UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CENTER FOR POPULAR DEMOCRACY ACTION and CITY OF NEWBURGH,

Plaintiffs,

v.

BUREAU OF THE CENSUS, STEVEN DILLINGHAM, UNITED STATES DEPARTMENT OF COMMERCE, and WILBUR ROSS,

Defendants.

Case No. 1:19-cv-10917-AKH

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

The 2020 Census will determine the distribution of congressional representation for the next decade and direct the expenditure of trillions of dollars in federal funding. But because of Defendants' actions, this iteration of the decennial count is hurtling towards a grossly disproportionate undercount of Hispanic Americans and African Americans across the country. Plaintiffs Center for Popular Democracy Action ("CPD Action") and the City of Newburgh, New York ("Newburgh") depend on the accuracy of the census. CPD Action's members and Newburgh's residents are concentrated in what Defendants call "Hard-to-Count" areas. They lack internet access at disproportionate rates, are less likely to be reflected in administrative records, and often must be counted in person. In violation of their statutory and constitutional obligations, Defendants have taken concrete steps that will exacerbate, rather than remedy, each of these difficulties experienced by Plaintiffs and deprive them of funding and representation to which they are entitled by law.

Defendants have moved to dismiss their complaint on the grounds that: (1) Plaintiffs lack standing; (2) Defendants' decisions regarding the conduct of the 2020 Census are committed to agency discretion by law; and (3) the actions challenged here are not sufficiently final or discrete to be subject to suit. Defendants are incorrect on each point. First, Plaintiffs have standing: consistent with recent and longstanding census decisions of the Supreme Court and Second Circuit, Plaintiffs have adequately alleged that the Bureau's actions will cause them to suffer loss of funding and representation, these harms are traceable to Defendants, and the harms are redressable by this Court. Second, Plaintiffs allege violations arising from discrete, circumscribed, and final agency actions that are subject to challenge. Finally, though Defendants argue implausibly that the Enumeration Clause "requires only that the population must be determined through a person-by-

person headcount," the reasonable relationship standard adopted by the Supreme Court in *Wisconsin v. City of New York*, 517 U.S. 1 (1996), forecloses such arguments.

Plaintiffs will suffer concrete and long-lasting injuries as a direct result of Defendants' challenged actions. Moreover, both the Constitution and Administrative Procedure Act ("APA") furnish standards under which Defendants' actions are unlawful and redressable. Defendants' arguments to the contrary are a meritless attempt to evade judicial scrutiny and public accountability. Therefore, the Court should deny Defendants' motion to dismiss.[1]

LEGAL STANDARD

To survive a motion to dismiss, a complaint need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Moreover, a court evaluating a motion to dismiss must "construe the complaint liberally . . . drawing all

[1] In their Complaint, Plaintiffs identified five different arbitrary and irrational design choices made by Defendants which underlie their APA and constitutional claims. Compl., ECF No. 1, at ¶ 36. Based on the representations made in the extensive declarations filed last week in the *NAACP v. Bureau of the Census* suit in Maryland containing information not included in the Administrative Record submitted in this case nor previously made available to the public, Plaintiffs are no longer relying on the replacement of most In-Field Address Canvassing with In-Office Address Canvassing, *id.* at ¶ 36(d), or the reduction in communications spending, *id.* ¶ 36(c) (as to communications only), as evidence supporting their claims. Accordingly, Plaintiffs no longer seek remedies related to those decisions. *See id.* ¶ 194(d) (requesting court hold unlawful and set aside changes to address canvassing); *id.* ¶ 197(b) (requesting injunction to increase communications program). Plaintiffs continue to seek remedies pursuant to the Enumeration Clause and APA for (1) Defendants' plans to hire an unreasonably small number of enumerators; (2) the dramatic reduction in the number of field offices, questionnaire assistance centers, and other physical presences in hard-to-count communities; (3) the significant reduction in the Bureau's partnership hiring; and (4) their decision to make only limited efforts to count inhabitants of units that appear vacant or nonexistent based on unreliable administrative records. *Id.* at ¶ 36 (a), (b), (c), (e), ¶¶193-198.

reasonable inferences in the plaintiff's favor." *Capital Mgmt. Select Fund Ltd. v. Bennett*, 680 F.3d 214, 219 (2d. Cir. 2012). "The Court's function on a motion to dismiss is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *In re Eaton Corp. Sec. Litig.*, 318 F. Supp. 3d 659, 662 (S.D.N.Y. 2018) (citation and internal quotation marks omitted).

