit they can't do something arbitrary and capricious to fix the harm. But if there was no APA claim whatsoever, our 141(c) claim could still stand on its own.

JUDGE MARKS: What happens to your case if we find Alabama can't be an aggrieved person under the definition of Section 209? It's a glaring omission that in the list -- I know it says including, so it's not an exclusive list -- Alabama's not -- or states are not included as aggrieved persons.

MR. LACOUR: If you want me to push back against the hypothetical and then accept it, so, first, if you look at Section 209(a), it references that one of the purposes of passing 209 was because it would otherwise be impractical for states to maintain -- or to obtain meaningful relief if they had to wait until after the census was conducted. So you have that indicia that the states should be included here.

You also have the fact that 209 is being appended to 141, which, of course, includes 141(c), which gives the states this right that -- again, I believe defendants agree that we have some right to some data. So I think that is additional indicia of the fact that states can be persons aggrieved. And

it's not unheard of for courts to make similar findings in other statutory contexts.

JUDGE NEWSOM: Although it could make the omission all the more glaring. If this is sort of an apparatus designed, as you say, to benefit states, and 209(a) lists, as I recall, two flesh and blood individuals and one inanimate object but not another inanimate object, it sort of makes the omission of states all the more glaring perhaps.

MR. LACOUR: We don't see it that way, Your Honor. We think that that's more of an indicator that it goes without saying. I mean, earlier in 209(a), they already referenced the need for states to get relief. Clearly the states have some sort of right under 141(c).

What Congress wanted to make sure could happen is that other entities could also borrow that informational right, so to speak. And that's, indeed, what the House of Representatives did in *U.S. House of Representatives v. Commerce* in 1998 and up into 1999 when the U.S. Supreme Court invalidated that last sort of unlawful statistical method.

But even assuming that the State is not a person aggrieved, our 141(c) claim still moves under the APA because they have made a decision to carry out agency action in a way that's contrary to law. That law would be 141(c).

JUDGE MARKS: Let me ask you this, then. What is the final agency action that triggers your cause of action under

the APA? Is it the announcement in 2017 that a decision had been made to use differential privacy? Is it the census plan, organizational plan that came out in 2018? Is it the listing of the invariants? Will it be setting the epsilon? What is the triggering final agency plan for your APA cause of action?

MR. LACOUR: So I think there are two sort of agency actions here. There's one, the decision to hold -- to not hold the block-level population counts invariant.

JUDGE MARKS: That's the invariant back in November of 2020?

MR. LACOUR: Yes, Your Honor.

JUDGE MARKS: Okay.

MR. LACOUR: And then you have -- I believe December 2018 is when they put forward, this is how we're going to be going forward. And as we've discussed previously, perhaps we could have brought a claim then, but I don't think plaintiffs were required to look into the future and know more than the Bureau itself knew as to how this was going to work or, indeed, not work until much later in the process.

Again, version 1.0 didn't -- the demonstration data, version 1.0, weren't released until October of 2019. 2.0 and 3.0 came out several months after that. And then 4.0 was just in November of 2020, around the same time they made the decision on invariants. Of course, 5.0 came out just last week.

JUDGE MARKS: If the 2018 differential privacy plan is

a final agency action, what should the defendants have done to comply with the APA that they did not do?

MR. LACOUR: This falls under our arbitrary and capricious claim. I think they should have considered the fact that Sections 8 and 9 don't require them to inject these massive amounts of error into the data because their reconstruction attack, which was abetted by a tremendous amount of expertise and census resources, came up so far short.

And one other note on why the attack failed is a great point made by defendant Ron Jarmin in February 2019. That even that 17 percent figure is overstated because no one else has access to the internal census records to confirm that when they rolled the dice and they got their one-in-six chance, that this is the one we were successful and these are the five where it was unsuccessful.

So that's coming from the Bureau itself, which, again, I think confirms that they made a mistake of law in how they read Sections 8 and 9. We think the Court should clear that up for them before issuing the injunction so that they know that they are free to, like, basically operate under their traditional and unbroken understanding until -- unbroken until recently understanding of Sections 8 and 9.

Because to return to an earlier point, Judge Huffaker, that you were hitting on, how do we know that this is possible, one is the *American Hospital Association v. Price* case -- that's

867 F.3d 160 out of the D.C. Circuit -- that said, first, the burden on showing impossibility lies with the defendants. But they have put forward -- in supplemental declaration of Dr. Abowd, they said it could take 24 to 28 weeks if we're rushing. Well, it's not clear how much of that is tied to this misreading of Sections 8 and 9. And I think with that declaration, they put how 8 and 9 should be read directly in front of this Court.

Because if they're right and you do have to, for the first time ever, protect from a nearly omniscient being, then perhaps that would take 24 weeks to come up with some new method that is as error injecting as differential privacy. But --

JUDGE MARKS: My question is probably a little bit more mechanical. So if the 2018 action was a final agency action, what is it that the Bureau is required to do under the APA? Do they have to publish it in the Federal Register? Invite comments and input from interested parties? What is it that they should have done that they didn't do? Because if they violated the APA, wouldn't we just remand this back to the Census Bureau and tell them to start over? Isn't that one of the ways that a violation of the APA is remedied?

MR. LACOUR: Yes, Your Honor. I mean, you could vacate their decision and send it back to them. But we do think in light of the statutory violations, both in terms of accuracy and timing, that injunction is still warranted in this instance to

ensure that we can get the data we're entitled to. Not when we're entitled to it, because we were entitled to it more than a month ago, but still soon enough that we're not even more grievously harmed by the delay.

JUDGE MARKS: So the injunction would not only be, you can't use differential privacy. You're seeking an order from the Court telling them what they should use; what privacy method they should use.

MR. LACOUR: No. I think the Court could clearly suggest that the 2010 methods would be sufficient, but I don't think the Court would need to order them to use the 2010 methods specifically.

In the redistricting context, if a map is found to be unconstitutional or in violation of the Voting Rights Act, it's -- typically the Court will say, this map fails for these specific reasons. Defendants, go draw a map that doesn't have these failings. And they may say, do it in this amount of time and bring it back to us to cure these harms that you've inflicted on the plaintiffs. I think we're looking for something similar to that here and that we're entitled to something similar to that here.

JUDGE MARKS: Are the privacy methods that were used during the 2010 census, did the agency utilize -- follow the APA for determining what privacy methods to use then that you're wanting them to revert back to now? Did they go through notice

and comment, publish it in the Federal Register?

MR. LACOUR: Your Honor, I believe there was some sort of consultation process, but I'm not certain if there was -- if there was a particular cite to the Federal Register out there, I don't have it at my fingertips.

JUDGE HUFFAKER: What consultation process is there ongoing at present? We have, the most recent, another level of demonstrative algorithm applied. Are the states still consulting with the Census Bureau on the outcome of that and what additional tweaks or different tweaks could be implemented?

MR. LACOUR: Your Honor, I do think a lot of stakeholders are submitting or -- I presume that stakeholders will be submitting comments to the Bureau based on demonstration data 5.0.

JUDGE HUFFAKER: Since you mentioned the injunction, what scope are you asking for? Is it to enjoin the use of differential privacy across the country or just here in Alabama concerning the data that you've requested?

MR. LACOUR: Under the APA, the Court has the authority to set aside agency action, and that could be read to provide some sort of nationwide relief at the same time. Alabama's concerned about Alabama's data, so if the Court were inclined to provide relief to Alabama alone, we would be fine with that.

JUDGE MARKS: Is the setting of the epsilon, will that be a final agency decision?

MR. LACOUR: I believe they have settled on that. But as we've noted, I mean, they have indicated it's not going to be -- it's not going to be infinite, and there's no indication it's going to be any higher than 12.3. And then, finally, as Dr. Abowd said in the supplemental declaration and as he noted in one of the sort of internal emails that we attached to our reply brief, holding the block-level population invariant -- this is from the email -- holding the block-level population invariant would break the top-down algorithm. And he sort of expounded on that in his supplemental declaration, explaining why it would cause the data to be tremendously skewed when it comes to characteristics, even more so than it will be with variations in where people are.

JUDGE HUFFAKER: Is the epsilon consistent across all of the states, or is it a state-by-state figure?

MR. LACOUR: Your Honor, I'm not certain precisely how it's going to be allocated. My understanding is you have -- the state-level populations will be held invariant, so you'll run -- you'll run differential privacy across the nation, and then you're going to run it across the state, and you work your way down. And at each step, there's going to be some of the epsilon or the privacy-loss budget spent to ensure there's sufficient accuracy.

But every time you sort of allow for some accuracy, you're spending down that budget until it's eventually all gone,

and there's just simply not enough left for them to comply with 141(c) without doing profoundly strange things to the rest of the characteristic data. We might have hundreds of thousands of Alabama children being reported in census blocks without parents, which is one example of how sort of bizarre and unusable the data could become.

JUDGE HUFFAKER: So is the answer you don't really know?

MR. LACOUR: Yes, Your Honor.

JUDGE NEWSOM: Can I ask one more? I know that maybe we've passed the hour threshold, which is fine, but can I ask one more? And this is pretty indelicate, and I'm just going to ask you for a very honest answer: Is there some political valence here? Is this like a Republicans and Democrats issue or an urban state and rural state issue? I'm just trying to figure out --

I mean, typically in these election cases, both as a lawyer and as a judge, I can kind of see what's going on. Here I can't quite figure it out. Why it is, for instance, that Alabama in particular has sued, whereas no one else, save for Ohio on the deadline issue, has. Nobody else seems to care passionately enough about differential privacy to have sued.

The amicus brief is pretty skewed. You just sort of see, like, Republican lawyers sort of lining up on one side and Democratic lawyers lining up on the other side, and I'm just

trying to figure out what's going on, like, what's really going on, if there is a what's really going on. And it may be, no, Judge, there's nothing. I'm just trying to figure it out.

MR. LACOUR: Your Honor, I don't think there's a "what's going on" when it comes to politics. If you look -- I mean, the -- I guess one of the amicus briefs from the national -- in support of DOJ, the national redistricting group, I believe they're traditionally associated with Eric Holder, who was, of course, former Democratic Attorney General.

JUDGE NEWSOM: And you've got the Pennsylvania Republicans on your side and the attorneys general -- overwhelmingly Republican attorneys general on your side. I'm just trying to figure out kind of what to make of any of that.

MR. LACOUR: Yes. So the one thing I would note about that brief from the redistricting group in support of DOJ is that they don't actually support differential privacy. Indeed, we had quoted them in our motion for their critiques of differential privacy.

They came in and they said, don't interfere based on the delay claim. And, yeah, we had our problems with differential privacy, too, but you don't see us suing about it, and you're way too late, Alabama.

So anyone who really uses the data appears to be quite concerned about this, at least anyone who's concerned enough to come and file an amicus brief before this Court. And of course,

in the brief that was led by Utah, there were at least a couple of Democratic attorneys general who signed on to that. And within that brief, you see citations to other states where Democrats are the more dominant party, including letters that the California Legislature sent to President Biden's chief of staff back in February of 2021 saying, abandon ship, please. We have serious problems with how this thing works.

Now, we do see it as a good governance thing. You look -- again, there are members of the Bureau, including James Whitehorne, whose job it is to interact with the states for redistricting purposes, who have said, I fear that in our zeal to protect privacy, we're going to be harming the people we're supposed to be protecting. That was back in October of 2020. So not to touch too much on the laches point, but in October it's still becoming clear where the harm is going to fall.

On top of that, though, there's just a general -- you call it sort of federalism concern with this approach. Because the power to move people around, it's -- these are tremendously powerful levers that would be handed to the Bureau. And I think we have that image in our reply brief that we borrowed from Justice Kagan in the *Rucho v. Common Cause* case of the demographer -- the modern day sort of map drawer who can create a thousand different maps that comply with all the traditional redistricting standards and then say, this is the one we're going to put out. This is the one because it benefits my

political party the most.

