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)

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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 reply memorandum of law in further 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

Plaintiffs initially challenged what they described as five "design choices" made by Defendants in designing and operating the 2020 Census:

> 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.

In their motion for a preliminary injunction (brief refiled at ECF No. 48) ("P.I. Br."), Plaintiffs sought relief relating to only the first three categories, asking that the Court enter an injunction requiring Defendants to increase outreach and communications efforts by $127.8 million; spend $597.2 million to deploy additional enumerators; and spend $45.6 million to increase the Bureau's physical presence in hard-to-count communities. P.I. Br. at 33.

Meanwhile, in opposing Defendants' motion to dismiss, Plaintiffs now withdraw their claims relating to address canvassing (Compl. ¶ 36(d)) and relating to their (now admittedly baseless) claim that the Bureau reduced its communications spending (Compl. ¶ 36(c) in part). ECF No. 45 ("MTD Opp.") at 2 n.1.

In their opposition, Plaintiffs urge the Court to treat the remaining claims for relief as discrete, isolated decisions reviewable under the Administrative Procedure Act ("APA") or the

Enumeration Clause. Yet the ever-shifting nature of Plaintiffs' claims and relief sought only highlights the incoherence of attempting to view each of their challenges in isolation from each other. Rather, as the District of Maryland and the Fourth Circuit both found, Plaintiffs' claims amount to a comprehensive, programmatic challenge to the 2020 Census, in which each alleged deficiency rests upon the others and the efficacy of any given relief cannot be viewed in isolation from the remainder. Such challenges are impermissible under the APA because (1) the APA forbids programmatic challenges, (2) Plaintiffs seek to compel government action but cannot identify any legal requirement for such action, and (3) the design of the 2020 Census does not constitute a final agency action that determines rights and obligations.[1]

Plaintiffs' Enumeration Clause claims, meanwhile, cannot overcome the extraordinarily deferential standard that the Supreme Court has imposed, even under Plaintiffs' preferred articulation of the applicable legal test. Defendants' projections of required enumerator hiring, comprehensive partnership and communications program, and implementation of mobile questionnaire assistance unquestionably "bear . . . a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996).

For these reasons, the Court should dismiss the Complaint.

[1] For the reasons set forth in Defendants' opposition to Plaintiffs' motion for a preliminary injunction (ECF No. 46) ("P.I. Opp."), even if Plaintiffs' claims were cognizable under the APA they would fail to allege plausibly any arbitrary or capricious action. Indeed, Plaintiffs' remaining claims are either based on a fundamental misunderstanding about Census operations (*id.* at 22-24), are moot (*id.* at 40-41), or rest on faulty assumptions (*id.* at 17-22).

ARGUMENT

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

Plaintiffs' asserted standing to bring these claims rests upon the spurious argument that the alleged "substantial risk" created by the 3.5 "design choices" at issue is as closely connected to a differential undercount as the previously challenged citizenship question. MTD Opp. at 3-7 (citing *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018)). That is simply not the case.

The *New York* Court relied upon the direct connection between the citizenship question and the minority response rate: according to the plaintiffs' allegations in that case, the addition of the question would trigger fear in minority communities and they would refuse to respond. *New York*, 315 F. Supp. 3d at 782 (finding standing to challenge a single discrete census decision). Here, by contrast, Plaintiffs complain about a scattershot of Census operations past, present, and future—some of which have *never* been at issue in this litigation—to argue that novel methods create risks of a less effective census that, in turn, may lead to an undercount. *See, e.g.*, MTD Opp. at 4 ("Defendants' cancellation of field tests creates a substantial risk that the historically undercounted populations represented by Plaintiffs will undercounted to an even greater extent as a result of Defendants' actions.").