ARGUMENT

I. Plaintiffs Have Standing to Bring Their APA and Enumeration Clause Claims.

Defendants base their argument that Plaintiffs have not sufficiently alleged standing on two grounds: that Plaintiffs' theory of injury is too speculative and attenuated to establish a concrete and imminent injury; and that Plaintiffs' alleged injuries are not redressable. Neither argument has merit.

To establish standing, Plaintiffs must allege facts that demonstrate that: (1) they have suffered an injury in fact; (2) that is fairly traceable to the challenged action of the Defendants; and (3) is redressable by a favorable judicial decision. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) ("*New York*") (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). Plaintiffs' complaint posits well-recognized concrete and particularized harms, including but not limited to vote dilution, malapportionment, and a loss of federal funding, each of which is imminent, directly traceable to Defendants' conduct, and redressable by a court. As detailed below, these allegations sufficiently establish standing at this stage, a conclusion buttressed by the Supreme Court's unanimous decision in *New York* that standing exists for census-related injuries.

A. Plaintiffs Have Alleged Actual and Imminent Harm Resulting from Defendants' Conduct.

Plaintiffs have sufficiently alleged actual and imminent harm to overcome Defendants' motion to dismiss. An "injury in fact" is any invasion of a legally protected interest which is (a)

concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Spokeo*, 136 S. Ct. at 1548. Defendants incorrectly argue that a threatened injury must be "certainly impending," ECF 39, Defs.' Mem. Supp. Mot. Dismiss ("Mot. Br.") at 11, but it is sufficient if "there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Plaintiffs have alleged sufficient actual and imminent injuries—the loss of federal funding, vote dilution, malapportionment, and diversion of organizational resources—resulting from Defendants' refusal to expend resources to count Hard-to-Count communities. *See, e.g.*, Compl. ¶¶ 40–44, 86–87, 97–100, 112–14, 119–24156–73. An increased differential undercount of these communities and resulting malapportionment and loss of resources are the predictable effects of those resource cuts. *See New York*, 139 S. Ct. at 2566.

Defendants distort Plaintiffs' allegations to label them as merely speculative; for example, Defendants allege that because Plaintiffs assert that there has been insufficient testing of the new processes to understand their effects, "the effects of the challenged operations are speculative rather than *certainly* impending." Mot. Br. at 10. But Plaintiffs' allegations regarding Defendants' cancelled testing describe the *Bureau's* decreased certainty in its estimates. Compl. ¶¶ 75–76. Defendants' cancellation of field tests creates a substantial risk that the historically undercounted populations represented by Plaintiffs will be undercounted to an even greater extent as a result of Defendants' actions. *See, e.g.*, *id.* ¶¶ 19–21, 153–170 (describing historical undercounts of Plaintiffs' communities and their resulting injuries).

Defendants also decry a supposed "speculative chain of causation," Mot. Br. at 11, but they exaggerate the causal chain, and fail to address the recent Supreme Court precedent that found injury in fact in nearly identical circumstances. The Supreme Court in *New York* unanimously held that, like Plaintiffs here, the plaintiffs established standing because the Bureau's conduct would

"depress the census response rate and lead to an inaccurate population count," causing a "diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources." 139 S. Ct. at 2565. In so holding, the Supreme Court rejected the same argument Defendants make here and held that such harm is not too speculative to establish an imminent injury. As in *New York*, there is evidence that "[African American and Latino] households have historically responded to the census at lower rates than other groups," and Plaintiffs plausibly allege that the Bureau's decisions will exacerbate those low response rates. 139 S. Ct. at 2566. At this stage, nothing more is required. As Judge Furman held in rejecting the Commerce Department's argument that *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), calls for a different result, *Clapper* dealt with a "significantly more attenuated" causal chain of "five discrete links" at the summary judgment stage. *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 787 (S.D.N.Y. 2018). In this case, as in *New York*, Plaintiffs' chain of causation has only two steps: 1) "Defendants' actions will increase non-response rates of certain populations" by removing the very resources that are aimed at counting those populations, and 2) "that the resulting undercount, in turn, will cause harm" through lost federal funding and decreased political representation. *Id.* These allegations are sufficient to establish an injury in fact.