And we don't have any evidence or reason to think that the Bureau's going to be abusing this to benefit one party or the other, but it's very troubling -- and maybe I'll hear that this is impossible for some reason -- that the Bureau could sort of hit the random number generator a thousand times for Alabama, get a thousand maps, and say, this is the one that we like the best.

And I think that should trouble this Court as well. I think that troubles all the states. Certainly all the states who have showed up here as amici. And I think it also bears, again, one more time, on 141(c) and why you cannot read it to give the Bureau this tremendous power to move people, money, and power around.

JUDGE HUFFAKER: This is a corollary to his question about what's going on in the background. The reapportionment data is now out. The State of Alabama did not lose a seat.

MR. LACOUR: Very happy about that.

JUDGE HUFFAKER: And Congressman Aderholt, who is a party in this case, will not be one of six fighting for what used to be seven seats. So in light of the fact that Alabama will not lose that seat, does that change any of the arguments you've made or are making?

MR. LACOUR: I don't believe so, Your Honor. Again, that was -- the apportionment data, the 141(b) data, which goes

to the president -- and if you'll allow me to harp on our 141(c) argument again, 141(b) says, provide tabulation of population of the states to the president. The Bureau wouldn't dream of running differential privacy on that data because, again, had they done so, Minnesota might be in a different position today than they found themselves last week when they prevailed by 26 people.

Here's what's also troubling. Had differential privacy been run and cost Minnesota their seat, Minnesota would never know.

Same thing is true here. They're going to be moving people around in a way that we will never really be able to know. And that's exactly why we need relief. That's exactly why we need relief before this harm comes to pass.

JUDGE MARKS: But doesn't the law recognize the difference between the national apportionment numbers and the redistricting numbers that are provided to the State? Because there's a statute that permits sampling, statistical sampling for the data that is provided to the State, and it requires actual enumeration for the nationwide apportionment.

MR. LACOUR: Your Honor, I don't think that issue is as settled as the Department of Justice would suggest in their brief. If you look at *House of Representatives* where the Supreme Court really unpacked what 195 means and undid the sampling that the Bureau planned to do in the lead-up to the

2000 census, you had plaintiffs there who were before the Court on an intrastate redistricting theory. And the Court held that they had standing based on the intrastate harms that were likely to befall them if sampling had been used contrary to 195. And it would make no sense to say they had standing to challenge 195 -- at least would strongly suggest that they had standing to challenge 195, because 195 similarly did not allow for sampling to be used for purposes of apportionment, which would include redistricting at the end of the day.

But even if you accept that -- and I still think the -- I mean, it's one of the oldest canons of construction, that you read like words alike. And the words could hardly be more similar between 141(b) and 141(c). We think it's obvious, for constitutional reasons, even, that 141(b) has to mean turn over to the president the number of people you actually counted, not some rough approximation that might end up being manipulated for political purposes. And similarly, 141(c)'s tabulations of population means turn over the numbers you actually got when you counted people in these substate geographies.

JUDGE NEWSOM: Can I ask one mechanical question? I recognize that this case began on a motion for preliminary injunction. Is there anything preliminary about this case anymore? I mean, like, is it really a preliminary injunction that you want, or, like, effectively a permanent injunction against the use of differential privacy at the very least? And

the only reason I really think it matters is that it will adjust the standard somewhat from likelihood of success on the merits to success on the merits or something like that.

MR. LACOUR: Your Honor, if we wanted to consolidate final judgment with this hearing, we would have no problem --

JUDGE NEWSOM: I mean, I'm just wondering. These guys probably understand preliminary injunctions in a way that I just, frankly, don't. Today is, like, my one opportunity to be a real judge, as I said.

So I'm just wondering, really, is there anything preliminary about this anymore? If there is, then you can explain to me, yeah, like, if you enter this injunction, then something else will happen and there will be some further hearing for a permanent injunction. But is there anything preliminary about it, or are we really here on the merits now?

MR. LACOUR: I suppose if you ruled for us on the preliminary matter and we got the data we were entitled to, but then you later ruled for defendants sometime towards the end of the year, then they would be free to do this again in the future. But we don't think that the difference between the preliminary injunction standard and the permanent injunction standard is material in this case, particularly because we're dealing with such clear questions of law when it comes to, how do you read 141(c)? How do you read Sections 8 and 9? And we think the Court should adopt the way the Bureau had been reading

them until just the very recent past.

If there are no further questions, I'm sure I'll have more to say to you perhaps after lunch.

JUDGE HUFFAKER: Why don't we take a break for a few minutes, since this is a good stopping point? Fifteen-minute break? Okay. Let's take about a 15-minute break. It's 11:20, so let's plan -- 11:40, 11:35, 11:40.

(Recess was taken from 11:19 a.m. until 11:40 a.m., after which proceedings continued, as follows:)

JUDGE HUFFAKER: Mr. Davis, two housekeeping issues. One, have you two had a chance to discuss exhibits?

MR. ELLIOTT DAVIS: Not yet. We plan on doing that I think at the next break, Your Honor.

JUDGE HUFFAKER: Okay. And that brings me to the other issue. It's about -- it's almost 11:45. I think when we get to either a good stopping point with you or when you've finished your argument, which may or may not be around 12:30 or so, we'll break for lunch. Then I encourage both of you to at least have a discussion about exhibits, and then we'll talk about it and see how -- tell you how we want to handle it.

MR. ELLIOTT DAVIS: Yes, Your Honor.

JUDGE HUFFAKER: You may begin.

MR. ELLIOTT DAVIS: Good morning, Your Honor. May it please the Court. Once again, my name is Elliott Davis, and I'm with the United States Department of Justice. I'll be

presenting today on the differential privacy aspect of plaintiff's preliminary injunction motion. After that I'll turn it over to my colleague, Mr. Robinson, to discuss the delay aspect.

In *Wisconsin versus City of New York*, the Supreme Court explained that the Secretary of Commerce has broad discretion over the conduct of the decennial census. The decennial census comprises hundreds, perhaps thousands of operational decisions. Decisions such as, how can respondents respond to the census questionnaire? For those people who don't respond to the questionnaire, how do we follow up with them to obtain responses? Once census field operations are complete, how does the Census Bureau process the data in order to, for example, resolve duplicate entries for certain respondents? And how does the Census Bureau best protect the confidentiality of the data when it is released?

The Constitution and the Census Act don't provide precise answers to most of these questions, and they're left in the discretion of the Secretary of Commerce. But the Census Act does impose some obligations on the secretary. As relevant in this case, Section 141(c) obligates the secretary to provide tabulations of population of the states. And that seems to be the one statutory provision that's really at issue here.

In their complaints and in their opening brief, plaintiffs have turned this into a referendum on differential

privacy, which we discussed in our opposition. And then in a reply, they seem to indicate that it's really about invariants. They seem to admit that Section 141(c) only really deals with the invariants issue.

But even standing here today, it's not clear to the defendants as to whether they're challenging differential privacy in itself, or whether they're challenging the invariants decision. And plaintiffs are the masters of their own complaint, and I can't say what they're challenging. But for us, it seems that the central question at issue in this litigation is whether the injection of any amount of statistical noise into the substate population counts so as to protect the confidentiality of that data renders the resulting data something other than tabulations of population, and we would submit that the answer is no.

JUDGE NEWSOM: But you do take his point; right? In response to my question about this very issue, he said, I think, some skewing of characteristics is okay of the sort that occurs with data swapping. But once you start skewing numbers, now that's no longer a tabulation of population. It's no longer a tabulation of at least the number of people in that geographic subarea.

MR. ELLIOTT DAVIS: Well, as a threshold, I wouldn't use the term skewing because skewing implies that it's being biased to the left or to the right. The way differential

privacy applies is it's centered around zero. So there's a little bit of noise here, a little bit there, and that it evens out as you build the blocks.

But in terms of the question as to -- yes, I would say that 141(c) only deals with the -- like the block population counts. 141(c) does not -- I think plaintiffs have said this. 141(c) does not obligate the secretary to provide characteristic data such as race data or ethnicity data or voting age population data. That concerns really only the number of people who live in a given census block. And that's why Section 141(c) to us has no bearing on whether differential privacy is better than, say, the disclosure avoidance system the Census Bureau used in 2010.

Plaintiffs complain about, you know, how the differential privacy system may in some future implementation affect, like, the racial and ethnic characteristics of the data. But they can't really compare apples to apples with the 2010 disclosure avoidance system because, as Dr. Abowd explains in his declaration, how the swapping in 2010 worked, the methodology and the rates, are necessarily kept in a black box because that's -- so plaintiffs can't say to any standard how the 2010 disclosure avoidance affected the race and ethnicity characteristics.

JUDGE NEWSOM: So help me out here, because this may just be a point of my genuine misunderstanding. I thought that

there was a difference or a distinction to be drawn between data swapping or the 2010 methodology, whatever it was, and differential privacy in that data swapping didn't affect numbers. Like the numbers were still the same. The characteristics may change in the sense that -- I don't know -- like, you know, let's say 30 white people in this geographic subunit may be swapped for 30 Asian people in that geographic subunit, but that the 30 was still the same on either side of the line, whereas differential privacy, that's not necessarily true. Do I have that mixed up?

MR. ELLIOTT DAVIS: You're correct in a sense. What numbers you keep invariant is not specific to the type of methodology you use. You can implement a data swapping mechanism where you don't hold the substate population numbers invariant, and you can theoretically implement some version of differential privacy where you keep the substate population numbers invariant. It's just the methodology of how the 2010 disclosure avoidance system was based on swapping, where you would swap characteristics of households with the same number of people in them amongst different blocks.

JUDGE NEWSOM: So this may be the dumbest question of all time, but is it just the Census Bureau's judgment that a version of differential privacy that holds the numbers invariant is insufficiently protective of privacy? Is that the idea?

MR. ELLIOTT DAVIS: Yes, and I'll explain why.

Basically, when the Census Bureau conducted its reconstruction attack -- and I'm sure we'll talk a little bit more about that -- the question was, how -- there's, like, say, five general factors that you can look at: There's location, there's sex, there's age, there's race, and there's ethnicity. And so the reconstruction attack was determined, how can we take all of this aggregated data that we released in 2010 and run it on computation -- you know, on high-powered computers, using sophisticated public algorithms that everyone knows about, and sort of deaggregate the data so that you can generate sort of the raw data that was combined? Like it was combined and aggregated into what was called the PL 94-171 file and some of the other releases that the Census Bureau made.

And the Census Bureau determined that about 46 percent of the entries were accurately reconstructed. And this is corroborated by a third-party group called JASON that consults with the Census Bureau. A report that plaintiffs pointed the Court to repeatedly in their opening brief that corroborated the Census Bureau's reconstruction.

I feel like I got off track from Your Honor's question. I apologize.

JUDGE NEWSOM: That's okay. I was just asking --

MR. ELLIOTT DAVIS: I'm sorry. Why -- I apologize. Why invariants are necessary.

So if you keep the substate population numbers

invariant, then for every block, about the eight million blocks in the United States, you know exactly how many people are in each block, and so then a reconstruction algorithm doesn't have to solve for location. Doesn't have to solve for five variables, because it already knows the location. The location is set in stone, and it only has to solve for four. It has to reconstruct the data for sex, age, race, and location.

So by adding just a little bit of uncertainty into the substate population counts, a little bit goes a long way, and that exponentially increases the confidentiality of the data.

In terms of what's required by Sections 8 and 9 of the Census Act, we would look at *Baldrige versus Shapiro*, a 1982 case which is the main Supreme Court -- I think the only Supreme Court case on point, which took a very broad approach at those sections. It's not -- in fact, the Supreme Court expressly rejected the idea that it's about reidentification of people. The Supreme Court said that the data protected by Sections 8 or 9 are the data provided by or on behalf of census respondents, so it's not key to reidentifications at all. In fact, in *Baldrige*, the Supreme Court explained that lists of vacant addresses were protected under Sections 8 and 9.