In order for a given household not to be counted or to be undercounted, Plaintiffs rely upon a veritable Rube Goldberg machine of missed opportunities: a housing unit must have been missed in the (already complete and no longer challenged) in-office address-canvassing phase and then not identified for follow-up in-person address canvassing, *and* its occupants must not have been made aware of the Census by the Bureau's partnership program or through the admittedly *more* extensive communications program, and then the occupants must fail to make contact with the Bureau's mobile questionnaire assistance (but would theoretically have made contact with a prior

fixed-location questionnaire assistance center had one existed). Or the occupants of a housing unit must fail to respond to six mailings, *and* the housing unit must be incorrectly identified as vacant by an enumerator *and* Post Office non-deliverable lists *and* other administrative records. Or the occupants must fail to respond to six mailings, *and* no proxies would be able to identify the number of occupants of the housing unit, *and* the Census Bureau would fail to impute sufficient occupants from a nearby housing unit. And *all* of this would have to happen at a disproportionate rate to certain households. This highly speculative series of assumptions is far more attenuated than in *New York*, where there was evidence that households fear responding to a Census that includes a citizenship question and that minority households would fail to respond at a disproportionate rate. *Cf. New York*, 315 F. Supp. 3d at 782.

With respect to redressability, even assuming the Court could properly order an agency to expend a lump sum appropriation for a specific purpose, which it may not, *see infra* at 11-12, such an order would not provide Plaintiffs their requested relief. As Defendants have explained, enumerator deployment is merely *projected* until data become available about the extent of self-response, and then is implemented as necessary to accomplish the tasks required by the Non-Response Follow-Up ("NRFU") program. So in order to do anything beyond causing the Census Bureau to pay existing enumerators, the Court would have to direct particular actions to be added to the NRFU program by, for example, mandating additional follow-up visits or restricting the types of administrative records that could be used to confirm vacancy.[2] At this point the Court would effectively be assuming detailed management of the 2020 Census—precisely what Supreme

[2] The Census Bureau could also respond to a Court order to deploy additional enumerators by simply deploying each for fewer hours, but under such circumstances Plaintiffs would fail to "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).

Court precedent forbids: "The 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." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004). The impossibility of the Court's fashioning effective relief without assuming wholesale management of the Census not only undermines Plaintiffs' standing, but also demonstrates why their claims fail on the merits.

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

A. Plaintiffs Fail to Challenge a Discrete Action

Plaintiffs' APA claims also should be dismissed on the merits because they fail to challenge discrete agency actions. Despite the wide-ranging allegations in the Complaint, which criticize the "sharp reductions in nearly *every aspect* of Defendants' field operations," Compl. at 1 (emphasis added), Plaintiffs' opposition attempts to disguise their broad attack as a limited challenge under Section 706(2) of the APA. The Court should reject Plaintiffs' attempt to recast their claims. Indeed, Plaintiffs' challenge is, at base, a policy disagreement with the Census Bureau's decision to increase its reliance on technology for the 2020 Census, and reallocate funding accordingly, while Plaintiffs would have the Bureau replicate the 2010 Census. Thus, Plaintiffs' challenges to the amount of enumerators deployed, the reduction in field offices, the changes to the partnership program, and NRFU operation, including use of administrative records, are questions that are tied to underlying decisions about funding and technology, and are all inherently related as part of the Census Bureau's program to carry out the 2020 Census. As the Fourth Circuit recognized in rejecting an identical challenge,

> Contrary to their position on appeal, the plaintiffs do not actually challenge multiple discrete decisions made by the Census Bureau. Instead, as pleaded, the various "design choices" being challenged expressly are tied to one another. "Setting 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.

Nat'l Ass'n for the Advancement of Colored People v. Bureau of the Census, 945 F.3d 183, 191 (4th Cir. 2019) ("*NAACP III*").