B. Plaintiffs' Harms Are Traceable to Defendants' Conduct.

Plaintiffs' alleged harms are caused by Defendants' conduct, not that of other actors. Defendants relegate to a footnote the bald assertion that Plaintiffs' alleged injuries are not directly traceable to the challenged actions, but rather to the intervening decisions of independent actors. Mot. Br. at 12–13 n.7. Yet Defendants acknowledge that if this Court accepts this argument, it must abrogate controlling precedent, *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), in which the Second Circuit held that Plaintiffs' alleged harm—a loss of federal funding—was directly traceable to a census undercount. Mot. Br. at 12–13 n.7. Notably, Defendants fail to mention that

the Supreme Court categorically rejected this very argument in *New York*, holding that the plaintiffs' census-related injuries were traceable to Defendants' decision to institute a citizenship question. 139 S. Ct. at 2565–66. As in *New York*, Plaintiffs have alleged injuries, such as the loss of federal funding and political representation, which are directly traceable to the drastic decreases in the resources necessary to reach Hard-to-Count populations. Accordingly, Plaintiffs satisfy this prong of standing.

C. Plaintiffs Have Alleged Redressable Harms.

Plaintiff's alleged harms are also redressable. The redressability inquiry focuses on whether the *injury* that a plaintiff alleges is likely to be redressed through a favorable decision arising from the litigation. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 286–87 (2008). The relief need not be total, and plaintiffs need only show that relief would address their injuries "to some extent." *Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007) (finding redressability satisfied where "risk of catastrophic harm" could be "reduced to some extent if petitioners received the relief they seek"); *Citizens for Responsibility & Ethics in Washington v. Trump*, 939 F.3d 131, 147 (2d Cir. 2019) (holding that plaintiffs' request for injunctive relief against President and Executive branch plausibly alleged redressability for their competitive injuries where relief would redress their injury "at least to some extent").

Here, Plaintiffs allege a wide and deep range of severe deficiencies in Defendants' plans and preparations for the 2020 Census, which separately and together will injure Plaintiffs. In Plaintiffs' pending preliminary injunction motion, they seek relief for these injuries by compelling the expenditures that Defendants are declining to make on vital outreach and preparation for the 2020 Census. *See* ECF 40; *State of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 238 (S.D.N.Y. 2018) (vacating DOJ's decision to "withhold . . . appropriated funds in order to effectuate its own policy goals"). Granting this relief is likely to remedy, at least to some extent,

Plaintiffs' census-related harms. Therefore, Plaintiffs have met their "relatively modest" burden to show that their injuries can be remedied by judicial action. *See Bennett v. Spear*, 520 U.S. 154, 170–71 (1997).

Defendants assert that it is "beyond the power of the judiciary" to remedy the problems identified by Plaintiffs, but fail to specify which types of relief lie beyond this Court's power. Indeed, Defendants do not argue that this Court cannot order the expenditure of withheld appropriations—nor could they. Defendants likewise do not and cannot argue that it is *beyond the power* of this Court to order the Census Bureau to hire additional staff or to expend more resources aimed at reaching Hard-to-Count communities. At most, Defendants argue that Plaintiffs cannot "seek wholesale improvement" of the census, Mot. Br. at 12, but this is not Plaintiffs' requested relief. Further, defining the contours of Plaintiffs' relief is a question better left for the merits of the case, and is not a question of standing. *See Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003) (holding that there is no requirement that the "plaintiff prove his allegations of injury" to satisfy standing). Because the Court is fully empowered to grant the relief sought, which would at least partially remedy Plaintiffs' injuries, Plaintiffs have satisfied their burden under the redressability prong.

II. Plaintiffs Properly State Claims Under the APA.

Plaintiffs allege Defendants violate the APA because of their arbitrary and capricious design choices for the 2020 Census. Defendants move to dismiss the APA claims by mischaracterizing Plaintiffs' claims as arising under § 706(1) of that Act. Defendants are mistaken. Plaintiffs challenge Defendants' arbitrary reasoning, under § 706(2), rather than a failure to take specific, legally required action. *See* Count 1, Compl. ¶¶ 174-178 (cause of action pursuant to § 706(2)(A)); Count 2, *id.*, ¶¶ 179-184 (cause of action pursuant to § 706(2)(B)).

The APA directs courts to find unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To withstand a challenge under § 706(2), an agency's action must have a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Most importantly, agency actions do not have to be legally required for a court to set the actions aside as being arbitrary and capricious. Only claims arising under § 706(1) need to be "legally required." *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (*"SUWA"*).