And so *Baldrige versus Shapiro* was decided in 1982. It talks about raw census data. 1982, the year the Commodore 64 came out. And in those days it was assumed that if you take all of the data and you aggregate it in some fashion, then, you

know, that data was essentially protected. And if there was some outliers -- for example, the example plaintiffs provided, one Filipino American on a block of 20 people -- you can either suppress that, or perhaps you can swap it somewhere else to protect the confidentiality.

But in the past decade, computing power has risen exponentially, and it's now possible to take the aggregated data and deaggregate it to find raw data. And to be sure, it's not a hundred percent perfect. The reconstruction attack didn't identify every single record of the 308 million people -- 308-odd million people who were counted in the 2010 census, but it reconstructed a significant amount of raw data that was provided by or on behalf of census respondents. So the Census Bureau in its discretion has decided that the 2010 methodologies are not sufficient today to protect against these kinds of attacks, and they certainly are not going to be protective in the future. But we would suggest that there's no standards for this Court to say the 2010 methodology -- which, again, is conducted generally in a black box -- is somehow sufficient and differential privacy somehow is not.

JUDGE NEWSOM: Can I ask you a question about Section 9? So Section 9 as I read it says the Census Bureau can't make any publication whereby the data furnished by any particular establishment or individual, dot, dot, dot, can be identified. That sounds to me like perfect privacy. Does differential

privacy -- does the differential privacy methodology, even if more protective of privacy than data swapping, does it meet what I think I'm reading in Section 9? Under any circumstances, if any publication leads to any identification of an establishment or an individual, there's a violation.

MR. ELLIOTT DAVIS: So I think that's -- you know, I think that is how the *Baldrige* case reads it. Now, we understand today -- and, again, that was decided in 1982. These are old statutes. And that was, you know, written in a day where if you just aggregated the data and you did some suppression or some data swapping, that was good enough. Today, computer scientists have determined that any release of public information creates a nonzero risk that data can be identified.

JUDGE NEWSOM: Okay. This is sort of another question I have. And this may be like -- this sounds communist or Cro-Magnon or something, but, like, why does the Census Bureau publish all this information? Why not, like, just suppression? Maybe that's a stupid question.

MR. ELLIOTT DAVIS: Well, I think the Census Bureau publishes this information, even if it's not necessarily required to by statute, because this information is used by a wide variety of data users. You know, I think we and the plaintiffs have cited to articles explaining how governments and business owners use these data to determine where to open new businesses and where to fund projects.

You know, this is really the only opportunity, once in a decade, for the government to go out and collect such a massive amount of information from every single person in the country. And throughout the years, the census has been used to collect a variety of information, and the Census Bureau publishes it because it's useful.

So there is -- I would agree that any publication of data creates a nonzero risk that -- or a nontrivial risk that someone can potentially be reidentified; but, you know, it's within the Census Bureau's judgment of how best to weigh things like confidentiality and things like accuracy, and we don't think that there is any way for -- there is no judicially manageable standards for this Court to decide whether differential privacy is somehow better than the 2010 disclosure methodology or whether the 2010 disclosure methodology somehow is sufficient.

The Census Bureau, not plaintiffs, not most other data users, are bound by Sections 8 and 9. Section 9 is -- a violation of that even comes with criminal penalties. And of course, the Census Bureau operates under the Secretary of Commerce, who is accountable to the elected executive. And we would say that the determination of what disclosure avoidance methodology to use is left to the discretion of the secretary.

The one thing that the secretary has to do under statute, though, is to provide tabulations of population to the

states. And to us, that really -- and I think plaintiffs have said -- that that really only goes to the question of invariants.

And plaintiffs I think in their briefs and today at argument have conceded they've actually brought a facial challenge, because the privacy-loss budget, the epsilon has not yet been set. In fact, right now -- the Census Bureau released last week its latest iteration of demonstrative data. And for about four weeks the Census Bureau is going to take comments, and in early June the Census Bureau's DSEP, the Data Stewardship Executive Policy Committee, will decide how to set the privacy-loss budget.

And as plaintiffs have said, if the privacy-loss budget is set to infinity, then there is perfect accuracy. All the substate population numbers will be exactly as before the disclosure avoidance is run.

Now, we're not saying that the DSEP and the Secretary of Commerce would go along with a privacy-loss budget set at infinity. But as Dr. John Abowd, the Census Bureau's chief scientist, explains in his opening and his supplemental briefs, the privacy-loss budget can be tuned very finely. And so you don't have to set the numbers to infinity. You can allocate a sufficient amount of privacy-loss budget to the substate population numbers such that those numbers become effectively invariant. So I would say you can -- they can allocate a

sufficient amount of privacy-loss budget so that in 999 out of 1,000 blocks, the numbers in the substate population column before and after the implementation of differential privacy would be the same. And the remaining, I think, one out of a thousand habitable blocks, the number might be off by an average of one. So to us it's very difficult to conceive of how that could not be considered a tabulation of population or how the latter numbers could be considered fake or false. At issue here is there's no stationary target for plaintiffs to fire at, and so they look at the old 2010 demonstration data. But as we explained in our brief, that demonstration data was tuned more towards privacy than to accuracy to sort of -- so that they can improve the algorithms so that the distortions become more apparent, and so they can fine tune all the algorithms.

And that's why, when plaintiffs point to the epsilon of 500 in the document that they referenced, that was in July before the algorithmic improvements were finalized. That's not the case today. The algorithm has been fine tuned, and they're now moving on to tune the privacy-loss budget.

And so to us, this is a facial challenge. They need to demonstrate -- they have a heavy burden of demonstrating that there is no possible privacy-loss budget that could possibly satisfy the strictures of Section 141(c).

JUDGE MARKS: So is the privacy-loss budget nationwide? It's one privacy-loss budget for every state?

MR. ELLIOTT DAVIS: So it -- there's no differentiation between states. The way you think of the privacy-loss budget, it's kind of a pot. The privacy-loss budget is you set aside, this is the amount of privacy risk that we are willing to tolerate. So the higher it is, the less privacy, because there's more, like, privacy currency to go around. And they don't allocate it by state, they allocate it by type of data. So they can allocate privacy-loss budget to the substate population numbers. They can allocate privacy-loss budget to, like, the racial characteristics or the ethnicity characteristics. And the idea is you can determine how accurate you want the numbers to be, and that's basically a policy judgment. There's no judicially manageable standards on how to govern those.

And that's why, since October 2019, the Census Bureau has engaged in a collaborative -- they've been releasing demonstration data to data users, and data users have been submitting comments and feedback like the documents that the amici states provided in Utah. The Census Bureau has received a lot of comments about its demonstration data and have used those comments and feedback to fine tune the algorithms.

And that's what they are doing right now with respect to the privacy-loss budget itself. Last week they released demonstration data where the privacy-loss budget -- I think it was set either at 10.3 or 12.3, and we are engaging with our

stakeholders to determine how to best set the privacy-loss budget so that the data are usable by groups like states and other people who use these census data.

JUDGE MARKS: Who are your stakeholders?

MR. ELLIOTT DAVIS: I'm sorry?

JUDGE MARKS: You mentioned stakeholders. Who are you referencing when you mention stakeholders?

MR. ELLIOTT DAVIS: Stakeholders are anyone who uses the census data. So those are states for redistricting; there's the National Council of State Legislatures; there's various public interest groups who want to ensure that the Voting Rights Act is complied with -- groups like MALDEF and, like, I think Asian Americans Advancing Justice -- who want to ensure that the data are usable so that states can comply with their districting obligations.

JUDGE MARKS: You indicated in your brief that there are data users who will provide feedback after the demonstration to set the privacy-loss budget. Is that what you're talking about here?

MR. ELLIOTT DAVIS: That's correct. And no one's obligated to provide us feedback. This is something that we provide out to the public. It's on the census.gov web site. And whoever wants to can take the data, just like plaintiffs' experts did with the old demonstration data, and perform their analysis on it and send it to us; post it public on their web

site so the public is aware what's going on. And that's really the benefit of differential privacy as compared to the previous methods that the Census Bureau used. And it's --

JUDGE MARKS: Is this feedback meant to constitute notice and comment under the APA?

MR. ELLIOTT DAVIS: No, no, Your Honor. It's not formal in, like, an APA sense. This is an iterative process so the Census Bureau can set the privacy-loss budget in a way that it believes to be accurate, with consultation from stakeholders who decide to provide comments.

And this is one of the benefits of differential privacy. This process didn't happen with respect to the way swapping worked in 2010. The way swapping algorithms work is that you have to keep the mechanisms and things like the swapping rates secret because if you publish those -- if you publish that information, people can reverse engineer the swapping. So no one really knows -- I don't know because it is protected by Sections 8 and 9 -- the rates of swapping or how exactly, you know, the algorithm decided who to swap.

With differential privacy, the way the algorithm is designed is that you can fine tune all of these things in the public eye. And as Dr. Abowd explains in his declarations, the Census Bureau will publish the algorithms and all the -- the algorithms publicly so that everyone can view what happened with the data.

JUDGE NEWSOM: So once the epsilon is set, it's not then just sort of like a foregone conclusion. It's not just like you punch a button and everything generates. I assume that there's still some judgment being exercised about how, when, and where to, like, impose the noise? The epsilon tells you how much noise, but someone in some room is making a decision about when, where, and how; right?

MR. ELLIOTT DAVIS: Right. So my understanding is that when the privacy-loss budget is set, also will be set is where in the various publications the privacy-loss budget will be allocated. And that determines where the noise is injected. And that's how differential privacy works. Where swapping, we would imagine most of the records are unperturbed; right? So you can imagine if most of the records aren't swapped, when you reconstruct it, you know, there will be a high degree of accuracy.

Differential privacy -- the way differential privacy is implemented in the Census Bureau's algorithm is that every characteristic that's not being held invariant, there is some chance that noise will be injected into it. And so the idea is that, you know, people shouldn't care about what is in the raw data; right? So if, you know, one block reports 29 people versus 28 people, that doesn't matter in the long run because the algorithm is designed that as you build the blocks into larger jurisdictions, the error evens out. What matters is in

the larger jurisdictions, what those numbers are.

So if you inject a little bit of noise into the record-level information, the idea with differential privacy is as you build it up into larger jurisdictions, the error evens out. But then it becomes immensely difficult, if not impossible, to reconstruct it because every single variable, except for the ones held invariant, there's a risk that that data might have been perturbed. So you can't deaggregate it in the same way as you can with something like swapping.

JUDGE MARKS: You indicated in your brief that the reporting of final redistricting data is a reviewable final agency action. The State of Alabama says the setting of the invariants is a final -- or maybe they said the 2018 decision in the setting of the invariants --

MR. ELLIOTT DAVIS: They said all of those things.

JUDGE MARKS: What is the final agency action here, and what are you doing to comply with the APA for the final agency action?

MR. ELLIOTT DAVIS: Well, the final agency action is when the secretary reports the districting numbers to the states. And that's based on *Franklin versus Massachusetts* and the *City of Detroit* case from the Sixth Circuit.

Now, to go back very briefly, because plaintiffs have argued in their complaint -- in their complaint and in their opening motion, they explained or they alleged that -- alleged,

argued -- that the final agency action was the 2017 announcement about the use of differential privacy, and the 2018 -- I think it was the final operational -- the census final operational report.

We explained in our opposition brief that those are not final agency actions, because the final agency action is when the secretary provides the data to the states. Because up until then, everything is kind of a moving target until the secretary sends the numbers out.

In reply, for the first time, they said, actually, the final agency action is this November 2020 decision by the Census Bureau's DSEP, the Data Stewardship Executive Policy Committee, which sets certain invariants which did not include block-level, substate populations.

Now, from my vantage point, plaintiffs have -- at a preliminary injunction, they have to demonstrate a likelihood of success on the merits on their claims. And they've basically abandoned in their reply brief the idea that the 2017 and the 2018 -- the 2017 announcement and the 2018 plan were final agency action.

