IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CENTER FOR POPULAR DEMOCRACY ACTION, *et al.*,

Plaintiffs,

v.

BUREAU OF THE CENSUS, *et al.*,

Defendants.

No. 19-cv-10917-AKH

SUR-REPLY IN FURTHER OPPOSITION TO PLAINTIFFS' PRELIMINARY INJUNCTION MOTION AND IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

In their reply in support of their motion for a preliminary injunction, Dkt. No. 55 ("P.I. Reply"), Plaintiffs raise a host of new arguments, based upon new allegations, that they claim support entirely new relief. These late contentions and requests should not be entertained. *See, e.g.*, *Sussman v. NYP Holdings, Inc.*, No. 16-CV-7659 (PKC), 2018 WL 2357256, at *8 (S.D.N.Y. Feb. 22, 2018) (denying request for stay "first raised in a reply brief"); *Levy ex rel. Levy v. Hustedt Chevrolet*, No. CIVA054832DRHMLO, 2008 WL 5273927, at *9 (E.D.N.Y. Dec. 17, 2008) (denying request for sanctions because "[i]t is inappropriate to raise new arguments and/or ask for new forms of relief in a reply memorandum where the opposing party will not have an opportunity to respond"). Because Plaintiffs' new arguments and claims for relief are improper, and because Plaintiffs' new allegations supporting those arguments and claims are unsupported by evidence and incorrect, the Court should deny Plaintiffs' motion for a preliminary injunction, with respect to both the relief originally requested and that requested for the first time in their reply brief.

ARGUMENT

I. PLAINTIFFS' NEW REQUEST TO MONITOR ENUMERATOR HIRING AND DEPLOYMENT SHOULD BE DENIED

In their reply in support of their motion for a preliminary injunction, Plaintiffs ask the Court to impose brand-new relief: weekly monitoring regarding "the number of enumerators hired to date and the number and location of enumerator-hours deployed in the preceding week." P.I. Reply at 3. They also ask for identification of "the criteria or threshold circumstances that will trigger the deployment of additional enumerators." *Id.* As a basis for these burdensome requests, they rely for the first time on concerns raised in a GAO report issued on February 10, 2020. Specifically, Plaintiffs cite to the GAO report in support of three arguments as to why more enumerators are needed: (1) the self-response rate in tests carried out by the Census Bureau has

been lower than the response rate of the 2010 Census; (2) purported technological challenges will cause a lower response rate and decreased enumerator productivity; and (3) the Bureau has not hired enumerators in a timely fashion. P.I. Reply at 7-11. However, none of the concerns Plaintiffs raise is justified because the fears raised by the GAO report have not come to fruition and because Plaintiffs fundamentally misunderstand the deployment process.

First, while Plaintiffs claim that 2020 Census testing has produced lower self-response rates than the anticipated actual self-response rate, they fail entirely to address the Census Bureau's explanation that the response rates in testing are not predictive of actual census response rates; this is because testing response rates are consistently lower than actual census rates given that the tests do not occur in conjunction with a large-scale advertising and media campaign in the background boosting self-response. Declaration of Patrick J. Cantwell, Dkt. No. 46-3 ("Cantwell Decl.") ¶ 19. The self-response rate is almost always higher during the actual census because: (1) many responders are aware of the census and its importance, and give it more regard than they might other surveys; and (2) the census itself is accompanied by the integrated communications program, which is designed to increase awareness about the census and maximize self-response rates. Supplemental Declaration of Patrick J. Cantwell, Dkt. No. 60-2 ("Supp. Cantwell Decl.") ¶ 8.[1] In contrast, the mid-decade census tests that have been conducted since 2010 have not included any wide-scale advertising, partnership events and promotions, or other communications efforts that will be a central part of the 2020 Census. *Id.* Accordingly, the best predictor of self-response at the national level is the self-response rates in prior censuses, which have been relatively consistent since 1990. *Id.* ¶ 5. Here, a predicted self-response rate for the 2020 Census that is higher than

[1] As discussed below, *see infra* Part IV, Defendants have properly relied on declarations in opposing the relief sought by Plaintiffs.

the test rates is "consistent with . . . observations from past censuses." Cantwell Decl. ¶ 19; *see also* Supp. Cantwell Decl. ¶ 9 ("The self-response rate for San Joaquin County increased from 45.3% in the [2008] Dress Rehearsal to 66.5% in the 2010 Census. The rate in North Carolina, the other site, rose from 44.9% to 62.1%."). Thus, Plaintiffs' expressed concerns do not warrant requiring increased enumerator hiring.