A. Plaintiffs Challenge Discrete and Circumscribed Agency Actions.

Contrary to Defendants' assertions, Plaintiffs do not bring a "broad programmatic attack" against the 2020 Census that seeks "wholesale improvement of [a] program by court decree." *Id.* at 64. Instead, Plaintiffs challenge discrete agency decisions by the Bureau, each separate from the others. Defendants could easily remedy any one of the challenged decisions without impacting the rest. Deploying more enumerators, for example, would not require the Bureau to open additional questionnaire assistance centers or vice versa. Nor would deploying more enumerators require the Bureau to abandon its plan to rely on new technologies, even assuming *arguendo* that such technologies would improve the accuracy of the 2020 Census.

It is true, as Plaintiffs note in their Complaint, that there have been "sharp reductions in nearly every aspect of Defendants' field operations." Compl. ¶ 28. But the multiplicity of the Defendant's failings does not convert Plaintiffs' discrete challenges into a broad programmatic attack. Rather, it underscores how troubling each of Defendants' individual choices are. Defendants' decision to deploy drastically fewer enumerators than were used in 2010—despite a population increase and documented challenges to reaching minority populations—is one such

sharp reduction. But the alarming arbitrariness of the Bureau's other decisions does not make its decision to slash enumerators any less discrete.

Plaintiffs' challenges are thus in line with the standard the Supreme Court articulated in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). There, the Court rejected an attempt to seek "*wholesale* improvement" of an agency program by court decree. *Id.* at 891 (emphasis in original). Instead, it held that "[u]nder the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm.'" *Id.* That is precisely what Plaintiffs have done here. When the Fourth Circuit held that challenges to various parts of the Final Operational Plan were not discrete because each decision was only insufficient relative to other decisions in the plan, it misinterpreted the nature of the discreteness requirement. *See Nat'l Ass'n for the Advancement of Colored People v. Bureau of the Census*, 945. F.3d 183, 190-91 (4th Cir. 2019). Naturally, any agency action will necessarily implicate other agency decisions. For example, the decision to add or remove a citizenship question to the 2020 Census questionnaire had implications for many other aspects of the 2020 Census, including the Bureau's nonresponse follow-up procedures, the number of enumerators it would need to hire, and the type of partnership outreach it would need to conduct. Merely because a challenged decision implicates other aspects of the 2020 Census' design does not mean such decision cannot be challenged on its own. If anything, the arbitrary and irrational nature of each decision points to the urgency of addressing these individual deficiencies now, so that, even if the rest of the design is unchanged, the 2020 Census will not fail to count Hard-to-Count populations.

B. Plaintiffs Need Not Show That the Challenged Agency Actions Are Required by Law.

Plaintiffs' APA § 706(2) claims are centered on Defendants' arbitrary and capricious design choices for the 2020 Census and are substantively distinct from a § 706(1) challenge of

failing to take legally mandated action. In addition, even if Plaintiffs were to make claims under § 706(1), Congress has explicitly instructed the Census Bureau to expend appropriated funds to amend the undercount thereby making Defendants' actions legally required.

1. *Plaintiffs Do Not Assert an APA § 706(1) Claim.*

Despite Defendants' assertions to the contrary, Plaintiffs are not asking the Court to compel the Census Bureau to perform any single, non-discretionary acts. Rather, Plaintiffs claim that Defendant's actions regarding design choices are arbitrary and irrational.

Under APA § 706(1), "the only agency action that can be compelled . . . is action *legally required*" and "*discrete*." *SUWA*, 542 U.S. at 63-64 (emphases in original). Indeed, an action founded on § 706 (1) seeks a court order compelling an agency to perform a specific "non-discretionary act." *Benzman v. Whitman*, 523 F.3d 119, 130 (2d Cir. 2008). That is not the matter before this Court.

Instead, Plaintiffs bring this action pursuant to § 706(2) and allege, in their well-pleaded complaint and motion for preliminary injunction, that Defendants' design choices are "arbitrary and irrational." Compl. ¶ 36. For example, Plaintiffs allege that the Bureau's research on self-response rates from the Census Barriers, Attitudes and Motivators Study contradicts its assumptions regarding self-response rates for the 2020 Census. Compl. ¶¶ 52-57. In the face of the Bureau's own research, Plaintiffs have demonstrated that Defendants' actions evince no "rational connection between the facts found and the choice made" and that its explanation "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. The hallmark and crux of the cause of action under the APA is the Bureau taking actions that are arbitrary and irrational.