As we explained, the invariants were not determined at all in the 2017 announcement and the 2018 operational plan. And the DSEP stated that -- the DSEP -- in November 2020 they decided to hold certain things invariant, not the substate population numbers. But as we've explained in our responses to

plaintiffs' request for admissions, I believe it's RFA 12, which plaintiffs attached in their reply brief in document -- I believe it is 94-12 -- yes, 94-12 -- that all these operational decisions, including the number -- like what invariants are used, are subject to review and change by the Secretary of Commerce up until she releases the data to the states.

And this stems from the Supreme Court's decision in *Franklin versus Massachusetts*. *Franklin* concerned the transmission of the apportionment data, what the president did last week.

The way it works in Section 141(b) is that the secretary provides a report to the president that contains apportionment numbers, and then the president reports apportionment data to Congress. And the Supreme Court said that the secretary's report to the president didn't constitute final agency action, because the secretary is subordinate to the president and the president has the opportunity and may, you know, order the secretary to reform the census. So therefore, the secretary's report to the president is just tentative in nature, and the secretary can't bind the president. So therefore, action is only final when the president sends the numbers to the states.

And the same analogy works here. Census Bureau's DSEP isn't sending redistricting data to the states. Under Section 141(c), it's the secretary that sends the redistricting data to

the states, and the DSEP has no ability to bind the secretary. So it's the secretary's reporting of the numbers that goes to -- that becomes final agency action.

JUDGE MARKS: And so once it's a final agency action, walk me through the steps under the APA of what you have to do to comply with the APA when there is a final agency action.

MR. ELLIOTT DAVIS: So when the final -- so the final agency action is just something that can be challenged. You know, a regulation that goes through notice and comment, that could constitute final agency action that is reviewable under the APA. But that's not the only circumstance in which the APA can attach. And we would agree that --

Well, first of all, we would dispute that setting the invariants is an agency action to begin with, because it is not a discrete and circumscribed decision. We've explain that in our opposition brief.

But assuming that setting an invariant, one small cog in the bigger disclosure avoidance mechanism and the bigger sense of this operation, if that could be a discrete agency action, that action is only final when the secretary sends the numbers to the states. Because that is the only point where the numbers stop moving and become fixed.

JUDGE MARKS: And you're saying it's only at that point that it's subject to judicial review?

MR. ELLIOTT DAVIS: If at all, that's the point when it

would be subject to judicial review.

But plaintiffs, in their complaint, they've alleged that -- you know, they didn't talk about how setting invariants in November 2020 was final agency action. In their complaint and in their opening brief, it was all about a 2017 announcement and a 2018 operational plan. And those aren't final agency actions either for the same reason.

But to the extent that the Court finds that they are, then we would say that that was barred by the doctrine of laches. Because if they thought in 2017 and 2018 those are final agency actions, they should have been reviewable then. But as plaintiffs said, you know, the invariants weren't set. The privacy-loss budget is still in the process of being set. That makes proof positive clear that the claims as pled in plaintiffs' complaint are not final agency action, and plaintiffs have no likelihood of success on those merits.

JUDGE NEWSOM: Can I ask you a standing question? I was sort of giving Mr. LaCour a hard time about standing, but I want to kind of reverse that a little bit.

I mean, he's right, isn't he, that, you know, the Supreme Court has said in cases like *Akins*, we have reiterated in a case called *Muransky,* that informational injury is good enough. So why doesn't the State, sort of given its historical reliance, 141(c)-based reliance on census data to do its redistricting and to plan for funding allocations, why doesn't

it have a valid informational injury here?

MR. ELLIOTT DAVIS: Because the informational injury is only -- you know, for informational injury, you look to what is promised to the information users. And here it's in Section 141(c): Tabulations of population. And here the Census Bureau will provide tabulations of population, as we've explained in our brief, certainly on the facial challenge. I think we've carried that burden -- plaintiffs have not proved their burden. So if we were to say, we're not going to provide any tabulations whatsoever, then that could be an informational injury.

What plaintiffs are really saying is that they don't like the methodology that we are using to determine the tabulations of population. But that can't -- that's not -- that's not enough to prove some sort of -- or demonstrate some sort of informational injury. It would be crazy to say that any methodological change between censuses could allow a state to say, I don't like that change and, therefore -- you're not giving me tabulations in the form or in the method that I like, and therefore, I have standing to sue.

JUDGE NEWSOM: So does that mean, though, that no matter how goofy your method of counting is, the State wouldn't have standing because -- I think what you're sort of saying is that their 141(c) claim fails on the merits? I mean, let's say you've decided -- maybe it's their example that everybody in Alabama lives in Birmingham. No informational injury there?

MR. ELLIOTT DAVIS: Well, I would say that that's -- you know, I think that's a tougher question, and that's something that's best raised on an as-applied basis. Because right now we're sort of shooting in the dark.

And I would say at a certain point -- as a matter of theory, at a certain point the data stops becoming population tabulations and becomes randomness. That's not what the differential -- what the implementation of the differential privacy algorithm is doing. It's taking the population counts and infusing into them a small amount of noise to slightly perturb them, noise that evens out as you take blocks and you build them into larger geography.

So we don't think the sort of absurd -- I don't want to say absurd, but the sort of extreme case where the Census Bureau just says, well, we're going to generate random numbers, or we're going to assign everyone in Alabama to the city of Birmingham -- that's not the case here. But that's a standard that's better suited to an as-applied challenge. And, you know, there is a very decent argument, as Judge Bumatay explains in his *National Urban League* opinion, there are no judicially manageable standards for a court to determine what is accurate enough.

And I agree, like, that is a difficult question. But we don't face that here, because plaintiffs are bringing a facial challenge. So it's their burden to show there's no set

of circumstances under which any implementation of this differential privacy algorithm would comport with Section 141(c). And if the privacy-loss budget is set to infinity, it clearly comports with it. I think plaintiffs admitted that earlier today. And we would say that, you know, any reasonable amount of -- anything that we believe the secretary will do will easily satisfy populations of tabulation. But until there is a stationary target, it's really impossible for the Court to consider that.

JUDGE NEWSOM: Is there any sort of administrative law doctrine of deference at issue here? Clearly we're not in Chevron land. Are we in Skidmore or Mead land? Are we in any land? I mean, is there some interpretation of the term, the phrase "tabulation of population" that the Census Bureau has sort of, like, imposed?

MR. ELLIOTT DAVIS: I wouldn't say that there's anything formal that the Census Bureau has put out. To us the phrase "tabulations of population" is very capacious, and we don't think it can be fairly read to impose any sort of invariant requirement.

And that's actually one of the things that we tried to emphasize in our brief, which is that tabulations of population -- and both Section 141(b) and 141(c) is methodologically neutral. The methodology for the apportionment stems from the Constitution. We know from Wisconsin and even

from Section 209 that the sole constitutional purpose of the decennial census is to provide for determinations of population for the apportionment of representatives in the House. And the methodology for doing that is the actual enumeration.

The phrase "actual enumeration" doesn't appear anywhere in Section 141(b). It just -- 141(b) obligates the president to transmit -- to transmit, basically, the tabulation of total populations by states. To us that's methodologically neutral.

The same thing in Section 141(c). Tabulations of population doesn't imply any sort of specific methodology whatsoever, and so the methodology is up to the Census Bureau to determine.

Plaintiffs have tried to say that, well, the actual enumeration standard applies to Section 141(c) as well. But the Census Act demonstrates that that's not the case, because Section 195 clearly states that the secretary's authorized to employ statistical sampling methodologies in effectuating the Census Act, except with respect to the population for apportionment purposes; right?

And Congress had the opportunity -- while contemporaneously was amending Section 141, it also amended Section 195 and easily could have excluded the redistricting data in Section 141(c) from engaging in a statistical sampling methodology as well, but it declined to do so.

So the import of 195 -- of Section 195 we think is

clear. The redistricting data could theoretically be based on a statistical sampling methodology. It does not necessarily have to be based purely on the actual enumeration.

So I wouldn't say -- just to go back -- I apologize. This is a little bit of a digression. I want to go back to your question.

I don't think there is any sort of necessary deference that is required to apply to the -- what means to be a tabulation of population. It's difficult to conceive of numbers where you take the population counts, you put in just a little bit of error to, you know -- here or there to better ensure the confidentiality of the data, and not call the results something other than a tabulation of population. In fact, in plaintiffs' brief, as we explained in our opposition, they repeatedly referred to the post-differential privacy numbers as tabulations of population. They called them flawed or inaccurate, but it's difficult to conceive of it as anything other than tabulations of population.

JUDGE MARKS: I have another question, back on final agency action.

MR. ELLIOTT DAVIS: Of course.

JUDGE MARKS: In section -- well, it's the Public Law 105-119(c)(2) specifically reads that the Census 2000 Operational Plan shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000

decennial census. If that was a final agency action, why wasn't the 2018 operational plan for the 2020 census a final agency action?

MR. ELLIOTT DAVIS: Well, I think that only proves that the 2018 final operational plan is not final agency action. Because if Congress had to deem something to be final agency action, that necessarily implies that it thought that without this deeming, it was not final agency action.

At the end of the day, final agency action is defined in Supreme Court case law as something that -- and I don't want to completely botch the standard -- final agency action is something that determines rights and obligations and where -- is something where legal consequences flow.

And the 2018 operational plan does not determine rights and obligations; does not determine legal consequences. It's merely an announcement to what the Census Bureau is planning on doing. The only point at which the release of the redistricting data could be considered to, you know, impose rights and obligations or from legal consequences will flow is when the secretary -- when the numbers stop moving and the secretary releases those numbers to the states.

JUDGE MARKS: Was the decision about which disclosure avoidance system to use for the 2010 census, was that a final agency action?

MR. ELLIOTT DAVIS: The decision of which to use? I

would say no.

JUDGE MARKS: So since you're saying it wasn't a final agency action, then the agency did not need to comply with the APA as it relates to what decision to use in terms of disclosure avoidance systems in 2010? You did not have to comply with the APA?

MR. ELLIOTT DAVIS: I would say that, you know, one only needs to comply with the APA when it comes to final agency actions. We would say the myriad operational decisions, thousands of decisions that go into a census, if those could be considered individual, discrete agency actions, then the census would never be able to perform its duties because every single person would be challenging different aspects of how the census operates.

We see these in the NAACP cases from the District of Maryland in the Fourth Circuit that we cited in our opposition brief. The courts are very wary of letting -- the courts are wary of letting themselves micromanage the detailed operations of the census because it is a massive, lumbering beast, and every change that you make -- you can see this in the differential privacy aspect as well. Any change you make to one part has dominoing effects on other aspects of the census operations. And it's something that I think is fairly uniquely committed to those persons who are ultimately accountable to the executive. And it's something where there really aren't

judicially manageable standards to decide which disclosure avoidance method is better than another one.

JUDGE MARKS: So even if the decision to use differential privacy effectively rescinded the agency's decision to use the disclosure avoidance system it used back in 2010, you're saying that is not a final agency decision along the same lines of -- I'm thinking of the DACA case where the Court said rescinding DACA required compliance with the APA. You're saying this is not a similar type of rescission of a final agency decision that would require compliance with the APA?

MR. ELLIOTT DAVIS: You know, I'm not familiar with the specifics, but I don't believe that the standard in the census operations world is we take what happened in 2010, and then any changes we make for 2020 is considered a decision. I believe the Census Bureau views every decennial census as a new event where it starts and determines what it is going to do. So I wouldn't deem the 2018 operational plan as a rescission of the previous disclosure avoidance methodology. I would view it more as this is how we are planning to implement disclosure avoidance for the 2020 decennial census.

JUDGE NEWSOM: Can I ask you a question? Going to, I suppose, the last question that I asked Mr. LaCour about sort of, like, what's really going on here, you mentioned just a second ago that any decision made -- I think you said this -- any decision made sort of within differential privacy world,

that's going to have cascading effects elsewhere. Can you help me with -- the sort of get over the relatively terrifying example that the State has at page 39 of its reply brief about Native American and Alaskan natives complaining about differential privacy, and the Census Bureau saying, Don't worry, we'll make sure that you're counted accurately. And the State says, well, if that's true, then the butterfly effect or the cascading effect that you have described means you're going to have to scramble somebody else, like, royally to make sure that they're counted accurately. Which does sound a little terrifying that, you know, somebody in some office in Washington is pulling all these levers.

