UNITED STATES DISTRICT COURT
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.	19 Civ. 10917 (AKH)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Defendants Bureau of the Census, Steven Dillingham, United States Department of Commerce, and Wilbur Ross, by their attorney Geoffrey S. Berman, United States Attorney for the Southern District of New York, submit this memorandum of law in support of their motion to dismiss Plaintiffs' Complaint ("Compl.") (ECF No. 1) pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(1) and 12(b)(6).

PRELIMINARY STATEMENT

The relief sought in this suit—"an injunction that requires Defendants to implement a plan to ensure that the hard-to-count populations will be actually enumerated in the decennial census," Compl. ¶ 197—is exceedingly broad and without precedent (except in Plaintiffs' counsel's prior attempt to obtain the same relief in the District of Maryland). Under the "virtually unlimited discretion" conferred by the Constitution and by Congress, the Secretary of Commerce and the Census Bureau are already implementing detailed plans that were years in the making, involving more advanced operations than any previous decennial census in order to conduct the largest census in American history. Nonetheless, Plaintiffs allege that these procedures are so deficient as to violate the Administrative Procedure Act ("APA") and the Enumeration Clause, and seek to have the Court assume responsibility for redesigning and administering the census, even as census operations are already underway. This case is groundless and should be dismissed.

First, Plaintiffs—the City of Newburgh and a non-profit based in Brooklyn—lack standing to challenge the census procedures at issue. Plaintiffs claim that they may eventually experience injuries of lost voting power and decreased federal funding *if* the challenged 2020 Census procedures' effects (which they admit are uncertain) result in the disproportionate undercount that they predict. Such claims are too speculative to constitute injury in fact. Further, this Court cannot redress Plaintiffs' alleged harm because neither the APA nor the Enumeration Clause provides a

basis to mandate the allocation of additional funds to partnership programs, the hiring of additional enumerators, or any other relief Plaintiffs seek.

Second, Plaintiffs' APA claims are foreclosed by Supreme Court precedent, as both the District of Maryland and the Fourth Circuit recently held in rejecting identical claims brought in Maryland by Plaintiffs' counsel. First, Plaintiffs do not challenge a set of "discrete" agency actions as the APA requires, but rather bring a wide-ranging challenge to the operation of the 2020 Census, akin to—but even more sweeping than—the sort of programmatic challenges repeatedly rejected by the Supreme Court. Second, the correspondingly broad agency action that Plaintiffs seek to compel finds no footing in any concrete statutory mandate, as required to justify judicially compelled action under the APA. Third, Defendants' broad plan of operation is not a final disposition of any party's legal rights or position.

Finally, Plaintiffs cannot state a claim for relief under the Constitution's Enumeration Clause. The Enumeration Clause requires only that the population must be determined through a person-by-person headcount, rather than through estimates or conjecture. Neither Plaintiffs' general allegations of an undercount nor their specific allegations of deficient census operations plausibly state a claim under the Enumeration Clause because there is no allegation that the Secretary is estimating rather than actually counting the population.

For all of these reasons, this action should be dismissed.

BACKGROUND

I. Constitutional and Statutory Authority for the Census

The Constitution's Enumeration Clause requires that an "actual Enumeration" of the population be conducted every 10 years and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. This clause "vests Congress with virtually unlimited discretion" in conducting the census. *Wisconsin v. City*

of New York, 517 U.S. 1, 19 (1996). Through the Census Act, Congress has delegated its virtually unlimited discretion to the Secretary of Commerce, vesting in him the authorityto conduct the decennial census "in such form and content as he may determine." 13 U.S.C. § 141(a). The Bureau of the Census assists the Secretary in the performance of this responsibility. *See id*. §§ 2, 4. As required by the Constitution, a census of the U.S. population has been conducted every 10 years since 1790. Compl. ¶ 14.

II. 2020 Census Procedures and Plans to Minimize Non-Response

The Department of Commerce and the Census Bureau have extensive plans in place to maximize self-response and thereby minimize the amount of non-response follow up for the 2020 Census. *See generally* 2020 Census Operational Plan (December 2018, v. 4.0), available at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf[1] ("2020 Operational Plan 4.0").[2] The 2020 Census will be the first to rely extensively on digital methods and automation. It will be the first census where individuals are encouraged to respond online, or by telephone in those areas with low internet connectivity

[1] Although typically courts may not consider matters outside the pleadings on a motion to dismiss under Rule 12(b)(6), Plaintiffs' complaint here is based entirely on various challenges to the 2020 Operational Plan 4.0, which is thereby incorporated by reference. *See, e.g., McCarthy v. Dun & Bradstreet Corp*., 482 F.3d 184, 191 (2d Cir. 2007) (Review of a motion to dismiss "is limited to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference."); *Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 122 (2d Cir. 2005) ("In determining the adequacy of the complaint, the court may consider . . . documents upon which the complaint relies and which are integral to the complaint."). Moreover, "[c]ourts may also take judicial notice of matters of public record when considering motions to dismiss." *In re Foreign Exch. Benchmark Rates Antitrust Litig*., 74 F. Supp. 3d 581, 590 (S.D.N.Y. 2015) (citing *Kramer v. Time Warner Inc*., 937 F.2d 767, 773 (2d Cir. 1991)).