True, Plaintiffs have specified discrete actions this Court could order that would remedy Defendants' arbitrary and capricious actions. But specifying relief that a court could order, and thus establishing that the claims are redressable, does not convert these claims into § 706(1) claims.

Defendants argue Plaintiffs' claim must arise under § 706(1) because Plaintiffs have requested that this Court enter an injunction requiring the Bureau to, among other actions:

> (a) restore[] the Bureau's 2020 Partnership Program to no less than 2010 levels, adjusted for inflation and population growth . . . (c) . . . open[] a number of in-person Questionnaire Assistance Centers commensurate to that used in the 2010 Census; and (d) increase[] the number of enumerators to no less than 2010 levels, adjusted for population growth.

Compl. ¶ 197; *see also* note 1, *supra* (withdrawing request for injunction in Compl. ¶ 197(b)). A prayer for injunctive relief does not turn a § 706(2) claim into one under § 706(1). It is well-established that, even under § 706(2), "APA review of agency action is vested in a court with equity powers, and while the court must act . . . without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 672 (S.D.N.Y. 2019) (quoting *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939)), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). Like this case, *Carey v. Klutznick* involved both constitutional and § 706(2) claims of arbitrary and irrational actions, and there the Second Circuit affirmed an injunction which required "funds . . . to be expended" and the hiring of "additional personnel." 637 F.2d 834, 837 (1980). That Plaintiffs have requested specific injunctive relief that would remedy the Bureau's arbitrary and capricious actions does not change the type of legal claim at issue here, as the requested relief is well within this Court's equitable powers.

To the extent Defendants lack permissible alternatives to the relief Plaintiffs have requested, that dearth of options is a product of the Bureau's own delays rather than the nature of the legal claim at issue. Plaintiffs seek an injunction mandating specific actions because the urgency of this case demands it. Census operations have already begun and will commence in full

in less than two months. *See* ECF No. 40-6, Wishnie Decl., Exhibit 25 ("2020 Census Starts in Alaska, Jan. 2020"). The actions Plaintiffs specify—restoring the Partnership Program, Communications Program, QACs, and enumerators to 2010 levels and expending additional funds—would sufficiently remedy the defects alleged. Even if this were the *only* available route to relief, which Plaintiffs have not argued, that still would not be sufficient to demonstrate that this action falls under § 706(1). Defendants work on the 2020 Census began nearly ten years ago. During the last decade, Defendants could have avoided running afoul of the APA's proscription of arbitrary and capricious action in numerous ways, such as conducting additional testing to establish the logic behind their design choices, developing additional technologies to remedy gaps in in-office address canvassing, or pursuing other fixes.

But Defendants have not done so. Instead, they have delayed remedying these defects until the eleventh hour, leaving themselves with few options to ensure they meet their statutory and constitutional duties. That many permissible options have become few due to Defendants' dilatory tactics does not convert Plaintiffs' claim under § 706(2) to one under § 706(1). It instead underscores the need for this Court's intervention to ensure Defendants do not squander their final opportunity to make good on their obligations. Furthermore, Plaintiffs recognize that their suggested actions are not the *only* lawful actions available to Defendants. Plaintiffs' requested remedies simply elucidate the actions that their experts deem to be most effective for preventing a differential undercount at this late stage of the census.

2. *Congress Has Directed Defendants to Spend Appropriated Funds to Ameliorate the Undercount*.

Plaintiffs do not assert claims under § 706(1), but if they had, Congress has directed what actions Defendants are legally required to take. In a recent appropriations bill, Congress explicitly instructed the Census Bureau to expend "no less than the level of effort for outreach and

communications that was utilized in preparation for the 2010 Decennial Census, adjusted for inflation," ECF No. 40-6, Wishnie Decl., Exhibit 3 at H10962 ("Explanatory Statement"); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 980 (2013) ("[T]he purpose of the committee report in the appropriations context is essentially to legislate—that is, to direct where the money appropriated is going."). In the face of such an explicit directive, Defendants have not provided any evidence that they are, in fact, doing so.