MR. ELLIOTT DAVIS: And I appreciate that you brought that up. I'll say two things about the American Indian, Alaska Native issue. The first is that we have a unique relationship with federally recognized tribes. The Census Bureau, therefore, determines to try to treat tribes like we treat other sovereigns. So at the state level, we have -- the Census Bureau has made the state population numbers invariant, and thus it's only fair to essentially do the same thing for federally recognized tribes who are also sovereign.

JUDGE NEWSOM: I see. So it's almost like a 141(b) apportionment judgment for the tribe?

MR. ELLIOTT DAVIS: I would say it -- yes, essentially. And they decided not to hold to -- in fact, we're treating the

tribes a little worse, because it's not purely invariant. But as Dr. Abowd explains, as is actually in his explanation of how they can assign sufficient privacy-loss budget to hold certain numbers invariant, that they've assigned sufficient numbers to the very -- just the top of the federally recognized lands to keep those numbers effectively invariant. But at all of the sublevels in American Indian/Native Alaskan lands, the privacy-loss budget is the same as its counterpart.

The other issue with -- I'll just shortcut -- AI/NA lands is that they're called very off spine. So there's a census spine which goes from the blocks to groups to tracts to counties and to the State. But a lot of entities -- for example, voting districts -- are not necessarily on the spine, because voting districts can cut across, you know, census tracts.

American Indian lands are very off the spine. And in early iterations of the algorithm, through the feedback process, the Census Bureau learned that the differential privacy algorithm was not particularly good at that point of controlling the privacy and the accuracy of things that were very off spine. So through the iterative algorithmic review process, they determined to make the algorithms' employment of off-spine uses, which includes American Indian/Alaskan Native lands, to perform better. So it's not just something that's purely unique to AI/NA lands. That's something that came out of the consultation

process with them, but it was not purely done just to benefit them. That's just due to the fairly unique geographies of those lands, which often even cut across states, which is fairly rare.

I'd like to just briefly turn, because I want to leave Mr. Robinson some time to argue delay, Judge Newsom, just to your points about vote dilution and federal funding harms. I think we would -- at least I would submit that since we do not know at this point in this facial challenge how the privacy-loss budget will even be set, how the substate numbers will even be affected, there's no possible way for plaintiffs to show that there's a substantial risk of vote dilution or federal funding harm, let alone that it's certainly impending. So we would agree that there's no standing for either of those types of harms at all.

And we would also argue that with respect to the equal protection claims. The Supreme Court has rejected attempts to import the one person, one vote standard to sort of be the tail that wags the dog of how the census operates.

And unless the Court has any further questions for me, I'd like to turn it over to Mr. Robinson.

MR. ROBINSON: Good afternoon. My name is John Robinson. I'll just briefly address plaintiffs' delay claim, which is their claim that the Bureau's February 12th press release violates the Census Act and the APA.

Our brief explains why plaintiffs are not entitled to

a preliminary injunction on this claim for several reasons, but I just want to emphasize three points.

First, the Census Bureau is doing everything in its power to get the redistricting data out as soon as it possibly can. And for that reason, because there's nothing more that the Bureau can do, as set out in its two declarations, plaintiffs' alleged injuries are not redressable, as the Ohio Court found in dismissing the State of Ohio's identical delay claim.

Second, not only are plaintiffs' alleged injuries not redressable, but they haven't established Article III injury at all on their delay claim.

And third, even assuming that plaintiffs had standing, the claims fail on the merits. Plaintiffs don't have a cause of action to bring a delay claim under the Census Act, which leaves only the Administrative Procedure Act claim, which fails because plaintiffs haven't established final agency action.

JUDGE NEWSOM: So can I ask you a question just about that last bit? So if it wasn't final -- on the delay piece of this, if it wasn't final agency action before, how is it not final agency action on April 1? I mean, once the deadline is blown.

MR. ROBINSON: Sure. First of all, *Franklin* does say that the final agency action is when the secretary releases the numbers and that sort of tentative subsidiary decisions are not final agency action. But, you know, there are requirements for

what final agency action is. It needs to impose legal rights and obligations on parties. It needs to be a decision, first of all. No one at the Census Bureau ever sat down on April 1st or otherwise and said, we're not going to produce the data on March 31st. The February 12th press release, which is what they're challenging, was a recognition, a tentative projection that has changed since then.

You know, most recently, just last week, the Bureau announced that they expect to be able to produce this data on August 16th. And as I understood plaintiffs in their presentation, they would be fine with that. So I don't know how they could establish an injury if they're fine with the August 16th release.

But to answer your question, you know, yes, the statutory deadline has passed. That doesn't necessarily mean that there was ever a decision that satisfied the requirements of final agency action under the --

JUDGE NEWSOM: So you, undoubtedly, know your administrative law better than I do. So a failure of an agency to act in -- sort of in comport with a statutory deadline isn't itself final agency action?

MR. ROBINSON: No. That's an excellent question, because there is a specific section of the APA that allows you to bring that type of challenge. That's a 706(1) challenge for agency action unlawfully withheld or unreasonably delayed.

Plaintiffs for whatever reason decided not to bring that challenge here. That would have been a different analysis under different factors. Instead, they brought a challenge under 706(2). 706(2) requires final agency action in the past. And having brought a 706(2) challenge, they need to satisfy the burden of showing that the February 12th press release was final agency action, and it simply wasn't. It was a tentative informational snapshot.

But Your Honor doesn't even need to reach the merits question. Because as the Thieme and Whitehorne declarations have laid out in detail, because of the COVID-19 pandemic, hurricanes, wildfires, the PL 94-171 data has, regrettably, been delayed and will not be produced until August 16th.

Plaintiffs say, as they acknowledged today, they don't demand it tomorrow. They don't demand it in a few days. They say we should put it out by July 31st. So just from the outset, we're talking about a difference of 16 days here: Between July 31st when plaintiffs say it would be reasonable and August 16th when we'll be able to put it out.

JUDGE MARKS: There was a press release back in April 2020, I this it's document 115-3, where the census said if we get specific information by October 30th, we will be able to get the redistricting data to the states by July 31st, 2021. You had that information actually before the deadline that you had put in that press release, so why is it not possible to get the

information to the states when you contemplated over a year ago that you could work on that time line?

MR. ROBINSON: Sure. So a couple of things.

Yes, the Bureau usually, typically, would be able to produce this data within three months of apportionment. But as Mr. Thieme explains in his declaration in paragraphs 84 to 86, they had to decouple certain processes here that would normally have been done in parallel prior to apportionment. They had to decouple them and do them after apportionment in order to prioritize the apportionment counts and get those out as soon as possible.

The other thing -- I mean, counsel brought up during his presentation some representations that were made in other cases. And the Bureau takes its statutory deadlines extremely seriously and did everything in their power to meet them, but they changed. And when they would report to courts what was feasible, it was always with the caveat that things could change. The Bureau could discover anomalies in the data that it needed to address. And it did discover anomalies, and that slowed things down.

If the Bureau -- you know, the August 16th date I think builds in a bit of time for -- if anomalies get discovered. If there are no anomalies, no more errors, and they're able to release the data sooner, they could even produce it by July 31st and, of course, they will produce it as soon as

they can. But the experts at the Bureau have projected that the soonest they can get the data out and have confidence in the data is August 16th.

And it's for that reason that the Ohio Court, which considered an identical delay claim from the State of Ohio, denied plaintiff's motion for a preliminary injunction; dismissed the complaint for lack of standing. That case is still pending in the Sixth Circuit, where it's been pending for a couple of weeks now, and the Sixth Circuit hasn't acted on it.

JUDGE HUFFAKER: Counsel, you've referenced the August 16 date, but what level of confidence can the State and the plaintiffs have that you will actually meet that date? Because it's been a moving target.

MR. ROBINSON: Yes. Understood, Your Honor. I think the State can have confidence in that date. I mean, it is made with the caveat that, you know, undiscovered, unexpected anomalies could be discovered. But as we get closer, I think they can have more and more confidence. There are only three steps left. So they produced the apportionment. They'll now be spending about two months on the census edited file. This is not just the population data; this is all the other demographic data that goes into the redistricting file. They need two months to do that. They need approximately three weeks to provide disclosure avoidance system.

Now, plaintiffs argue that, well, you could just get

rid of differential privacy and you could save some time there, but that's not true as Dr. Abowd and Mr. Thieme explain in their declarations.

The 2010 swapping algorithm actually took four weeks. So if anything, differential privacy is speeding things up. It's taking less time. And as Dr. Abowd explains, if they were ordered to change disclosure avoidance systems, that would add multiple months here.

Then the last step they need to do is to produce the actual tabulation file, which takes approximately three weeks. And again, it's not as though this data exists today and it's out there and they can just push a button. It needs to be created. It's in an unworkable, unusable form now, and the experts at the Bureau need the time to provide the data in a form that is usable to the states.

And that's another point that the Ohio court picked up on in dismissing plaintiffs' complaint there. Not just for lack of redressability, but also for lack of standing and ability to show injury in fact. Because of the fundamental inconsistency between the alleged injury, we want that data so we can rely on it as soon as possible, and the redressability will rush through it and get it to us as soon as you can. The Bureau needs this time.

And yes, it is our burden to establish impossibility. Cases have recognized that. But plaintiffs in their reply brief

haven't challenged the declaration at all. The only argument they've made in reply is that we should be able to do it within three months, because that's what we've done before. But we've explained why we need a little bit more time than that this time, and that's because of the decoupling to prioritize apportionment.

So plaintiffs cannot establish redressability. They cannot establish injury in fact. They conceded today that their sole basis for harm, that they need it as soon as possible to redistrict. They need it six months ahead of time. They can no longer rely on that because they will have it for seven months. They're getting it in August. The primaries aren't until May of 2022. So they'll have the time that, even under their theory, they need to redistrict.

And then just briefly on the merits. If the Court were to find standing, there is no cause of action under the Census Act. They have an argument that Section 209 of Public Law 105-119 provides a cause of action. That only provides a cause of action to challenge the use of statistical methods. And even assuming that differential privacy is a statistical method, they have no argument that their delay claim challenges the use of a statistical method. So they say, well, differential privacy, a byproduct of that statistical method, is the delay. But first of all, that's wrong as a factual matter. Differential privacy is speeding things up, not slowing things down. And second of

all, Section 209 does not give them a cause of action to challenge any and all byproducts that might flow from the use of a statistical method. It allows challenges to the statistical method itself. So there's simply no cause of action under Section 209, which leaves only their APA claim, which fails for the reasons we discussed earlier.

So for all those reasons, we would request that plaintiffs' motion for preliminary injunction on the delay claim be denied.

Just one housekeeping matter before lunch, if I may, before I sit down. Defendants have an answer deadline coming up -- of course, any need for further questions from the Court. But we have an answer deadline coming up on May 11th. We haven't raised this yet with plaintiffs, and we're happy to do it over the break, but we think it would be in all parties' interests to postpone that deadline until the Court rules on the motion for preliminary injunction, just because we would be raising the same arguments in a motion to dismiss. And rather than brief those a second time, I think it makes sense for everyone to postpone that deadline until the Court has provided guidance on the preliminary junction. But we're happy to discuss that with plaintiffs over the break, but we wanted to raise it before the Court before we sat down.

JUDGE HUFFAKER: Before we take a break, let me ask you this. And maybe it's just a function of the algorithm. The

data, when it's rolled out to the states, does it all become available at the same time internally to the Bureau, and that's why you can't release Alabama's before maybe California's?

MR. ROBINSON: Mr. Thieme explains this. It is conceivably possible to prioritize some states. But if the Bureau were to do that, Alabama would actually be at the back of the line because their Constitution doesn't require reliance on census data. In fact, it provides an express mechanism. It would also slow things down for the other states. So rather than try to pick winners and losers in terms of who's going to get it first, the Bureau has decided to release it all at once. Even if it were to prioritize Alabama or Ohio or some other state, it would only save a few days or weeks at most. It wouldn't make a significant difference.