[2] Plaintiffs refer to the 2020 Operational Plan 4.0 as the "Final Operational Plan," and indicate that it was made final on February 1, 2019. Compl. ¶ 30.

and those less likely to use the Internet. *Id.* at 9-10, 18-19, 79. Most housing units will receive several short mailings instructing them to complete the census either online or by telephone; both options will be available in multiple languages. *Id.* at 9-10, 18-21, 98. If households do not respond by the fourth mailing, the full paper questionnaire will be sent. *Id*. at 9-10, 18, 44, 210. In particularly hard-to-reach areas, census questionnaires will be hand-delivered. *Id.* at 10. Housing units that are less likely to have Internet access will receive a full paper questionnaire in the first mailing, allowing them to respond immediately via mail. *Id.* at 9-10, 18, 210.

The Census Bureau has thorough and coordinated procedures in place for following up with households that do not self-respond initially.[3] Each household will receive up to six mailings, if necessary, and certain households in hard-to-count areas may receive more than six attempts. *Id.* at 129, 212. Typically, if no response has been received after the fifth mailing, a census enumerator will be assigned to that address. *Id.* at 210. The enumerator will personally visit all units to which he or she is assigned to verify that the address is occupied and to attempt to contact a household member to complete the questionnaire. *Id*. at 123-25, 212. If the enumerator is not able to complete the questionnaire, administrative records[4] will be used to identify vacant housing units and determine response data for occupied households where the Census Bureau has high-

[3] For a detailed description of non-response follow-up operations, *see* 2020 Census Detailed Operational Plan for: 19. Nonresponse Followup Operation (NRFU) (July 15, 2019, v.2.0 Final), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan_v20.pdf ("NRFU Detailed Operational Plan").

[4] Administrative records include data from the Internal Revenue Service, the Social Security Administration, the Centers for Medicare and Medicaid Services, the Department of Housing and Urban Development, the Indian Health Service, the Selective Service, and the U.S. Postal Service. *See* Proposed Information Collection, 2020 Census, 83 Fed. Reg. 26643, 26645 (proposed June 8, 2018). The Census Bureau will only use administrative records "when it can confirm empirically across multiple sources that the data are consistent, of high quality, and can be accurately applied to the addresses and households in question." *Id.*

quality administrative records. *Id*. at 22, 123-24. If such records are unreliable or do not exist, a final postcard encouraging self-response will be mailed, and all addresses still non-responsive will undergo up to six contact attempts, with eligibility to have the data obtained from a proxy (such as a neighbor or landlord) after the third unsuccessful attempt. *Id.* at 125-26. Finally, the Census Bureau will use statistical models to impute the enumeration of occupied housing units that remain unresolved after non-response follow-up ("NRFU") operations. *Id.* at 134.

The Census Bureau also plans to mount extensive publicity and outreach campaigns, in which it will work with units of state, local, and tribal governments, the media, and community-based organizations to encourage people to respond to the census. *Id*. at 8, 18, 99-102. Through that outreach the Census Bureau also regularly reiterates its strong commitment to preserving the confidentiality of the data it collects as required by statute. *Id*. at 72; *see also* 13 U.S.C. § 9.

The 2020 Census has involved more wide-ranging and more advanced preparation and operations than any previous decennial census and, as publicly-available information demonstrates, a complete and accurate enumeration is fully contemplated. *See, e.g.*, 2020 Census Life-Cycle Cost Estimate Executive Summary, Dec. 21, 2018, https://www2.census.gov/programs-surveys/decennial/2020/program-management/planningdocs/2020-cost-estimate1.pdf (featuring estimates of a variety of aspects of planning and operation for the 2020 Census); Ron S. Jarmin, "U.S. Census Bureau Responses to National Advisory Committee on Racial, Ethnic and Other Populations 2017 Fall Meeting Recommendations," May 1, 2018, https://www2.census.gov/cac/nac/meetings/2017-11/2018-05-01-census-response.pdf (including, *inter alia*, discussions of planned focus groups in areas hit by recent natural disasters, the ongoing undercount of children, and reaching hard-to-count populations); 2020 Census Detailed Operational Plan for: 3. Security, Privacy, and Confidentiality Operation (SPC), June 6, 2017,

https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/planning-docs/SPC-detailed-op-plan.html (detailing "production support processes for the 2020 Census SPC operation" and "a summary of the operational processes involved, their inputs, outputs and controls, and the basic mechanisms employed to conduct the operational work"); *see generally* NRFU Detailed Operational Plan.

III. Procedural Background

Plaintiffs' Complaint purports to state claims seeking relief from assertedly arbitrary and capricious action under the APA, 5 U.S.C. § 706(2)(A); unconstitutional agency action under the APA, *id.* § 706(2)(B); and violation of the Enumeration Clause, U.S. Const. art. I, § 2, cl. 3. These are precisely the claims brought in a Maryland lawsuit involving the same attorneys from Jenner & Block LLP and the Yale Law School Rule of Law Clinic. *See* Second Amended Complaint (Dkt. No. 91), *Nat'l Ass'n for the Advancement of Colored People et al. v. Bureau of the Census et al.* ("*NAACP*"), No. 18 Civ. 891 (D. Md. April 1, 2019) (the "*NAACP* SAC").