Such a broad attack on "an on-going program or policy is not, in itself, a [challenge to a] 'final agency action' under the APA," and thus Plaintiffs' claims must be dismissed. *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (citing *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 890 (1990)); *see also Habitat for Horses v. Salazar*, No. 10 Civ. 7684 WHP, 2011 WL 4343306, at *6 (S.D.N.Y. Sept. 7, 2011) (Under the APA, Plaintiffs "may not challenge an entire program by simply identifying specific allegedly-improper final agency actions within that program."). A review of each of Plaintiffs' challenged "decisions" demonstrates the interdependence of these claims with the each other and the broader census design.[3]

To start, Plaintiffs challenge the Bureau's decision as to how many enumerators to deploy during the 2020 Census. However, as the Fourth Circuit recognized, the "sufficiency of the number of Enumerators hired inextricably is dependent on the other programs and decisions that the plaintiffs themselves identify." *NAACP III*, 945 F.3d at 191. The number of enumerators ultimately deployed will be a function of (1) the design of the NRFU operation, including the number of follow-up visits and the use of administrative records to confirm vacancy, and (2) the actual prevalence and distribution of self-responses. A challenge seeking more enumerators alone would be nonsensical without additionally determining what those enumerators will do and where they will be deployed. Plaintiffs' own Complaint alleges that the projections regarding required

[3] Plaintiffs "no longer seek remedies" related to the Census Bureau's address canvassing operations and the Bureau's allegedly decreased spending on communications. MTD Opp. at 2, n.1. Nor could they, given that such claims are now moot. *See* P.I. Opp. at 39-41. Indeed, the address canvassing phase of the 2020 Census is complete, and Defendants plan to spend roughly $583 million on their communications contract, or about $128 million *more* in constant 2020 dollars than was spent for the 2010 Census, *see id.* at 12.

enumerators are incorrect in part because the Bureau assumes that it "will be able to reduce the NRFU workload significantly by enumerating households based on administrative records." Compl. ¶ 51; *see also id.* ¶¶ 78-85.

Similarly, decisions about funding and technology drive decisions about the number of field offices, which also affect Census Bureau choices about staffing. 2020 Census "field operations will rely heavily on automation," allowing enumerators and supervisors to work remotely by communicating and performing all tasks directly from a mobile device. 2020 Operational Plan 4.0 at 25. "These enhanced capabilities significantly reduce the number of offices required to support 2020 Census fieldwork," and fewer offices are needed to provide staff workspaces and house paper (such as daily routes, payroll, completed forms, etc.) as compared to the paper-dependent 2010 Census. *Id.* Additionally, "automation enables significant changes to how cases are assigned and the supervision of field staff. By making it easier for supervisors to monitor and manage their workers, the ratio of workers to supervisor can be increased, reducing the number of supervisors required." *Id.* Accordingly, the design of the NRFU program is directly tied to the sufficiency or insufficiency of Area Census Offices ("ACOs").

Moreover, while Plaintiffs have dropped their allegations relating to address canvassing, those allegations undergirded their theory that the number of ACOs was insufficient. *See* Compl. ¶ 92 ("If the Bureau has too few ACOs, it will not be able to hire and train a staff of enumerators capable of conducting an actual enumeration of households that do not self-respond to the 2020 Census, nor will it be able to hire and train a staff of listers capable of performing address canvassing accurately."); *id.* ¶ 93 ("Having too few ACOs will also constrain the Bureau's ability to identify and address any problems that arise during address canvassing and NRFU.").

Finally, despite Plaintiffs' efforts to challenge partnership program expenditures in isolation, this question too cannot be disconnected from the rest of Plaintiffs' allegations or the total mix of Census techniques. First, as noted above, the effectiveness of overall outreach will likely affect the self-response rate, which in turn will impact the number of enumerators required. And second, Plaintiffs' claim that the partnership program is insufficient rests in large part upon their since-abandoned allegations regarding the communications program. *See* Compl. ¶ 107 ("[G]iven the significant cut to the partnership program, more spending [on the communications program] is required to inform hard-to-count communities about the Census just to match 2010 levels of awareness."). Given that Plaintiffs no longer claim that the communications program will be less effective than in 2010, or that there is any funding shortfall, their allegations regarding the partnership program rest on the thin reed of elimination of partnership assistants in favor of additional partnership specialists. *See* P.I. Opp. at 17-19.