This is all the more troubling given that Defendants have carried over an astounding $1.3 billion from Fiscal Years 2018 and 2019 unspent. Congress has recently allocated an additional $7.28 billion for Fiscal Year 2020. ECF 40-6, Wishnie Decl., Exhibit 2 at 1134 ("2020 Appropriations Package"). In refusing to spend these funds, the Bureau is actively ignoring Congressional instructions—every year for the last three years—to spend appropriated money on programs designed to reach Hard-to-Count communities.

C. The Challenged Actions Are Not Committed to Agency Discretion by Law.

Plaintiffs' APA claims receive a "strong presumption favoring judicial review." *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015). Any exception to that presumption is "very narrow," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), and can only apply where "statutes preclude judicial review" or the "action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2).

The discrete challenged actions here do not fall under the narrow exception for actions committed to agency discretion by law. Just last year, the Supreme Court held in *New York* that the Census Act does not "leave [the Secretary's] discretion unbounded" and that "the taking of the

census is *not* one of those areas traditionally committed to agency discretion."[2] 139 S. Ct. at 2568 (emphasis added). The Second Circuit also has held that census activities are not committed to agency discretion by law. *See Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (holding that challenges to deficiencies in the Bureau's census operational procedures, similar to the actions at issue in this case, are not committed to agency discretion by law). Defendants unnecessarily assert that they "reserve the right to argue *Carey*'s abrogation on appeal," ECF No. 39 12-13 n.7, but that argument is unavailing. The Supreme Court's ruling in *New York* is the most relevant and controlling precedent here and applies regardless of how the government interprets and applies *Carey*. Plaintiffs' challenged actions pertain to "the taking of the census" and therefore are not committed to agency discretion by law. *New York*, 139 S. Ct. at 2568.

D. Plaintiffs Challenge Final Agency Actions.

The Bureau's Final Operational Plan qualifies as final agency action because it meets both conditions of finality: it "mark[s] the consummation of the agency's decisionmaking process" and is an action "by which rights or obligations have been determined." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted). The Bureau has already completed the transition from its planning phase to implementing the design choices articulated in its Final Operational Plan, demonstrating the finality of the agency action. *See U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016) (finding jurisdictional determination by the Army Corps of Engineers to be final where it was described by the agency as "final" and completed the agency's "decisionmaking process on that question"). The Bureau has consistently described

[2] The Court did not find APA claims challenging discrete agency actions related to the 2020 Census to be an unreviewable political question.

the Final Operational Plan as the "final design" for the 2020 Census;[3] the mere "possibility" of revision "does not make an otherwise definitive decision nonfinal." *U.S. Army Corps of Eng'rs*, 136 S. Ct. at 1814. By the Bureau's admission, the Final Operational Plan was the culmination of its decisionmaking processes for the 2020 Census, and Defendants notably do not contest this claim in their brief.

Defendants incorrectly claim that the design choices challenged in this case do not have "an immediate and practical impact" and do not determine any "rights or obligations." ECF No. 39 at 20. Critically, Defendants fail to note that Plaintiffs need not await the eventual execution of these unlawful decisions and bear their material consequences to pursue relief. *See Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 194–95 (4th Cir. 2013) (finding that the U.S. Army Corps of Engineers' "approval [of a project], not the Corps' subsequent activities in carrying it out, was the final agency action."). The Supreme Court has expressly noted, in the standing context, that courts need not "wait until the census has been conducted to consider" issues pertaining to the census's execution, "because such a pause would result in extreme—possibly irremediable—hardship." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999).

Plaintiffs have alleged—and the Court must accept as true at this stage—that the Bureau's actions will lead to an undercount of Hard-to-Count communities that Plaintiffs represent, leading to loss in federal funding and political power. Compl. ¶¶ 26-144. The Bureau's decisions as outlined in the Final Operational Plan are final for the purposes of the APA because of these

[3] *See, e.g.*, Deborah Stempowski (Chief, Decennial Management Division), *2020 Census Operational Plan*, Census Bureau (Feb. 1, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf (Slide 19).

abrogations of Plaintiffs' rights—precisely the same harms, stemming from an almost identical chain of events, recognized by the Supreme Court in *New York*. 139 S. Ct. at 2565.

III. Plaintiffs Properly State Claims Under the Enumeration Clause.

The Supreme Court and lower courts have repeatedly held that Enumeration Clause claims are justiciable and subject to a "reasonable relationship" standard. Plaintiffs' specific claims are also consistent with prior challenges that have been adjudicated by the Supreme Court. Moreover, the Bureau's cuts to the programs being challenged do not bear a reasonable relationship to the conduct of the Census.