The plaintiffs filed the *NAACP* SAC on April 1, 2019, two months after the February 1, 2019 publication of the 2020 Census Operational Plan that they identify as the relevant final agency action subject to APA review. *See NAACP* SAC ¶¶ 31-33, 206, 212; Compl. ¶¶ 30-32, 176, 182. Defendants moved to dismiss the *NAACP* SAC on April 15, 2019, on the grounds that (1) plaintiffs' underfunding claims had been mooted; (2) plaintiffs' APA challenge was not to a discrete "agency action" but was rather a broad, programmatic attack on the design of the 2020 Census; (3) the Operational Plan did not represent a "final" agency action; (4) census design was committed to agency discretional by law; and (5) plaintiffs' claims were unripe because further refinements and modifications of the Operational Plan would continue to be made in the run-up to the 2020 Census. *See NAACP* Dkt. No. 95-1.

On August 1, 2019, the *NAACP* Court granted the motion to dismiss. *Nat'l Ass'n for the Advancement of Colored People v. Bureau of the Census*, 399 F. Supp. 3d 406 (D. Md. 2019) ("*NAACP II*"). The Court dismissed the Enumeration Clause claim[5] on the basis that the underfunding claim had been mooted because Congress had passed a subsequent appropriations act designating funding for the Census, that the plaintiffs lacked standing, and that judicial review of the amount appropriated by Congress was barred by the political question doctrine. *Id.* at 413-19. Turning to the plaintiffs' APA claims, the Court found that those were deficient in several respects. First, the challenge was not, as claimed, to six discrete design choices, but rather amounted to a programmatic attack on the design of the 2020 Census. *Id.* at 420-22. Second, the plaintiffs sought to compel agency action, but could not identify any action "unlawfully withheld or unreasonably delayed," as required by the APA, 5 U.S.C. § 706(1). 399 F. Supp. 3d at 422-24. Third, the plaintiffs' claimed harm – that they would receive fewer resources as a result of undercounting – was too attenuated from the Operational Plan to render that plan a determination of rights and obligations as required by the APA. *Id.* at 424-25.

On December 19, 2019, the Fourth Circuit issued an opinion affirming in part and reversing in part the District Court's dismissal of the *NAACP* Complaint. The Court unanimously affirmed the dismissal of the *NAACP* plaintiffs' APA claims, finding that the challenged actions were not "'circumscribed' and 'discrete'" as required by the APA. *Nat'l Ass'n for the Advancement of Colored People v. Bureau of the Census*, 945. F.3d 183, 189-92 (4th Cir. 2019) ("*NAACP III*"). The Fourth Circuit reversed the dismissal of the plaintiffs' Enumeration Clause challenge, concluding that the District Court had erred in dismissing that portion of the action on ripeness

[5] The Court had previously dismissed the Enumeration Clause claims other than that related to funding as unripe. *See Nat'l Ass'n for the Advancement of Colored People v. Bureau of the Census*, 382 F. Supp. 3d 349 (D. Md. 2019) ("*NAACP I*").

grounds but declining to reach any other aspect of the claim in advance of a ruling from the district court addressing any other grounds, and remanded that portion of the case to the District Court. *See id.* at 192-93.

ARGUMENT

I. Legal Standard

A. Motion to Dismiss Pursuant to Rule 12(b)(1)

"A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it, such as when (as in the case at bar) the plaintiff lacks constitutional standing to bring the action." *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.À.R.L.*, 790 F.3d 411, 416-17 (2d Cir. 2015) (internal quotation marks and citation omitted). To survive a motion to dismiss under Rule 12(b)(1), a plaintiff must establish a court's jurisdiction through sufficient allegations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The plaintiff bears the burden of establishing that subject-matter jurisdiction exists over his claims, including that standing exists. *Cortlandt St.*, 790 F.3d at 417. While a court resolving a motion to dismiss under Rule 12(b)(1) "must take all uncontroverted facts in the complaint . . . as true, and draw all reasonable inferences in favor of the party asserting jurisdiction," when jurisdictional facts are placed in dispute, "the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits," in which case "the party asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014) (alteration and quotation marks omitted).

B. Motion to Dismiss Pursuant to Rule 12(b)(6)

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.*

v. Twombly, 550 U.S. 544, 570 (2007). This "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). While the Court accepts well-pleaded factual allegations as true, "mere conclusory statements" and "legal conclusion[s] couched as … factual allegation[s]" are "disentitle[d] … to th[is] presumption of truth." *Id.* at 678, 681 (citation omitted). Although the Court generally may not rely on material outside the pleadings under Rule 12(b)(6), it may consider any matters of public record of which the court may take judicial notice, as well as documents incorporated in the complaint by reference. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

II. Plaintiffs Lack Standing to Bring Their APA and Enumeration Clause Claims

The "irreducible constitutional minimum" of standing has three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent; (2) a causal connection between the injury and defendants' challenged conduct, such that the injury is "fairly trace[able] to the challenged action of the defendant"; and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. If the plaintiff fails to establish any of these three elements of standing, the case must be dismissed for lack of jurisdiction. *Id.* at 561. The standing inquiry is "'especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)).

Plaintiffs have not met their burden here. Plaintiffs' allegations that the procedures for the 2020 Census will result in an undercount relative to their preferred procedures are far too speculative to establish that injury in fact is certainly impending. Additionally, Plaintiffs' claimed injuries are not redressable because remedying the alleged deficiencies in the 2020 Census preparations is beyond the power of the judiciary.