Thus, regarding all aspects of Census plans that Plaintiffs still challenge, the interrelationship between those actions and the Census's overall design defeats Plaintiffs' assertion that "Defendants could easily remedy any one of the challenged decisions without impacting the rest." MTD Opp. at 8. Accordingly, as set forth in the motion to dismiss, and as held by the Fourth Circuit, Plaintiffs fail to state a claim under the APA because they "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. Their claim should thus be dismissed because "'[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," which "is precisely the result that

the 'discreteness' requirement of the APA is designed to avoid." *Id.* at 191 (internal citations omitted) (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004)).

B. Plaintiffs Fail to Identify a Legally Required Action Pursuant to Section 706(1)

Plaintiffs further argue that they are not seeking to compel agency action and that, because their challenge is brought under APA Section 706(2), as opposed to Section 706(1), they need not show any action that the Census Bureau was legally required to take. This argument should be rejected on its face. A challenge to an agency's alleged failure to act is brought under Section 706(1), and such a challenge is only reviewable under the APA "where a plaintiff asserts 'that an agency failed to take a discrete agency action that it is required to take.'" *Sharkey v. Quarantillo*, 541 F.3d 75, 89 n.13 (2d. Cir. 2008) (quoting *Norton*, 542 U.S. at 65); *see also Blancett v. U.S. Bureau of Land Mgmt.*, No. CIV.A. 04-2152 (JDB), 2006 WL 696050, at *3 (D.D.C. Mar. 20, 2006) (finding that even though plaintiff's complaint alleged agency actions were arbitrary and capricious under § 706(2) of the APA, "it is clear from the face of the complaint and the briefing that plaintiffs do not challenge a decision issued by the agency, but rather a failure to act governed by § 706(1)"). Here, Plaintiffs specifically challenge the Census Bureau's *failure* to take various actions including: the spending of additional funds, the deployment of additional enumerators, and the establishment of more field offices. They attempt to disguise their claims by saying they seek to "set aside" the agency's decisions *not* to take certain actions. However, the only way to "set aside" a failure to act is to compel agency action, which is the relief that § 706(1) provides. *See Norton*, 542 U.S. at 61-62. Thus, Plaintiffs' APA claims amount to a challenge under Section 706(1), as Plaintiffs challenge Census Bureau decisions (grounded in technological advances) *not* to spend money on certain operations and *not* to implement the 2020 Census in the same manner as in 2010.

Moreover, the relief that Plaintiffs seek makes clear that their challenge is properly brought under Section 706(1). Plaintiffs do not merely "specif[y] discrete actions this Court *could* order." MTD Opp. at 10 (emphasis added). Rather, as articulated in their motion for a preliminary injunction, they seek a Court order:

> directing the Bureau to spend money already appropriated and currently held in accounts of Defendants to (1) increase outreach and communications to no less than 2010 Census levels as directed by Congress (expenditure of an additional $127.8 million); (2) deploy a number of core enumerators whom Defendants are already hiring (but do not intend to use in the field) at no less than 2010 Census levels (expenditure of an additional $597.2 million); and (3) increase the Bureau's presence within Hard-to-Count communities by increasing the number of fixed Questionnaire Assistance Centers, field offices, and/or mobile questionnaire assistance units within those communities at levels commensurate to 2010 (expenditure of an additional $45.6 million).

P.I. Brief at 33.[4] This relief, which explicitly seeks a Court order directing that the Census Bureau take specific actions, is not merely a request to "set aside" agency action; as the Second Circuit has made clear, when the specific relief sought is an order directing agency action, such relief is not available under section 706(2), because that section only empowers a court to "hold unlawful and set aside" an agency action. *Benzman v. Whitman*, 523 F.3d 119, 132 (2d Cir. 2008). Accordingly, Plaintiffs' request to have this Court require agency action cannot plausibly be construed as a claim brought under Section 706(2).[5]

[4] As noted above, Plaintiffs have withdrawn their claim regarding communications spending, but have maintained their request for an increase in spending to the Partnership Program. MTD Opp. at 2 n.1, 11.