A. The Supreme Court Has Developed a Constitutional Standard Applicable to Census Procedures.

Contrary to Defendants' claim that "[t]he constitutional and statutory framework underlying the census . . . lacks any specific guiding principles," ECF No. 39 at 22, the Supreme Court and lower courts have repeatedly held that claims under the Enumeration Clause are justiciable and subject to clear standards. Courts must evaluate the Census Bureau's choices to ensure that they bear a "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," which principally includes a "preference for distributive accuracy." *Wisconsin*, 517 U.S. at 20. Although the Secretary has broad discretion over conducting the census, such discretion is not unbounded. *Wisconsin*, 517 U.S. at 19. It is essential that such claims be reviewed, as a "violation of the Enumeration Clause's mandate" cannot be hidden "behind the fig leaf of deference to administrative procedure." *NAACP v. Bureau of the Census*, 945 F.3d at 194 (Gregory, C.J., concurring).

In addition to the reasonable relationship standard, the Supreme Court has also emphasized "a strong constitutional interest in accuracy" for the census. *Utah v. Evans*, 536 U.S. 452, 478

(2002). Defendants' choices will undermine the accuracy of the 2020 Census—and particularly, the "distributive accuracy," *see Wisconsin*, 517 U.S. at 20—by failing to ensure Hard-to-Count communities like Newburgh are adequately counted. A court may review census procedures to determine whether they satisfy the reasonable relationship standard before "the census has been conducted" as a failure to do otherwise "would result in extreme—possibly irremediable—hardship." *Dep't of Commerce*, 525 U.S. at 332. Thus, it is appropriate for this Court to review Plaintiffs' claims now. Indeed, the Fourth Circuit recently confirmed that Enumeration Clause challenges to the "procedures that the [Government] intend[s] to use, or not use, in conducting the Census" are appropriate for judicial review because the Operational Plan is final and delay would harm the plaintiffs. *NAACP*, 945 F.3d at 192-93.

B. The Discrete Actions Challenged by Plaintiffs Are Akin to Those in Previous Enumeration Clause Challenges.

The Supreme Court's established constitutional framework is clearly applicable to the discrete actions challenged by Plaintiffs. Despite Defendants' claim that there is "simply no constitutional authority" for Plaintiffs' suit, ECF No. 39 at 28, Plaintiffs advance specific challenges consistent with those that have been previously adjudicated by the Supreme Court. As in prior cases, Plaintiffs challenge the *methods* by which the Bureau is undertaking the Census. These include cuts to programs that have historically been among the most vital for distributive accuracy, including enumerators and partnership staff. In *Utah v. Evans*, the plaintiffs similarly challenged the Bureau's method of carrying out the census—in particular, its use of "hotdeck imputation"—and the Court allowed the suit to reach the merits. 536 U.S. 452 (2002). Similarly, in *Franklin v. Massachusetts*, plaintiffs challenged a different method adopted by the Bureau—one for where to count overseas personnel—and the Court found the suit appropriate for review. 505 U.S. 788 (1992). There is nothing "impossib[le]," ECF No. 39 at 28, about judicial

intervention and review when census operations become conspicuously deficient. Rather, this has been the tradition.

Defendants mistakenly interpret *New York* and *Carey* as precluding judicial review of this case. First, Plaintiffs' claims differ from those advanced in *New York.* In that case, the Court denied review of Enumeration Clause claims with respect to the citizenship question, holding that the framework was appropriate for review of "decisions about the population count itself" and not "decisions about what kinds of demographic information to collect." *New York*, 139 S. Ct. at 2566. The Court's narrow holding does not preclude review of Plaintiffs' claims because these claims have nothing to do with the collection of demographic information. Indeed, Plaintiffs' claims directly relate to the "the population count itself," as the challenged actions directly impact who is counted and who is not.

More generally, Defendants incorrectly argue, relying upon dicta in *New York*, that Congress's broad delegation of authority for the census to the Secretary of Commerce should immunize the Bureau from judicial scrutiny. This is wrong. As the Supreme Court has noted, "while Congress may dictate the manner in which the census is conducted, it does not have unbridled discretion." *Utah*, 536 U.S. at 495 (Thomas, J., concurring in part and dissenting in part). Taken to its logical conclusion, under Defendants' interpretation, the government could refuse to conduct any outreach to any communities and, instead, post one notice in front of the Department of Commerce requiring all residents to report to the nation's capital to be counted. Of course, such an action would violate the Constitution. Though the Secretary may have discretion over certain operations of the census, he is and must be constrained by the constitutional duty of an accurate enumeration.