A. Plaintiffs' Alleged Injuries Are Not Concrete or Actual and Imminent

"Whether a party has demonstrated an injury in fact is resolved by a two–step analysis. A court must determine (1) whether the asserted injury is 'concrete,' and (2) whether it is 'actual or imminent.'" *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 45 (2d Cir. 2017), *as amended* (Aug. 2, 2017) (quoting *Ne. Fl. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993)). "The first prong requires that the alleged injury is 'particularized' to the plaintiff, rather than 'conjectural or hypothetical.'" *Id.* (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)). "The second prong requires that the alleged injury is, if not actual, at least '*certainly* impending' and 'not too speculative.'" *Id.* (quoting *Adarand*, 515 U.S. at 211) (emphasis in *Adarand*).

Plaintiffs detail a variety of methodological innovations being implemented for the 2020 Census, from use of online self-response, *see* Compl. ¶¶ 58-65, to use of administrative records to steamline nonresponse follow-up (NRFU) operations, *see id.* ¶¶ 78-81. Plaintiffs allege that these innovations will result in a disproportionate undercount of minority and hard-to-reach populations, *id.* ¶¶ 25, 26, but they also contend that there has been insufficient testing of these innovations to understand their effects, and they readily admit that the effects are uncertain, *id.* ¶¶ 75, 82. This concession—that the effects of the challenged operations are speculative rather than *certainly* impending—is fatal to their standing.

The chain of events that would have to occur for a disproportionate undercount to occur reinforces the speculative nature of Plaintiffs' allegedly impending injury. First, Plaintiffs' denizens (or members' localities' denizens) would have to not respond to the initial mailings; they would have to not be counted by an in-person enumerator; they would have to not be counted through use of administrative records; they would have to not be counted by proxy (*e.g.*, a neighbor); and their occupation would have to be counted by imputation from nearby occupied dwellings. And *all* of this would have to occur at a disproportionate rate relative to other states or localities.

This speculative chain of causation is a far cry from the discrete methodological choices that courts have previously found created a sufficiently concrete basis for standing. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452 (2002) (challenging use of "hot-deck" imputation). Nor is Plaintiffs' claim that the methods utilized for the census *have* resulted in an undercount that must now be ameliorated. *Cf. Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) (granting injunction to keep open late-stage counting procedures because plaintiffs had established factual predicate that "that Census Bureau procedures were inadequate in New York to avoid this disproportionate undercount" in the largely-concluded 1980 Census).[6] Rather, Plaintiffs contend that the extensive procedures planned for the 2020 Census are both uncertain in effect and doomed to lead to a differential undercount. Such speculation does not suffice to establish actual or imminent injury in fact as required to confer standing.

[6] As the *NAACP* Court noted, numerous other cases alleging that Census methodology led to an undercount have been brought after the Census has taken place. *See NAACP I*, 382 F. Supp. 3d at 369 (citing *District of Columbia v. Dep't of Commerce*, 789 F. Supp. 1179 (D.D.C. 1992); *Massachusetts v. Mosbacher*, 785 F. Supp. 230, 233-34 (D. Mass. 1992); *Texas v. Mosbacher*, 783 F. Supp. 308, 309-10 (S.D. Tex. 1992); *City of Willacoochee v. Baldrige*, 556 F. Supp. 551 (S.D. Ga. 1983); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980); *City of Camden v. Plotkin*, 466 F. Supp. 44, 47 (D.N.J. 1992)).

B. Plaintiffs' Alleged Injuries Are Not Redressable

Besides injury and causation, a plaintiff also "must show that some personal benefit will result from a remedy that the court is prepared to give." 13A Charles Alan Wright *et al.*, Federal Practice & Procedure § 3531.6 (3d ed. Apr. 2018 update). Redressability thus requires the plaintiff to show that "the court has the power to right or to prevent the claimed injury." *Gonzalez v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.). If the Court cannot order relief that would remedy the plaintiff's alleged injury, redressability—and thus Article III standing—are lacking. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 229 (2003) (no redressability because Court "has no power to adjudicate a challenge to the [allegedly unconstitutional] FECA limits in this litigation"), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Here, Plaintiffs cannot show redressability because, even if Plaintiffs' alleged injuries were fairly traceable to Census Bureau underfunding, understaffing, or design choices, remedying those supposed problems is beyond the power of the judiciary. For reasons more fully set forth below, a plaintiff "cannot seek wholesale improvement of [a federal] program by court decree, rather than in the offices of the [agency] or the halls of Congress, where programmatic improvements are normally made." *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 891 (1990). And it is entirely speculative that the relief sought by Plaintiffs' will redress the hypothetical harms that they may or may not suffer sometime after the 2020 Census.[7]

[7] Plaintiffs' alleged injuries—loss of political representation and loss of federal funding, *see* Compl. ¶¶ 152-73—are also not directly traceable to the challenged actions, but rather to intervening decisions by residents on whether to answer the census, by the federal government on how to allocate funding, and by New York in how to disburse federal funds and how to draw political districts. Defendants acknowledge that *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), binds this Court insofar as it found federal funding allocation traceable to an alleged census undercount. *See id.* at 838. But *Carey* (1) relied upon the standing analysis of *City of Camden v. Plotkin*, 466 F. Supp. 44 (D.N.J. 1978), in which the plaintiff specifically demonstrated that

III. Plaintiffs Fail to State a Claim for Relief Under the APA

Plaintiffs' APA claims cannot succeed here because they: (1) fail to challenge a discrete agency action; (2) fail to identify any specific legal requirements that could justify compulsion of agency action; and (3) fail to identify a final agency action that determines rights or obligations. Accordingly, Plaintiffs' APA claims must be dismissed.