[5] To the extent this Court finds that Plaintiffs' claim is properly brought under 706(1), Plaintiffs' complaint still should be dismissed for the reasons set forth above and below—they do not challenge discrete or final agency actions. Indeed, the Fourth Circuit affirmed dismissal without reaching the question of whether Plaintiffs' complaint was proper under Section 706(1) or (2)—although it did note the "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

Faced with the reality that their claims are properly brought under Section 706(1), Plaintiffs attempt to identify a "legally required" action that the Census Bureau has failed to take by citing to an "Explanatory Statement" for the questionable proposition that Congress "explicitly instructed the Census Bureau" to spend appropriated funds to address a potential undercount. MTD Opp. at 12-13. However, an explanatory statement by a single committee chairperson regarding appropriated funds simply cannot be construed as an "action required by law," particularly when the statement merely notes that the total budgetary amount "supports no less than the level of effort for outreach and communications" in the 2010 Census, should the Bureau choose to allocate the appropriation in that manner, and suggests no specific amount of funds for that purpose. Wishnie Decl., Ex. 3 at H10962.[6] As courts have held, "the explanatory remarks in the 'conference report' do not have the force of law." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237 (D.C. Cir. 2003).[7]

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accurate enumeration in the 2020 Census, and must be compelled to do more." *NAACP III*, 945 F.3d at 190.

[6] As set forth in the Government's opposition to a preliminary injunction, the Bureau's spending on outreach and communications is greater than in 2010. P.I. Opp. at 22. Further, the statement cited by Plaintiffs notes that a significant part of the appropriated funds was expected to fund contingency needs that may arise during the 2020 Census, which is precisely what the Bureau has planned. *See* Wishnie Decl. Ex. 3 at H10962

[7] In support of their argument that Congress issued a legally binding direction to spend funds, Plaintiffs cite a law review article for the proposition that "the purpose of the committee report in the appropriations context is essentially to legislate—that is, to direct where the money appropriated is going." MTD Opp. at 13 (quoting 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)). Plaintiffs' citation is highly misleading. After surveying legislative staffers, the article *actually* says: "Forty-four respondents (32%) specifically explained that the purpose of the committee report in the appropriations context is essentially to legislate—that is, to direct where the money appropriated is going." 65 STAN. L. REV. at 980. Thus, Plaintiffs are representing a minority survey result as the conclusion of the article. Indeed, the article goes on to note that binding Supreme Court caselaw directly contradicts Plaintiffs' argument:

Indeed, the 2019 act appropriating funds to the Census Bureau specifies that that "from amounts provided herein, funds *may* be used for promotion, outreach, and marketing activities," without mandating that any amount be so spent. Pub. L. 116-6, 133 Stat. 13, 94 (Feb. 15, 2019) (emphasis added).[8] Such decisions about how lump sum appropriations are spent are not judicially reviewable. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (the "allocation of funds from a lump sum appropriation" is the type of "agency decision[] that courts have traditionally regarded as unreviewable"); *accord Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). Because Plaintiffs fail to show that any outreach and communications spending was "legally required," they fail to state a claim under APA Section 706(1).

C. Plaintiffs Fail to Challenge a Final Agency Action

Plaintiffs also fail to identify a final agency action subject to review under the APA because they do not articulate any "rights and obligations" that are determined by the Census Bureau's plans for the 2020 Census. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The Census Bureau's detailed strategy for enumeration seeks to accurately count the approximately 330 million people in this country. Nothing in Plaintiffs' Complaint explains how the carefully planned

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> [W]ith respect to appropriations legislative history, the Court appears to apply precisely the opposite presumption as do congressional insiders and agencies: the Court gives particularly little credence to it. Indeed, in one of the most famous statutory interpretation cases involving an appropriations statute, *Tennessee Valley Authority v. Hill*, [437 U.S. 153, 191 (1978),] the Court expressly relied on the fact that the relevant explanatory information was in the legislative history rather than in the text of the bill itself as a reason to disregard that information.

Id. at 981 (footnotes omitted) (citing *inter alia*, *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 608 n.7 (2007); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)).

[8] This is in marked contrast to the way funds are allocated to the Department Office of Inspector General in the same provision, which directs, a specific amount of funds to that office for the specific purpose of investigating and auditing the Census Bureau. *See id*.