Likewise, Defendants' arguments regarding *Carey* do not bear on whether the actions at issue are reviewable. Defendants argue that the Supreme Court "has since decisively rejected application of the one person, one vote standard to the conduct of the census." ECF No. 39 at 29. But even if this Court agreed that the *Wisconsin* Court replaced *Carey* with a new standard, Plaintiffs' claim can still proceed and be evaluated under the *Wisconsin* standard of "reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin*, 517 U.S. at 20. Other controlling Supreme Court precedents cited above, including *Utah* and *Franklin*, support Plaintiffs' claim for review. The choice of constitutional standard—whether originating in *Carey* or *Wisconsin*—is not the point: The point is that there *is* a workable constitutional standard applicable to this case which would result in the relief sought.

C. Defendants' Actions Do Not Bear a Reasonable Relationship to an Actual Enumeration.

Plaintiffs have sufficiently alleged that the specific choices made by Defendants in designing the 2020 Census and challenged here do not reasonably relate to the conduct of an actual enumeration. Defendants' cuts, such as dramatically cutting the number of enumerators and partnership staff, will diminish both the numerical and distributive accuracy of the 2020 Census as they will disproportionally affect the count of Hispanic, African American, and undocumented households, which make up a large proportion of Newburgh's population. Compl. at ¶ 27.

The Supreme Court has recognized that the requirements of the Enumeration Clause are satisfied when "all efforts have been made to reach every household." *Utah*, 536 U.S. at 479. Here, however, the Bureau has forsaken such efforts by paring back exactly the programs designed and used with great effect to ensure that "every household" has been reached in prior censuses. Compl. at ¶ 112-14. Further, when the Bureau's efforts fall so short of what the Constitution requires, courts should review claims under the Clause even if they "need not decide . . . the precise

methodological limits foreseen by the Census Clause." *Utah*, 536 U.S. at 479. That is precisely the situation here. This Court need not decide whether the Bureau should hire 1,500 Partnership Specialists or 1,501 Partnership Specialists, *cf.* ECF No. 39 at 23, to determine that hiring *half* the number of partnership staff used in the 2010 Census is plainly insufficient to conduct an actual enumeration when there is a larger population that is increasingly distrustful of the government. Compl. at ¶¶ 102–05.

The Enumeration Clause also does not prevent the Bureau from adopting new "methodological innovation[s]" as long as those methods bear a "reasonable relationship" to ensuring an actual enumeration. ECF No. 39 at 23 n.10. In this case, Defendants' choices do not ensure an actual enumeration. In the face of insufficient testing and lingering uncertainty about the efficacy of new technologies, Compl. at ¶ 28-29, the Bureau cannot simply assert, without any evidence, that its innovations will succeed. Without such evidence, the Bureau's cuts to the precise programs designed to follow up with Hard-to-Count communities bear no reasonable relationship to the conduct of the Census.

Finally, violations of the Enumeration Clause do not turn on the difference between "estimating rather than counting the population," as Defendants suggest. ECF No. 39 at 23. In *Franklin*, the Supreme Court considered under the Enumeration Clause the question of where overseas federal personnel should be counted, even though their numbers were already known. *Franklin*, 505 U.S. at 803-06. Thus, in focusing on the deficiencies of specific procedures used to count the population, Plaintiffs have adequately alleged violations of the Enumeration Clause. Given that "[t]he life of the 'Republic' is tied to the Enumeration Clause of the Constitution," *NAACP*, 945 F.3d at 194 (Gregory, C.J., concurring), violations of the Clause such as those alleged by Plaintiffs cannot be "beyond the reach of judicial review" and must be assessed under the

"reasonable relationship" standard established by the Supreme Court. *Id.* Plaintiffs have adequately alleged that Defendants' drastic cuts to the resources needed to reach Hard-to-Count populations will significantly undermine the "distributive accuracy" of the 2020 Census. *Wisconsin*, 517 U.S. at 20. No more is required at this stage.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss in its entirety.

Dated: February 21, 2020

Respectfully submitted,

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* Motion for Leave to File Law Student Appearances forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2020, a true and correct copy of the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint, was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system.

/s/ Jacob D. Alderdice
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