A. Plaintiffs Fail to Challenge a Discrete Action

Judicial review under the APA is limited to review of "final agency action." 5 U.S.C. § 704. "Agency action" is defined within the APA as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13); *see also* 5 U.S.C. § 701(a)(2) (adopting the definition given in Section 551). "All of th[e]se categories involve circumscribed, discrete" actions, and only actions that share this "characteristic of discreteness" are reviewable under the APA. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004) ("*S. Utah*"). The APA's limitation to discrete agency action precludes "broad programmatic attack[s]" that "seek wholesale improvement of [a] program by court decree." *Id.* at 64. "While a single step or measure is reviewable, an on-going program or policy is not, in itself, a 'final agency action' under the APA." *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (citing *Lujan*, 497 U.S. at 890). "The principal purpose" of this limitation "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial

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Camden was at risk of tipping below the population threshold of 100,000 for eligibility for Comprehensive Employment and Training Act funding rather than making vague allegations regarding overall federal funding, *see id.* at 46; and (2) has been substantially undermined by developments in standing law, *see, e.g.*, *Lujan*, 504 U.S. at 562 (noting that "much more is needed" to establish standing where injury and redressability "hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well"); *Clapper*, 568 U.S. at 414 (adhering to the Court's "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors"). Defendants reserve the right to argue *Carey*'s abrogation on appeal.

entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *S. Utah*, 542. U.S. at 66. Indeed:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

Id. at 66-67.

Here, Plaintiffs mount a broad programmatic challenge to the 2020 Operational Plan 4.0, including the Bureau's spending decisions and the choice to use the newest technology for the 2020 Census. Compl. ¶¶ 27-28. Indeed, the Complaint's allegations reveal the breadth of Plaintiffs' attack as they broadly challenge what they term as "dramatic" and "sweeping" changes in the 2020 Operational Plan, including alleged "sharp reductions *in nearly every aspect of Defendants' field operations*." *Id.* ¶¶ 1, 28 (emphasis added); *see also id.* ¶ 27 (the "deficiencies in the 2020 Census preparations are not simply the result of a choice of methodology" but a result of years of "unreasoned agency decisions"); ¶ 187 (the decisions made in the 2020 Operational Plan 4.0 "individually and cumulatively" deprive Plaintiffs of constitutional rights). As the Fourth Circuit correctly held about an essentially identical complaint advanced by the same counsel, Plaintiffs "do not actually challenge multiple discrete decisions made by the Census Bureau," but rather make "broad, sweeping . . . allegations" about the overall design of the 2020 Census. *NAACP III*, 945 F.3d at 191.

Plaintiffs purport only to challenge five assertedly "arbitrary and irrational design choices," which they ask the Court to invalidate:

> a (a) plan to hire an unreasonably small number of enumerators; (b) drastic reduction in the number of Bureau field offices; (c) significant reduction in the Bureau's communications and partnership program, including the elimination of

> local, physical Questionnaire Assistance Centers; (d) decision to replace most In-Field Address Canvassing with In-Office Address Canvassing; and (e) decision to make only limited efforts to count inhabitants of units that appear vacant or nonexistent based on unreliable administrative records.

Compl. ¶¶ 36, 194. However, these "design choices" being challenged "expressly are tied to one another." *NAACP*, 945 F.3d at 191. Indeed, the challenged actions are inextricable parts of the overall design and implementation of the 2020 Census, and implicate decisions about how to allocate funding and to what extent to rely upon technological innovations. *See id.* ("As [plaintiffs'] allegations make clear, the identified 'decisions' are 'insufficient' only in relation to one another and to the broader Operational Plan that the plaintiffs deem 'inadequate' in its entirety . . . . The sufficiency of the number of Enumerators hired inextricably is dependent on the other programs and decisions that the plaintiffs themselves identify.").

Plaintiffs' Complaint explicitly acknowledges the link between the challenged actions and the Bureau's implementation decisions regarding technology and funding. *See* Compl. ¶ 37 ("Individually and collectively, these five decisions demonstrate an abandonment of the Bureau's congressionally designated goal of reaching hard-to-count communities in the 2020 Census."); ¶ 45-47 (explaining that Final Operational Plan allegedly reduces enumerators because of new technology and protocols), ¶ 58 (explaining that 2020 Census will collect a large proportion of census responses online); ¶ 114 (describing decision to use mobile questionnaire assistances instead of Questionnaire Assistance Centers), ¶ 121 (explaining how In-Office Address Canvassing relies on external information source validation and satellite imagery), ¶ 189 (alleging that Defendants' program for the 2020 Census "is understaffed and underfunded"). As the Fourth Circuit held, "'[s]etting aside' one or more of these 'choices' necessarily would impact the efficacy of the others, and inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations. This is precisely the result that the 'discreteness' requirement of the

APA is designed to avoid." *NAACP III*, 945 F.3d at 191 (quoting *S. Utah*, 542 U.S. at 66-67) (internal citations omitted).