Census operations, while planned to be conducted in a different manner than Plaintiffs would prefer, does anything but seek truthful responses to the Census, which individuals are already obligated to provide. *See* 13 U.S.C. § 221. And Plaintiffs fail to make any non-speculative claims that Defendants' actions will cause "a loss in federal funding and political power." MTD Opp. at 15. Accordingly, as the 2020 Census plans do not create rights or obligations, they do not constitute "final agency actions." *See e.g.*, *Nat'l Ass'n for the Advancement of Colored People v. Bureau of the Census*, 399 F. Supp. 3d 406, 424-25 (D. Md. 2019) (challenged actions did not determine rights and obligations because Plaintiffs were challenging how plans impacted Defendants, and rejecting argument that Defendants' implementation of 2020 Census affects rights of private parties as too attenuated and not immediate).

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

A. The Enumeration Clause Vests Defendants with Virtually Unlimited Discretion in Carrying Out the Census

As Defendants previously noted, the Supreme Court's "reasonable relationship" standard for Enumeration Clause claims has previously been implemented in challenges to allocation or methodology rather than the actual process of collecting Census responses, as here. *See* Dkt. No. 39 ("MTD Br."), at 23 n.9 (collecting cases). The cases relied upon by Plaintiff regarding "hot deck" imputation (*Utah v. Evans*, 536 U.S. 452 (2002)) and allocation of overseas military personnel (*Franklin v. Massachusetts*, 505 U.S. 788 (1992)) (neither of which apply the "reasonable relationship test") are quite distinct from the Court overseeing the mechanics of enumeration itself: the number of partnership staff, the deployment of enumerators, or the distribution of local questionnaire assistance.

While it is not clear that any standard exists, *if* there is any standard to be applied to Plaintiffs' challenge, it is the extremely deferential standard set forth in *Wisconsin*. *Wisconsin*'s

holding 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, derives from the fact that the Enumeration 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* 517 U.S. at 19).

Plaintiffs' citation to dicta noting a "preference for distributive accuracy" or "strong constitutional interest in accuracy" does not support their claim that the Bureau's actions need to satisfy a standard beyond bearing a reasonable relationship to an actual enumeration. MTD Opp. at 16 (quoting *Wisconsin*, 517 U.S. at 20; *Utah*, 536 U.S. at 478). The Census Bureau fully embraces these interests, and its dedicated professionals have devoted their careers to implementing them. But the Supreme Court has never suggested that an interest in accuracy creates a justiciable standard by which to overturn the decisions of the Census Bureau and the Secretary of Commerce. In *Wisconsin*, the Supreme Court overturned a lower court ruling rejecting the Secretary's decision not to use statistical adjustment, because

> As in *Montana*, where we could see no constitutional basis upon which to choose between absolute equality and relative equality, so here can we see no ground for preferring numerical accuracy to distributive accuracy, or for preferring gross accuracy to some particular measure of accuracy. The Constitution itself provides no real instruction on this point, and extrapolation from our intrastate districting cases is equally unhelpful. Quite simply, "[t]he polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course."

517 U.S. at 18 (alteration in *Wisconsin*) (quoting *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 463 (1992)). The *Wisconsin* Court went on to articulate the "reasonable relationship" standard, under which it deferred to the Secretary of Commerce's decision to rely on distributive accuracy over numerical accuracy and to determine that not statistically adjusting the enumeration

was the best way to achieve such distributive accuracy. It strains credulity to suggest, as Plaintiffs do, that the *Wisconsin* Court imposed a constitutional standard of distributive accuracy by which it then measured the conduct of the Census.