JUDGE HUFFAKER: Well, weeks seem to count. At least that's what I'm hearing from the State. But the fact that Alabama is the only state that's chosen to actually file a lawsuit, that would not bump them to the front of the line?

MR. ROBINSON: Well, Ohio -- yeah. Fair point, Your Honor. Ohio also, obviously, brought the delay claim, and obviously, we don't want to incentivize lawsuits.

Thank you.

JUDGE HUFFAKER: Okay. I think it's time to take a break. Let's take a break until 1:30.

Counsel, if there's anything you need to work out

amongst yourselves, I would encourage you to take the opportunity to do so.

Those of you who are not familiar with the courthouse, there's a cafeteria that's down on the basement floor. It will make just about anything for you that you may wish.

So with that, I think we're adjourned. We'll see you at 1:30.

(Recess was taken from 12:39 p.m. until 1:38 p.m., after which proceedings continued, as follows:)

JUDGE HUFFAKER: Okay, counsel. We've got rebuttal from the State. Mr. LaCour, is that you?

MR. LACOUR: Your Honor, if it's all right with the Court, my colleague, Mr. Torchinsky, was going to briefly run through the demonstrative that lays out some of the more granular uses of the data we used for redstricting, just sort of touch on that aspect of the harm, and then I was going to make a few more points in rebuttal after that.

JUDGE HUFFAKER: That's perfectly fine with me. You may proceed.

MR. TORCHINSKY: Your Honor, I'd like to sort of address essentially Judge Newsom's questions.

JUDGE NEWSOM: Quick logistical question. Again, sorry. The Court of Appeals guy in the District Court doesn't know how these demonstratives work. Where will I see this? Will it be here?

MR. TORCHINSKY: I can probably put it up on a PowerPoint, or I have a printout of it, or it's in the files we gave to the Court. I can put it up on --

Well, it's on the thumb drive. Can you put it up?

JUDGE NEWSOM: If it's possible to put it up, that's great. If it's not, that's totally fine.

MR. TORCHINSKY: I can email it to a clerk if that would work.

JUDGE NEWSOM: No, no. That's okay.

MR. TORCHINSKY: I'll do it the old-fashion way on the Elmo.

Your Honors, the government's position here seems to be that we can do whatever we want, whenever we want, and however we want with the substate population data. And I want to illustrate to the Court why that doesn't work as a matter of law.

If you go to -- and this is page -- this is document 115-37. Towards the end of that file, we include a number of maps from this Court's decision in *Alabama Legislative Black Caucus*. That was a case that --

(Brief interruption.)

MR. TORCHINSKY: I wanted to get back to what Judge Newsom was asking about, about why this matters and why the level of specificity here matters. And I want to point the Court to this Court's decision. This was the Middle District of

Alabama, sitting in a three-judge panel assessing the constitutionality and Voting Rights Act compliance with the state legislative redistricting plans from 2010.

The maps that I have provided up here are excerpts from Judge Pryor's majority opinion in 2017, which was following the remand from the Supreme Court. And what I want to point out for the Court is how Judge Pryor and the other judge that joined him in the majority literally went down to the block level here. These are block-level population numbers. And what you see is the ones -- the populations that are in green, that have the green numbers, those are the majority Black districts.

Judge Pryor thought the block-level data was important enough to literally include over 200 of these block-level maps in his 450-page opinion that looked at exactly how and where lines were drawn. So when the Bureau claims that they just insert a little bit of noise, it matters a lot for where these lines are drawn, because districts are drawn from the block level.

I know the Bureau stood here and said, well, when you go up the census spine, the errors kind of average out. The problem is we don't draw -- when legislators and law makers and commissions are drawing these lines, they don't draw from the census spine, they draw from the block-level data. And so it doesn't matter if county lines line up or tract lines line up or average out. What matters is the block-level data. And that's

why it's always been historical practice of the Census Bureau to release invariant block-level data and perturb a little bit of characteristics, because this block-level data matters for redistricting.

And so, for example, you know, not only did Judge Pryor think this was important enough to include over 200 maps like this in his opinion, in this state Alabama just had a three-year-long battle in a case called *Chestnut v. Merrill* in the Northern District of Alabama over whether the congressional districts maps in this state complied with Section 2 of the Voting Rights Act. And it was a statutory claim, and the plaintiffs were claiming that Alabama needed to draw a second Black majority congressional district.

So what's at issue here -- and, Judge Newsom, this gets exactly to your point. The way this data is perturbed or moved around the state will have an impact on whether Alabama can draw or will need to draw no majority-minority districts for Congress, one majority-minority district for Congress, or potentially even two majority-minority districts for Congress.

Even in the last version of this differential privacy data -- I know the Bureau says the errors kind of average out. But when you look around the state in the version that they released last week, something like 11 percent of African-American population -- that's about 130,000 of the approximately 1.2 million African Americans in Alabama -- were

moved around. And in large part, they were moved to places where there wasn't African-American population.

When concentrations of voters and concentrations of people matter, and then the Bureau randomly reassigns 11 percent of the 1.2 million African Americans to places in the state where there aren't -- in some cases where there aren't African-American population, it matters here at this level at the congressional level. It matters here at the state legislative level. And that's why this is so important.

The Bureau sort of takes the position that they can give you whatever we want, whenever we want, and it doesn't matter, but it does matter for Voting Rights Act compliance. It does matter for one person, one vote purposes.

And I also think it's important -- hang on. Let me just collect my thoughts for a second.

So even if the errors average out when you're going up the census spine, districts aren't built from the census spine. Districts are built from the block. So even if you know that errors average out based on the existing spine, the errors aren't going to average out when you draw new districts. And that's, I think, the point of why this is so important.

JUDGE NEWSOM: So can I ask you a question? I hope I'm not just retreading the same ground. But so are you, your side, are you demanding something like perfect accuracy?

MR. TORCHINSKY: Your Honor, I think --

JUDGE NEWSOM: Is there any kind of what I'll just call generically kind of fudging that's permissible?

MR. TORCHINSKY: Your Honor, I think when it comes to block-level population, not characteristics but block-level population, I think the answer is no. The Bureau's historical practice has always been to keep block-level population as an invariant in whatever disclosure avoidance mechanism they applied.

So that block-level population, knowing that in Homewood Public Library precinct -- you know, that in the Homewood Public Library precinct, how many people were in each census block inside that precinct has always been kept invariant. And I think 141(c) requires it. The problem --

JUDGE NEWSOM: So I get it how that helps you on one person, one vote compliance.

MR. TORCHINSKY: Yes.

JUDGE NEWSOM: How does it help you or how does it solve problems in Voting Rights Act compliance?

MR. TORCHINSKY: Well, because, Your Honor, we know from emails that Dr. Abowd sent to Director Jarmin, that if they have to hold block-level population invariant, they cannot apply the version of differential privacy that they are intending to apply. Because as Dr. Abowd said, it breaks his algorithm.

So the problem is we know that if -- if this Court says block-level pop must be invariant because 141(c) says so, what

they will have to do for disclosure avoidance is going to have to be something different than they're currently planning. Exactly what that's going to be, Your Honor, I don't know that I could tell you, and I don't know that it's this Court's obligation to tell them how to do it, other than they have to comply with certain basic legal requirements.

That's why, Your Honors, they couldn't come up here and say, you know, all of the population in Montgomery lives across the street from the courthouse. You know, they couldn't do that. And why? Because 141(c) says you have to give the tabulations of population.

So, Your Honors, I think when you look at *Alabama Legislative Black Caucus*, when you look at cases like *Chestnut v. Merrill*, this matters. It matters in the real world. And going back to what Mr. Whitehorne said internally, this -- you know, perturbations of this data, when you allow it to happen in some kind of black box where they're not even keeping block-level population invariant, it really matters in the real world and it matters how government interacts with people and it matters how the people interact with their government. And that's why we're asking you to declare that this current method of differential privacy that doesn't keep block-level populations invariant is unlawful.

And I think with that, unless the Court --

JUDGE NEWSOM: So I have a question, just sort of

generally. And I'm not really sure which bucket this goes into, but just sort of like at an impressionistic level, it just strikes me that there is this giant factual dispute about whether differential privacy is better, as good as, worse than data swapping, suppression, whatever was going on in 2010. Then separately, there's this giant policy dispute about whether differential privacy strikes the right balance between accuracy and privacy, all of which just kind of leaves me with the willies about whether or not I'm the right one to be making those determinations, given everything that the Supreme Court has said about the discretion vested in the Census Bureau to kind of do its thing.

MR. TORCHINSKY: Your Honor, let me just make one point, and then I'm going to turn it over to Mr. LaCour. The 2010 swapping methods kept block-level population invariant, kept voting-age population at the block level invariant, and swapped characteristics, but they swapped characteristics close geographically. So, for example, inside a block group, they might have moved characteristics around, but they wouldn't have taken an African American who lives in Montgomery and assigned him to Birmingham.

JUDGE NEWSOM: Right, but I -- didn't your brief say that the swapping wasn't always within a census block. Wasn't it sometimes like a neighboring census block or something?

MR. TORCHINSKY: It wasn't within a block, it was

within a block group.

JUDGE NEWSOM: Oh, I see.

MR. TORCHINSKY: So when you knew -- so the geography -- if you look at page 1 of our demonstrative here, when you go up the hierarchy -- sorry. Let me get back to page 1 --

JUDGE NEWSOM: I mean, I guess the money question is the swapping never occurred across district lines?

MR. TORCHINSKY: The swapping never occurred across block groups.

JUDGE NEWSOM: And then those would be within -- are legislative district lines -- this is elementary, I'm sure, to you. Are legislative district lines ever drawn so that they bisect either a census block or a block group?

MR. TORCHINSKY: They never -- it is very, very rare to split a block. The block level -- and this is -- if you look on the screen here, what we have here is the census geography. So the geography, when you go up what they call the spine, it's census blocks, block groups, census tracts, counties, states, division, regions, the country.

In Alabama maps are drawn at the census block level. So you could in theory split a block group, but at least in the old method of disclosure avoidance in 2010, you knew the characteristics were not swapped outside of a block group.

JUDGE NEWSOM: But they could be swapped across

district lines; right?

MR. TORCHINSKY: They could be swapped across block lines.

JUDGE NEWSOM: So, in other words, a district line could hypothetically split one block from another?

MR. TORCHINSKY: It would be very rare to split a block. And the reason that is is because the GIS software that is used to draw lines is based on the block geography. So in other words, if this courthouse was a block, it would be very -- I have almost never seen it happen. It would be like drawing a line down the middle of the courthouse when the courthouse was the lowest unit that was in the GIS system.

JUDGE NEWSOM: So in the data swapping era, could you take some people from this courthouse block and swap them with people from the across-the-street block such that now the characteristics of the two blocks are mixed up a little bit, and then the district line gets drawn down the middle of the street such that the swapping actually has sort of moved characteristics across district lines?

MR. TORCHINSKY: The 2010 swapping method could move characteristics between blocks, but only within the same block group. So a block group doesn't necessarily have to be in a particular district. You could split a block group when you were drawing lines. So it's possible. But, Your Honors, that would happen at such a very low level that you wouldn't see

African Americans assigned to places where they aren't actually found, for example.

And that's what -- this latest version of differential privacy does that in some 20,000 blocks. It puts African-American population into census blocks that don't actually have African-American population. And you can imagine, if you take that and try to apply the Voting Rights Act to this perturbed data with African-American population spread out as version five of DP seems to do it, it could be a real challenge, not only for one person, one vote compliance, but also Voting Rights Act compliance. Because the old versions of swapping happened at such a low geographic level, there's no low geographic level of control for that kind of characteristic swapping in the Bureau's implementation of differential privacy.

JUDGE MARKS: Isn't the Department of Justice using these same numbers for purposes of enforcement of the Voting Rights Act?