Programmatic challenges of the type mounted here are precisely those forbidden by the Supreme Court. *See S. Utah*, 542 U.S. at 67 (rejecting challenge to how the Bureau of Land Management carried out statutory directive to preserve wilderness because "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA"); *Lujan*, 497 U.S. at 875-79 (rejecting challenge to implementation of federal statute because a plaintiff cannot "seek *wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made"). Indeed, under the APA, a plaintiff "must direct its attack against some *particular* 'agency action' that causes it harm." *Lujan*, 497 U.S. at 891 (emphasis added).

Here, Plaintiffs are not seeking changes to discrete agency actions, "but rather a sweeping overhaul to the Final Operational Plan, which exceeds the scope of reviewable 'agency action.'" *NAACP II*, 399 F. Supp. 3d at 422.[8] And the fact that Plaintiffs point to certain specific actions does not render their comprehensive programmatic challenge justiciable. *See Habitat for Horses v. Salazar*, No. 10 Civ. 7684 WHP, 2011 WL 4343306, at *6 (S.D.N.Y. Sept. 7, 2011) (citing *Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000)). Indeed, Plaintiffs "may not challenge an entire program by simply identifying specific allegedly-improper final agency actions within that program." *Id.* (quotation omitted); *see also City of New York v. U.S. Dep't of Defense*, 913

[8] Plaintiffs here may have reduced their list of challenged actions from six to five—recognizing the lateness of the day, they no longer challenge the cancellation of certain field tests—but the scope of their challenge to the 2020 Census is no less ambitious than the challenges rejected in *Lujan* and *SUWA*.

F.3d 423, 433 (4th Cir. 2019) (rejecting plaintiffs' attack on government program where real request was to have court "supervise an agency's compliance with the broad statutory mandate," and was not a challenge of discrete agency action). Indeed, "[i]f a party could seek review any time the federal government's alleged non-compliance made a government program less useful than it might otherwise be, the possibilities for litigation would be endless." *City of New York*, 913 F.3d at 435. Like the District of Maryland and the Fourth Circuit, this Court should reject Plaintiffs' sweeping, programmatic challenge to the 2020 Census Operational Plan 4.0 as beyond the ambit of the APA.

B. Plaintiffs Fail to Identify an Action that Is Required by Law

Section 706(1) of the APA "empowers a court only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing how it shall act." *S. Utah*, 542 U.S. at 64 (internal quotation marks omitted). When a plaintiff asks a court to compel agency action under Section 706(1), the plaintiff must show that the action the plaintiff seeks to compel is one that the agency is "legally required" to take. *Id.* at 63 ("[T]he only agency action that can be compelled under the APA is action *legally required*." (emphasis in original)). "Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64 (emphases in original); *accord City of New York*, 913 F.3d at 432 (Under the APA, "actions that can be compelled are only those that have been 'unlawfully withheld or unreasonably delayed,'" which "requires that the plaintiff identify action that is 'legally required.'" (citing 5 U.S.C. § 706(1)). Plaintiffs seek to compel sweeping agency action without any identification of required action, and should accordingly be dismissed.

First, notwithstanding Plaintiffs' purportedly discrete challenges, the Complaint's prayer for relief makes clear that in reality Plaintiffs seek to compel, at an infeasibly late date, the

wholesale restructuring of the 2020 Census. Exactly as in the *NAACP* litigation, the Complaint here asks the Court to "[e]nter an injunction that requires Defendants to implement a plan to ensure that hard-to-count populations will be actually enumerated in the decennial census . . . ." *Id.* ¶ 197. Thus, Plaintiffs do not seek the invalidation of specific, discrete agency actions, but rather seek the implementation of an entirely new plan, which:

> shall include but not be limited to a plan that: (a) restores the Bureau's 2020 Partnership Program to no less than 2010 levels, adjusted for inflation and population growth; (b) augments the Bureau's 2020 Integrated Communications Program to achieve coverage equivalent to the 2010 Census, accounting for inflation, population growth, and the increased cost of advertising in 2020; (c) requires opening a number of in-person Questionnaire Assistance Centers commensurate to that used in the 2010 Census; and (d) increases the number of enumerators to no less than 2010 levels, adjusted for population growth.

Compl. ¶ 197.

As in the substantially identical Maryland litigation, "[t]he relief Plaintiffs request . . . cannot be read as anything less than court-ordered modification the Bureau's overall plan for the 2020 Census." *NAACP II*, 399 F. Supp. 3d at 422. Indeed, the breadth and depth of what Plaintiffs seek to compel would require the Court to assume comprehensive oversight of the Census Bureau as it implements the 2020 Census, down to the number of enumerators hired, the advertising outlay, and the number of Questionnaire Assistance Centers. Invalidating the challenged actions would amount to a massive reorganization of a census process that has been a decade in the making and is well underway. The Supreme Court has prohibited precisely this sort of judicial compulsion of specific agency action in the absence of a statutory mandate. *See S. Utah*, 542 U.S. at 66.