Similarly, while the *Utah* Court noted that the constitutional design suggested a "strong constitutional interest in accuracy," it did so in the context of *rejecting* the argument that this constitutional interest mandated a specific framework by which to evaluate the choice to use "hot deck" imputation. Of great relevance here, the Court noted the necessity of leaving room for technological innovation, and the correspondingly broad discretion that the Constitution afforded:

> Of course, the Framers did not consider the imputation process. At the time they wrote the Constitution "statisticks" referred to "'a statement or view of the civil condition of a people,'" not the complex mathematical discipline it has become. Yet, however unaware the Framers might have been of specific future census needs, say, of automobiles for transport or of computers for calculation, they fully understood that those future needs might differ dramatically from those of their own times. And they were optimists who might not have been surprised to learn that a year 2000 census of the Nation that they founded required "processed data for over 120 million households, including over 147 million paper questionnaires and 1.5 billion pages of printed material." *Consequently, they did not write detailed census methodology into the Constitution. As we have said, we need not decide here the precise methodological limits foreseen by the Census Clause.* We need say only that in this instance, where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the population, and where consequently manipulation of the method is highly unlikely, those limits are not exceeded.

536 U.S. at 479 (emphasis added) (citations omitted).[9]

[9] Plaintiffs also suggest that this dicta means that provisions for the Census suffice only when "all efforts have been made to reach every household." MTD Opp. at 19 (quoting *Utah*, 536 U.S. at 479). That is clearly not what *Utah v. Evans* provides; rather, the Court was stating that it deferred to a methodological decision that was made *in the context* of a Census Bureau already making all reasonable efforts to reach every household, as the Bureau did in conducting the 2000 Census and continues to do today. If Plaintiffs' argument were taken literally, no Census could withstand constitutional scrutiny until the entire federal budget had been expended on enumeration—and even that might not suffice.

Thus, contrary to Plaintiffs' suggestion, the Court has never suggested that any specific method of conducting an actual enumeration—or resulting standard of accuracy—is embedded in the Constitution.

B. Defendants Have Not Exceeded the Discretion Afforded by the Enumeration Clause

Despite having asked for nearly $800 million of additional spending in specific categories, Plaintiffs hastily disclaim any suggestion that they are using the Enumeration Clause to impose specific standards upon the Census. *See* MTD Opp. at 20. But that is precisely what they would have the Court do. As detailed extensively in prior briefing, *see* MTD Br. at 3-6; P.I. Opp. at 4-13 & Declarations, the Census Bureau has spent nearly a decade carefully developing, testing, and implementing design changes intended to reflect improving technology, increased automation, and a 2020 Census whose needs differ dramatically from past censuses. *Cf. Utah*, 536 U.S. at 479. Plaintiffs suggestion that the Bureau's decision to implement these improvements is "without evidence" can hardly be credited given the thousands of pages of public and non-public memoranda, studies, reports, and deliberations that have been produced here (and extensively cited by Plaintiffs themselves in support of their claims).

At bottom, the fact that a prior census entailed spending a certain amount of money does not mean that the Constitution obligates the Bureau to replicate prior programs or expenditures for all future censuses: the Enumeration Clause no more requires continued expenditure on partnership assistants than it required that continued spending on horses and buggies notwithstanding the arrival of the automobile. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 364 (1999) (Stevens, J., dissenting) ("Methodological improvements have been employed to ease the administrative burden of the census and increase the accuracy of the data collected. The 'mailout-mailback' procedure now considered a traditional method of enumeration was itself an innovation of the 1970 census."). Defendants' decisions to modernize NRFU operations (resulting

in projections that fewer enumerators will probably be required), reallocate partnership spending to partnership specialists while realizing certain efficiencies, and eliminate the unproductive brick-and-mortar Questionnaire Assistance Centers while spending far more on mobile questionnaire assistance, all bear a reasonable relationship to the conduct of an actual enumeration in today's society. Neither the Constitution nor the Supreme Court's precedents can be read to require more.

CONCLUSION

For the reasons stated herein, in the prior memorandum of law in support of its motion to dismiss, and in its partial motion to dismiss for mootness, Plaintiffs' complaint should be dismissed in its entirety.

Dated: March 4, 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 March 4, 2020, I caused a copy of the foregoing Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss the Complaint to be served by ECF upon all counsel of record.

Dated: March 4, 2020
New York, New York

By: ___/s/ Lucas Issacharoff_____

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