MR. TORCHINSKY: Well, I guess that depends on what comes out. I mean, if the Civil Rights Division of the Department of Justice looks at this and says, okay, wait. If we compare what's in the DP data and we compare what's in the Alabama voter file and we see differences, it is possible that DOJ could come out and say, look. Based on your own voter file, you have a violation here.

Alabama is one of a handful of states that actually

keeps -- that actually keeps race information on the voter registration form. If you look at your Alabama voter registration form, it actually asks you to identify your race. So in Alabama there's an additional level of data available, which is every voter identified by race.

I think there were maybe -- I think there's about -- the March version of the data that's on the Secretary of State's web site has something like 3.5 million or so registered voters, and they have race information for all but 27,000.

So the Alabama voter file has detailed race information that is very likely -- if version five of the DP data is what becomes something like the final, the voter file and the census file won't line up because this -- because the Bureau is inserting African-American population in places where it doesn't exist and inserting Hispanic population in places that it doesn't actually exist. And the Justice Department, other plaintiffs, the State, everybody will see that there's this inconsistency between the census data and the Alabama voter file data that could be very significant.

And I don't know how that will play out in litigation. That's because somebody at the Bureau is sitting there running a thousand different runs of differential privacy and tweaking their privacy-loss budget application to come up with what they think should be the final population that they decree exists in Alabama when it's not actually there. And that's why we think

differential privacy is a problem.

And I think their position, Your Honor, is, no judge can question us on this. We can just do it, and you'll just have to live with whatever we tell you is actually there, when he know that in the real world, when people interact with their government, it's not there. And that's why this is a problem.

So with that, unless the Court has any more questions, I'm going to turn it over to Mr. LaCour for some closing legal arguments.

MR. LACOUR: Thank you, Your Honors.

First, Judge Newsom, your point about the -- whether this is a policy question or really fact-bound question. We don't see it that way. We think this is a legal question about how Sections 8 and 9 should be read. We don't think that Dr. Abowd didn't run his reconstruction attack correctly. We accept that they ran it in some methodologically accurate way. Our dispute is what legal conclusion you draw from that. And, again, if all that that gives you is the ability to guess somebody's race with 1 in 6 percent accuracy, or even, again, assume the nearly omniscient attacker who has the perfect census data on age, sex, and block population, they're only right 58 percent of the time.

If that violates Sections 8 and 9, then everything they're going to produce -- nearly everything they're going to produce sometime this fall is also going to violate Sections 8

and 9. That's a clean legal issue. They don't really have a standard to guide Sections 8 and 9.

And that's what I was referring to earlier in the morning about this bait and switch. They said, well, the old methods don't work against our nearly omniscient attacker, but they haven't shown the new ones would either.

And I think you were hitting on this during the Department of Justice's argument. Is it a zero risk thing? Well, no, it obviously isn't. Their own internal attack, they ran it against the 2010 data after differential privacy had been applied. And when you look at the data with a 12.3 privacy-loss budget, which is sort of the current plan to use that 12.3 privacy-loss budget, they were still able to successfully reidentify 7.5 percent of people.

So we're on a sliding scale here. They can't explain to you why 17 percent would be a problem, but 7.5 percent would not be a problem. And the answer is that neither of them is a problem under how the Bureau has always read and always applied Sections 8 and 9.

Again, if you go and you look at your census block online from 2010, it's going to say some percentage of racial and ethnic breakdown in that group. And if it says 60 percent white, and someone wants to guess your race and they guess white, they're going to be right 60 percent of the time. That doesn't mean anybody has reidentified you or a characteristic

about you. If that sort of guess is enough, well, then the census as we know it is unlawful, and a lot of people are putting themselves in legal jeopardy when the numbers come out in a few months.

So, again, we think it is a legal question, not a factual one. We have not disputed how they performed the attack, just merely the legal conclusions they have drawn from it. And we think this Court needs to correct that misconception, that misreading of the law in its final order here.

Now, a few points on the delay. They said this is not redressable. Anything sooner than August 16th would be some redress for us; would give us more time to accurately draw maps and situate people in the correct precincts. No final agency action because the numbers have not gone to -- from the secretary to the states. By that standard, there would never be final agency action if they decided to hold these numbers until 2030.

JUDGE NEWSOM: But I guess his response was, you just sort of brought a 706(2) claim, not a 706(1) claim. There is an APA claim for agency action unlawfully withheld or unreasonably delayed. The 2030 example is that claim, and you just said you didn't bring that.

MR. LACOUR: Well, I think their same arguments would still be available to them as to whether this was final or not.

We're still basically working on it.

JUDGE NEWSOM: But at some point, wouldn't you have a legitimate 706(1) claim? Like, good grief, Census Bureau. Enough's enough. I mean, like, at some point, isn't a court going to -- sort of almost like a mandamus style, like, step in and say, you've had this thing long enough. You know, you haven't acted. Not only did you not act by the deadline, but now you haven't acted for a year beyond the deadline or whatever. We're going to bust it.

MR. LACOUR: That could be the case, Your Honor. I don't think that necessarily negates the APA claim that we have brought. That they have made this decision that we are going to take this long, and we think that if you were to order them to reconsider that and come up with something that more closely complies with 141(c) and that March 31st deadline in there, then that would provide some redress for us.

JUDGE NEWSOM: So can I ask you just a quick question to follow up on a question that Judge Marks asked during the opening, maybe to both sides? So your contention in your opening brief, I think, or in your motion, was that the final agency action here was what? I just want to make sure I've got this crystal clear. You've got to have final agency action to bring your APA claim, so what was the final agency action in your contention?

MR. LACOUR: I think we have two, Your Honor. I think

the decision to use DP, which we think is arbitrary and capricious because, again, the whole purpose -- the whole reason for doing so was based on a misreading of Sections 8 and 9, and a reconstruction attack that actually proved the old methods worked rather than disproving their efficacy.

JUDGE NEWSOM: Just so I'm clear, that one was -- the decision to use differential privacy, was that late 2017, mid to late 2018? When did the decision occur?

MR. LACOUR: We think when they put it in the operational plan --

JUDGE NEWSOM: So '18.

MR. LACOUR: -- in 2018. But whether it's 2017 or 2018 I don't think really affects the laches -- the laches point or laches debate because, again, it's not just delay, it's unreasonably delayed.

And so, again, returning to some earlier points, there was no need and perhaps not even a basis for bringing that challenge back in 2017 or 2018 when the Bureau had just launched this new experimental approach to disclosure avoidance when it still was not clear how many potentially huge problems would be introduced into the data in order to make this work.

And perhaps -- I mean, I would certainly hope that if anyone in the Bureau recognized that this would be a problem, that they would have diverted it long ago. But I think they've all been learning as they go. That's, I think, part of our

concern here.

And so I don't think it's in any way fair to say that the plaintiffs should have known better than even the Bureau itself just how much unnecessary error was going to be introduced into the data based on this misreading of Sections 8 and 9.

And then the second final agency action would be that decision of November 24, 2020, to set the invariants. I mean, if you look at paragraphs two and three of our complaint, we reference the decision to skew the population counts at the block level. I think it was clear from the beginning that we had a particular problem with that based on the statute. I don't know if we actually cited the November 24th decision in the complaint itself, but I think the Bureau certainly knows when it made its decision.

JUDGE NEWSOM: I want to just make sure I've got this citation. Because that was a question I had, is, did you ever make the invariants argument? The November 2020, did you ever make the argument that that was the final agency action, either in your complaint or your motion?

MR. LACOUR: I think that is -- I think that is a fair reading of the complaint where you have the 141(c) claim, which was clearly premised on the population counts. I don't think that complaint could be read to mean that characteristics were somehow required to be invariant under 141(c). Indeed, in the

complaint we lay out in great detail the sorts of steps the Bureau has taken in the past, including 2010 with the characteristic swapping, as sort of a proof that there are better ways and lawful ways for the Bureau to protect privacy consistent with an appropriate understanding of 8 and 9 and consistent with the -- what we think is the only plausible reading of 141(c). We have a separate claim just as to 141(c) and that decision to skew the block-level data. As I said, I don't think that we had the November 24th decision explicitly cited there, but it's clear from the complaint and the motion that we have a particular problem with that decision to skew that particular part of the PL 94 data.

JUDGE MARKS: Point us to -- you-all have submitted quite a bit of evidence. Point us to the evidence in the record that shows that those two alleged final agency decisions were arbitrary and capricious.

MR. LACOUR: Well, Your Honor, I think I would point you to -- I would point you to John Abowd's declarations, actually, to show that 8 and 9 -- Sections 8 and 9 have been misread. And if you have a misreading of the law that is a foundation for the agency action, then you are dealing with arbitrary and capricious agency action.

So they have said we ran this attack. This is proof that 8 and 9 are going to be violated by the old methods because we can make a one in six guess about somebody's race, or the

supper attacker can make a 58 percent guess about somebody's race. Well, that is a judgment about 8 and 9. And as we noted before -- and I didn't hear anything in response from the Department of Justice -- better guesses can be made based on the data that the Bureau intends to produce in 2020. They're going to hold those places -- the census places of 500 people or more relatively invariant when it comes to the largest racial group there. So you can look with at least some degree of confidence as to the largest racial group for a town of 500 or more. And then if you already know that John Smith lives in that town, and you know his age but you just don't know his race, well, look at the data the Bureau's already given you. You can make a better guess about his race. What Abowd called the harm of this reconstruction attack. You can make a better guess about that person's race just based on what they're already planning to give you.

So it can't be -- and we don't think that what they're planning to give the world is a violation of Sections 8 and 9. But I think that necessarily follows if this reconstruction attack that was the basis for implementing differential privacy is sufficient to be a violation of Sections 8 and 9. So, again, that's why we think it is a legal question, and we think because they've gotten it wrong, we have arbitrary and capricious action. And then the decision not to hold the block-level populations invariant, that would be unlawful under the APA and

under 141(c).

JUDGE NEWSOM: Can I ask one further question? I realize this may be a little far afield, given the way that the briefing has unfolded.

So I read once last week, once again over the weekend, the Bumatay dissent in the Ninth Circuit litigation. And in all candor -- I'm putting all my cards on the table -- the first time I read it through, his invocation of political question seemed to me sort of to be a bridge too far. And the second time I read it through, I started thinking, wait a minute. I already -- we explored with you to some extent the judicially manageable standards question. And I started wondering, is there here a textually demonstrable commitment to a coordinant branch of government? Because Article I, Section 2 basically says the census -- the actual enumeration shall be made in whatever manner -- I don't want to -- in such manner as Congress shall by law direct.

And then the implementing statute, so far as I understand, 13 U.S.C. 141(a), Congress basically gives its discretion to the Census Bureau. It says, you know, conduct it in such form and content as he, the secretary, may determine.

It just sort of seems like all of that together is like the one branch of government that hasn't been invited to this party is us. So, like -- this is a Breyeresque kind of question. Give me your response to that.

MR. LACOUR: We're big fans of Judge Bumatay.

I think the key difference here is in the nature of our claim and the nature of the claim of the plaintiffs in *National Urban League*. Theirs was much more along the lines of, well, your plan for nonresponse follow-up is to knock on doors six times. Maybe you should have really done it seven times. And to claims like that, I don't see how courts could typically adjudicate those.

But to take a different example, if the plan by the Bureau was we're going to send our numerators to Georgia but we're not going to send a single one to Alabama, I think a court could and would have to step in there. And, yes, there has been a delegation of authority to the secretary, but not completely. I mean, Title 13 still has a lot of restrictions. It still has Sections 8 and 9. So he can't conduct it in a way that's going to violate privacy. And it has 141(c). He can't conduct it in a way where, at the end of the day, the states don't get their tabulations of population that they're entitled to.

So I think that's the key difference here. You have the invariant, so to speak, that's been put in there by Congress. If anything the Bureau did was a political question, then *U.S. House of Representatives* would have come out differently. They would have said, well, this is how we read sampling. And, indeed, that was their argument. They said, we don't think that taking a sample of people and then using that

to fill in the rest of the way is sampling under 195. And the Supreme Court said, what are you talking about? Of course it's a sampling. And they forced the Bureau to do things differently. Same if you look at *New York v. Department of Commerce* from the U.S. Supreme Court in 2019, which, by the way was an APA challenge.