Second, the Court should reject any argument that Plaintiffs are not seeking to compel agency action. In the *NAACP* litigation, Plaintiffs argued that "because they have presented each APA claim exclusively as a request to 'set aside agency action' under Section 706(2), it is not necessary to show that any action of the Census Bureau is 'required by law.'" *NAACP*, 945 F.3d

at 189. The Fourth Circuit noted that there was "tension between the substantive allegations in the Complaint and the plaintiffs' contention that their APA claims do not seek to 'compel agency action,'" because "the essence of the plaintiffs' APA claims is that the Census Bureau is not doing enough to ensure an accurate enumeration in the 2020 Census, and must be compelled to do more." *Id.* at 190 (quoting 5 U.S.C. § 706(1)). While the Fourth Circuit ultimately did not have to reach the question (because it held that Plaintiffs' challenge failed because it was not discrete or circumscribed), there is little basis to contest the District Court's determination that "Plaintiffs are asking the Court, both directly and indirectly, to compel agency action." *NAACP II*, 399 F. Supp. 3d at 422**.**

The same is true here. The Complaint explicitly seeks an injunction requiring the Census Bureau to create an entirely new operational plan that would increase spending and overhaul operations for the 2020 Census. Compl. ¶ 197 (seeking court order requiring plan that restores partnership programs, augments communications programs, opens Questionnaire Assistance Centers ("QACs"), and increases number of enumerators). Plaintiffs cannot escape or change this reality by calling their extensive demands simply requests to stop changes from the previous census. An injunction requiring the Census Bureau to deploy 200,000 additional enumerators is a compelled agency action, whether it is stated forthrightly our couched as an injunction to "set aside" the decision *not* to deploy these enumerators. Compl. ¶ 194.

Finally, with the Complaint properly construed as an attempt to compel agency action, Plaintiffs cannot satisfy the test of identify action that the Census Bureau is "legally required" to take. Plaintiffs can identify no legal requirement that the Census Bureau hire a specific number of enumerators, open a specific number of Census Bureau field offices, operate neighborhood QACs, or take any other action Plaintiffs ask this Court to require. *See* Compl. ¶¶ 66-175; *see also NAACP*

III, 945 F.3d at 189 ("[I]n alleging that the Census Bureau plans to hire an 'insufficient' number of Enumerators, the plaintiffs notably do not allege that any specific number of Enumerators is required to conduct the Census."). Accordingly, Plaintiffs' APA claims must be dismissed for seeking to compel agency action that is neither discrete nor legally required.

C. Plaintiffs Fail to Challenge a Final Action

Plaintiffs' APA claim must also fail because they do not challenge any final action that determines rights and obligations. To challenge an action under the APA, the action must not only be discrete, but also "final." 5 U.S.C. § 704. "The finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Darby v. Cisneros*, 509 U.S. 137, 144 (1993) (quotations and alterations omitted). "As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotations and citations omitted). Thus, "if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review." *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005). APA claims are limited in this manner to "ensure[ ] that judicial review does not reach into the internal workings of the government, and is instead properly directed at the effect that agency conduct has on private parties." *City of New York*, 913 F.3d at 431.

Here, Plaintiffs challenged actions do not "determin[e]" "rights or obligations" because they neither have "an immediate and practical impact" on private parties, nor "alter the legal regime" in which they operate. *Id.* The 2020 Operational Plan 4.0 sets forth the Census Bureau's detailed strategy for enumerating 330 million people across 3.8 million square miles; it does not

change or impose any legal requirements on private parties. *Nat'l Ass'n of Home Builders*, 415 F.3d at 15. United States residents are required to truthfully answer the census regardless of the enumerators employed or field offices opened. *See* 13 U.S.C. § 221. None of the Census Bureau's preparations or operations obligate private parties to do anything they were not otherwise required to do, and, as the 2020 Census plans do not create rights or obligations, they do not constitute "final agency actions." *See Franklin v. Massachusetts*, 505 U.S. 788 (1992) (finding no final agency action where plaintiffs challenged Secretary's tabulation of census results because Secretary's report to President did not create any right or entitlement); *City of New York*, 913 F.3d at 434-35 (Department of Defense's compliance with statutory requirements was not "agency action" under the APA because it did not "in any way determine [the plaintiffs'] rights and obligations"); *NAACP II*, 399 F. Supp. 3d at 424-25 (challenged actions did not determine rights and obligations because Plaintiffs were challenging how plans impacted Defendants, rejecting argument that Defendants' implementation of 2020 Census affects rights of private parties as too attenuated and not immediate).

It also cannot be said that the Operational Plan "alter[s] the legal regime in which it operates." *City of New York*, 913 F.3d at 431. The Plan neither prohibits the Census Bureau from making further adjustments to census operations, nor exposes anyone to civil or criminal penalties for failing to follow it. *Cf. Bennett*, 520 U.S. at 178 (a legal regime is altered by an agency's determination when the action agency would expose itself to civil and criminal penalties if it disregarded that determination); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002) (an EPA Report did not alter the legal regime because "no statutory scheme triggers potential civil or criminal penalties for failing to adhere to the Report's recommendations").

IV. Plaintiffs Fail to State a Claim Under the Enumeration Clause

The constitutional and statutory framework underlying the census is straightforward, but notably lacks any specific guiding principles. The Constitution says only that an "actual Enumeration shall be made . . . within every subsequent Term of ten Years, in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3. And Congress has provided only that the Secretary of Commerce has the responsibility to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. § 141(a).

The Supreme Court has recognized that "[t]he text of that clause 'vests Congress with virtually unlimited discretion in conducting the decennial actual Enumeration,' and Congress 'has delegated its broad authority over the census to the Secretary.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (quoting *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996)). In light of this discretion, the Supreme Court has never invalidated the Secretary's population count on Enumeration Clause grounds. See *Utah*, 536 U.S. at 474 (holding "hot-deck imputation" of address status information from nearby housing units permissible under the Enumeration Clause); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 344 (1999) (holding that statistical sampling violates the Census Act and declining to reach Enumeration Clause claim); *Wisconsin*, 517 U.S. at 1; *Franklin*, 505 U.S. 788.

Assuming *arguendo* that the standard set forth in *Wisconsin*—*i.e.*, that the conduct of the census "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," 517 U.S. at 20—

provides an appropriate standard to adjudicate this Enumeration Clause claim,[9] it sets an impossibly high bar for Plaintiffs' challenge.

There is simply no constitutional authority from which Plaintiffs derive the proposition that deploying 600,000 enumerators bears a reasonable relationship to the accomplishment of an actual enumeration, but deploying 400,000 does not. *Cf.* Compl. ¶ 49. Similarly, no authority mandates that opening 494 local census offices and one area census office bears such a reasonable relationship, while opening 248 area census offices does not. *Cf. id.* ¶¶ 86-87, 92. Or that hiring 849 partnership specialists and 2,000 partnership assistants bears a reasonable relationship, but hiring 1,501 partnership specialists does not. *Cf. id.* ¶ 104.[10] The impossibility of such fine-tuning through the courts is precisely why the Constitution delegated authority over the census to Congress, and why Congress delegated that authority to the Secretary of Commerce. Neither Plaintiffs' general allegations of an undercount nor their specific allegations of deficient census operations plausibly state a claim under the Enumeration Clause because there is no allegation that the Secretary is estimating rather than counting the population.

[9] The Supreme Court noted in *Dep't of Commerce v. New York* that the standard articulated in *Wisconsin* is not applicable in all cases, and had previously been employed regarding "decisions about the population count itself." 139 S. Ct. at 2566. In fact, the Supreme Court has only employed the standard when evaluating challenges to methodological decisions outside the actual population count itself, such as whether to use statistical adjustments (*Wisconsin*) or how to allocate overseas military personnel (*Franklin*, 505 U.S. at 790-91). As the Supreme Court has never entertained a challenge to the actual mechanics of the enumeration, "it is arguable that there is no law for a court to apply in a case like this—that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417-18 (7th Cir. 1992).

[10] One might equally ask why the 2010 Census, rather than any of the 22 preceding censuses dating back to 1790, provides the dispositive baseline for how to conduct an "actual enumeration." Surely *some* methodological innovation is appropriate.

Plaintiffs cannot rely on the Second Circuit's decision in *Carey* to support their claim. *Carey* upheld a preliminary injunction requiring the Census Bureau to continue to accept "Were You Counted" forms and to review administrative records to determine whether there had been an undercount in New York City. 637 F.2d 834. In finding a likelihood of success on the merits (one that was ultimately not borne out by the litigation, *see Cuomo v. Baldrige*, 674 F. Supp. 1089, 1092-93 (S.D.N.Y. 1987) (tracing the tortuous procedural history of the *Carey* litigation and ultimately dismissing the amended complaint)), the Second Circuit pointed to the one person, one vote line of cases. *Id.* at 839 (citing *Reynolds v. Sims*, 377 U.S. 533, 537 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)). While acknowledging that "mathematical exactness or precision 'is hardly a workable constitutional requirement,'" *id.* (quoting *Reynolds*, 377 U.S. at 537), *Carey* nevertheless suggested that the standard should be adopted from that line of cases, *i.e.*, that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *id.* (quoting *Wesberry*, 376 U.S. at 7-8).

The Supreme Court has since decisively rejected application of the one person, one vote standard to the conduct of the census:

> We think that the Court of Appeals erred in holding the "one person-one vote" standard of *Wesberry* and its progeny applicable to the action at hand. For several reasons, the 'good-faith effort to achieve population equality' required of a State conducting intrastate redistricting does not translate into a requirement that the Federal Government conduct a census that is as accurate as possible.
>
> Rather than the standard adopted by the Court of Appeals, we think that it is the standard established by this Court in *Montana* and *Franklin* that applies to the Secretary's decision not to adjust. . . . In light of the Constitution's broad grant of authority to Congress, the Secretary's decision not to adjust need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census.

Wisconsin, 517 U.S. at 16-17, 18-19 (1996).

Because Plaintiffs' claims do not relate to the method of calculating the population of the United States or the resulting allocation of representatives, they cannot plausibly allege that their challenge relates to whether the Government is fulfilling its constitutional obligation to conduct an "actual Enumeration." Following the controlling Supreme Court precedent, this Court should therefore reject any suggestion that the Enumeration Clause provides a workable framework for the Court to mandate a particular number of enumerators or level of spending.

CONCLUSION

For the reasons stated herein, Plaintiffs' complaint should be dismissed in its entirety.

Dated: January 31, 2020
New York, New York

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Lucas Issacharoff, an Assistant United States Attorney for the Southern District of New York, hereby certify that on January 31, 2020, I caused a copy of the foregoing Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint to be served by ECF upon all counsel of record.

Dated: January 31, 2020
New York, New York

By: /s/ Lucas Issacharoff

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