So I don't think the idea that things have to finally go to the president or 141(c) data has to finally go to the states before any challenge can be brought really holds up when you look at that decision of the U.S. Supreme Court. That was an APA challenge where the secretary decided, I'm going to put the citizenship question on the census. I suppose at the very last second, he could have said, now I've got all this data about citizenship, you know, maybe I don't really want it. Maybe I don't really want to put it out there. And so the fact that that was potentially an option didn't mean there wasn't a final decision there that could be challenged. Indeed, it was successfully challenged by the State of New York and the other plaintiffs in that case.

Which I think goes back to the point you were touching on, Judge Marks, earlier in the morning about whether there has been opportunity for notice and comment. Notice and comment does not have to be present for there to be final agency action. All that's really key is that you have got the consummation of the decision that there's going to be some rights or duties or

harms that are going to flow from that.

And we think we have that here. There's no allegation that they're going to turn back on differential privacy; indeed, they've said quite the opposite. They've said, it's far too late. It's unthinkable.

And then when it comes to the invariants, they speculate that maybe we could change course. But, again, they've also said in internal emails and in Dr. Abowd's declarations that to turn back on that invariants decision that is published there for everyone to see would break differential privacy; would break the top-down algorithm. So there's no reason to think that that decision is anything but the final decision that they have made it out to be before this litigation began.

JUDGE MARKS: If we do determine that their actions have violated the APA, isn't the remedy to remand it to the agency to start over? And how does that -- how does that help Alabama or the Alabama plaintiffs in any way? If time is of the essence, how would a delay of that magnitude be an adequate remedy?

MR. LACOUR: Well, Your Honor, I think you still do have authority under your equitable jurisdiction and also under our 141(c) claims to order them to comply with the law. I mean, what we've heard today is that if they're not providing us tabulations of population, then, yes, we have standing, and yes,

they're violating 141(c) by providing us something that is not tabulations of population.

I think what that also means is that 141(c) is also where you find the deadline of March 31st. So the fact that we're past the deadline means that informational harm has also accrued and that this Court could order some sort of relief consistent with both aspects of 141(c): Of accurate data and data that's not necessarily on time at this point, but is not delayed any longer than necessary because, again, we've been expecting it for quite some time.

JUDGE MARKS: Is your mandamus petition moot at this point?

MR. LACOUR: I don't think so, Your Honor. I think you could still order them to comply more quickly. I mean, they said earlier that it could be a few more weeks. They could get it to us a few more weeks early if they prioritized us. I mean, a few more weeks would help. And so I don't think they sort of escape the requirement of meeting March 31st simply because they've made it to April 1st without giving us the data.

Let me make sure I've hit on everything.

(Brief pause in the proceedings)

MR. LACOUR: My colleague did note -- and this was in Mr. Thieme's declaration -- that they already have what's known as the CUF that was completed in March. That includes the population numbers for every single block. The CEF, C-E-F, is

still to come with characteristics. That should be completed by I think mid-June is what the declaration suggests. And then from mid-June to mid-August, there's the differential privacy portion, and then some further processing of the data before turning it over.

So we do think there is still time in that schedule for them to come up with some other means of providing us true population counts while still protecting privacy as Sections 8 and 9 would properly require, not this sort of vision of Sections 8 and 9 that they've put forward to justify differential privacy, which I think as we've shown and as their own evidence has shown causes the census to sort of collapse in on itself. There's really nothing they could produce if you accept the reading of 8 and 9 needed to get differential privacy out the door.

My colleague, Mr. Davis, said that JASON with outside advisors had corroborated that the reconstruction attack had worked. That's -- I think that's a little too strong. They did not rerun the attack. All they simply did was sort of show that in some theoretical sense, if you had unlimited time and resources, the attack is at least theoretically possible. But, again, as Defendant Ron Jarmin has noted, too, you still need access to the data that only the Bureau possesses to confirm that your roll-of-the-dice guess is actually accurate.

Judge Newsom, I thought you had a very fair point.

Why produce all of this data? This is something that Mr. Whitehorne was sort of getting at. It seems to us that the Bureau has sort of forgotten what its fundamental mission is and who its clients, who its prime clients are. And that is, of course, the president for the apportionment numbers and the states for the redistricting numbers. And the fact that they're publishing billions and billions of additional statistics, and that's why they can't comply with Congress's requirements in 141(c), seems to us exactly backwards.

This, again, gets to a point about timing and what is possible on their end. The PL 94 data, as I mentioned earlier, has only very basic characteristics. Not age by year. Doesn't even have sex. Just voting age, race, ethnicity, and block. There is plenty of time for them to figure out what they want to do with the rest of the more granular data that is not required any time this year, even. And so we think that if they are ordered to give us what we need and what we are entitled to in a timely manner, that they will be able to meet them, and that they certainly have not shown that it is impossible.

To that point, I think what we really need from the Court is two legal judgments that 141(c) requires what they -- the counts that they actually got at the block level so that we can know where our people are actually counted and not some other number that they've decided to give us, and that Sections 8 and 9 have not been shown to be violated by the methods that

were employed in 2010. I think with that, the Court could suggest to them that the 2010 methods would be one way to meet their obligations under 141(c).

I think the Court could give plaintiffs and defendants a week to sort of hash out what might actually be possible, and our experts could talk to theirs, and maybe we could come to some resolution that would return the Bureau to its prior understandings of those fundamental statutes. But what cannot be is that they are simply allowed to give us whatever numbers they want, whenever they feel like it.

Mr. Davis said that if we were at a situation where the Bureau was telling us that all five million Alabamians lived in Birmingham, that that would be a tougher question. With due respect, it's not a tough question at all. That is an obvious violation of the statute. And the fact that they lack a limiting principle, either for Sections 8 and 9 or for Section 141(c), shows that they are wrong on the law. This Court needs to correct them and give Alabama the data to which they are entitled in a timely manner.

JUDGE NEWSOM: All right. At the risk of ruining your closing --

MR. LACOUR: That's my mic-drop moment.

JUDGE NEWSOM: -- can I ask you one other question or maybe just a series of questions about Section 201 of the Alabama Constitution which Judge Marks asked you about earlier?

MR. LACOUR: Yes.

JUDGE NEWSOM: Do you know, what's the genesis of that provision? How long has it been in the Constitution? Where did it come from? What was it for? I mean, it clearly suggests that there was an expectation that census data may be bad at some point or unsatisfactory in the language of the amendment.

Feel free to confer. That's totally fine.

(Brief pause in the proceedings)

MR. LACOUR: Thanks to my colleague, Mr. Davis, I can tell you that a similar provision was in the 1875 Constitution, and it was carried over to the 1901 Constitution. Previously it said Alabama could just do its own census.

JUDGE NEWSOM: And do we have any idea -- and we may just not -- sort of what it's all about? I mean, as I said, to me it suggests this expectation that Alabama, sort of the sovereign, anticipates that there may be times when the census data is insufficiently reliable to conduct the census and will sort of strike out on its own. And I'm just curious, do we know anything sort of -- even sort of atmospherically about it? Has it ever been used?

I mean, you know, the fact that it comes at sort of the culmination -- like in your opening brief, you guys cited sort of strongly 97, 98, 99, 100, or 200. And then in the response the Census Bureau says, oh, but they forgot to tell you about 201. So I'm just curious about how the four on the one hand

and the one on the other kind of gee and haw, and has 201 ever been used.

MR. LACOUR: What I just learned is that 201 has never been used. I mean, it was adopted before *Baker v. Carr*, so before there was even any requirement that we redistrict every ten years. And as we noted earlier, *Baker v. Carr* is what led to PL 94 being passed in 1975 and beginning this process by which the State gets to work with the secretary if the State so chooses and can rely on the secretary to provide information.

Like a FOIA plaintiff, there's no obligation for us to seek emails from the government, but once we do, we have a right to them. And it's a similar process here under PL 94.

And in any event, if we're looking at this practically, I mean, we had every reason to think that we were going to get good data from them, and we did not know until November 2020 that was not going to be the case. So as a practical matter, it's far too late in the day to get rolling on the first ever Alabama census. Even if we decide to do that, that would be a tremendous diversion of resources, if you will, and that's certainly enough for standing.

JUDGE HUFFAKER: How would that work today? The language says if it's not taken or when taken. So when you look at the language, when taken, when would that date be? April of 2020, or is that when the final census data is out and ready -- or ready and out?

MR. LACOUR: That's a little unclear, Your Honor. I think it would probably suggest that it's taken once it's done or at least nearly done, not simply when they started the count. And in any event, the count wasn't done here until I think October 15th, 2020, is when the count wrapped up after DOJ prevailed at the Supreme Court in gaining a stay of Judge Koh's order from the Northern District of California.

So if it was finished on October 15th and thus entered the realm of when taken, that would be, I think, when 201 at the earliest could be triggered, and we would have to get moving pretty quickly to conduct the first ever Alabama census.

JUDGE NEWSOM: And I guess -- sorry for playing on my phone here, but I was just pulling it up.

It says, "The legislature shall have the power at its first session after the time shall have elapsed for the taking of said census." So does that mean you've got to wait until their job is done, then at the next legislative session you start your census?

MR. LACOUR: That would seem to be a reasonable reading of the provision, Your Honor.

JUDGE NEWSOM: Gotcha. Okay.

MR. LACOUR: I think either way you read it is really neither here nor there when it comes to standing because, again, we had -- and for decades now, quite literally, we have participated in the PL 94 process. We submitted this in

declaration from Ms. Loftin who works for the legislature. We submitted our plan in 2016 to the secretary. It was approved. We had every reason to think that they were going to follow the law here. We're not required to assume the worst about our federal partners and our federal system. For that reason, the harm is traceable to them, and this Court should redress it.

JUDGE HUFFAKER: Thank you, Mr. LaCour.

MR. LACOUR: Thank you very much.

JUDGE HUFFAKER: Okay, counsel. I think that satisfies us from our end. Is there anything else we need to discuss before I leave it to you for today? You two have had a chance to talk during lunch, I assume?

MR. LACOUR: Yes, Your Honor. I think we came to some agreement on the supplemental exhibits but not final agreement. We were going to submit a joint status report to the Court Thursday.

JUDGE HUFFAKER: Thursday this week?

MR. ELLIOTT DAVIS: Yes, Your Honor. I think we intend to meet and confer about the various exhibits that were filed, and we'll try to arrive on as much agreement as possible. If we need to lay out perhaps some objections, we will do so, but we're optimistic that we can get most of this resolved amicably.

JUDGE HUFFAKER: Okay. Good enough.

MR. ELLIOTT DAVIS: And the other housekeeping thing, Your Honor, is that as we explained at the beginning, that there

is -- and as Mr. Robinson explained at the end of his argument, that we have an answer deadline currently due on May 11th. And I believe we and plaintiffs have agreed that further proceedings in this case should be stayed pending, I think, 14 days after the Court issues its order on the preliminary injunction. Because at that point, we would know whether someone is going to be perhaps taking an appeal, and it is not judicially efficient for the parties or the Court to engage in supplemental briefing on the same issues until the Court has reached a resolution.

Is that fair?

MR. LACOUR: Yes.

JUDGE HUFFAKER: So 14 days after we've ruled on the preliminary injunction?

MR. BUTLER: The parties would submit a joint status report in terms of further proceedings.

JUDGE HUFFAKER: That's satisfactory to us.

Okay, counsel. Anything else?

MR. LACOUR: I think that's it, Your Honors.

MR. ELLIOTT DAVIS: Nothing from defendants. Thank you.

JUDGE HUFFAKER: I appreciate it very much. I know we all do. We're adjourned.

(Proceedings concluded at 2:29 p.m.)

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COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

This 7th day of May, 2021.

/s/ Patricia G. Starkie
Registered Diplomate Reporter
Certified Realtime Reporter
Official Court Reporter