Second, with respect to any supposed technological issues, contrary to Plaintiffs' assertion, the Census Bureau completed its testing milestones for the self-response system. Supplemental Declaration of Deborah Stempowski, Dkt. No. 60-1 ("Supp. Stempowski Decl.") ¶ 13 (discussing the development, testing, and deployment of the 52 IT systems to be used for the 2020 Census and noting that the operational delivery for self-response has been implemented).[2] The GAO Report cited by Plaintiffs reflected information "as of January 2020," and stated that five Operational Deliveries were "at risk" of not meeting planned milestones. P.I. Reply at 9. This is no longer the case: as of today's date, each of the five Operational Deliveries noted by the GAO as being "at risk" of meeting milestones is on track for completing testing and supporting operations on schedule. Supp. Stempowski Decl. ¶ 13. Further, Plaintiffs' contention that enumerator productivity might be affected by technological challenges is unsupported by the GAO report, which does not express any concern about enumerator productivity; nor do Plaintiffs provide any other evidence that the Census Bureau's anticipated range of enumerator productivity is incorrect (indeed, Plaintiffs do not present any study of, or evidence about, enumerator productivity whatsoever). *Cf.* Stempowski Decl. ¶ 51 (setting forth anticipated range of enumerator

[2] Over 90% of the planned systems have been implemented. The only five systems that have not been fully tested are not due to be deployed until later in the census cycle, and are not part of the operational delivery for self-response. Supp. Stempowski Decl. ¶ 13.

productivity). Indeed, in their Reply, Plaintiffs acknowledge that enumerator productivity has *increased* since 2010. P.I. Reply at 9 n.2.

Third, with respect to hiring, the Census Bureau has exceeded its goal of 2.66 million applicants and, as of March 11, 2020, has 2,718,198 applicants. Suppl. Stempowski Decl. ¶ 10; *cf. id*. ¶ 8. Indeed, for the Pawling, New York ACO, there have been approximately 4.5 applicants for each position, and for the four Brooklyn, New York ACOs, there are between 5.2 and 8.4 applicants for each position. *Id*. ¶ 11. There is therefore no basis to Plaintiffs' claim that the Bureau's plans are somehow deficient because it failed to meet hiring targets. P.I. Reply at 11.

Accordingly, none of the concerns raised by Plaintiffs justify their new requested relief regarding the hiring and monitoring of enumerators. As previously explained, the number of enumerators that will actually be needed—and where they will be needed—will not be known until into the self-response period. Stempowski Decl. ¶¶ 50-53. The Census Bureau's hiring plans are based on a range, with the exact number—and distribution—to be determined based on the ultimate need, up to 500,000, which is as yet unknown. *See id.* ¶ 53; Declaration of Benjamin Taylor, Dkt. No. 46-2 ("Taylor Decl.") ¶ 34. Whatever the ultimate workload turns out to be, the Census Bureau will hire and train more enumerators than that workload is expected to require to react flexibly to changing circumstances and worker attrition. *See* Stempowski Decl. ¶¶ 50-53, 59.

Plaintiffs also fail to contend with the critical point that, while Defendants will be able to afford an increased need for enumerators if the NRFU workload exceeds their estimated range, it would harm the Census to prematurely commit the funds to enumerator hiring when there is no evidence that this expenditure will be needed. Taylor Decl. ¶¶ 19-20, 34; Stempowski Decl. ¶¶ 50-53; *see also* Taylor Decl. ¶¶ 11-18; Stempowski Decl. ¶¶ 57-59. There are various possible

contingencies that the Census Bureau must be prepared to address, including the real concern of a nationwide pandemic. Ordering Plaintiffs' requested relief would reduce the likelihood of an accurate census in the event that a contingency requires spending on something other than enumerators to address. *See* Taylor Decl. ¶¶ 17-20.[3]

II. PLAINTIFFS' NEW REQUESTS REGARDING THE PARTNERSHIP PROGRAM SHOULD BE DENIED

Plaintiffs similarly rely on the GAO report to argue that the Census Bureau's partnership program "lags behind key targets" and "lacks sufficient resources." P.I. Reply at 11; *id*. at 13 (citing GAO report for proposition that Census Bureau had not met its goal to establish 250,000 community partnerships by February 1, 2020). To start, Plaintiffs fail to address Defendants' point that their initial requested relief is now moot. Plaintiffs initially asked to restore the Bureau's partnership and communications spending to 2010 levels. Compl. ¶ 197. But, as previously noted, the Census Bureau currently plans to spend $585 million on the advertising campaign, or $129 million more than the 2010 advertising campaign in constant dollars. Declaration of Burton Reist, Dkt. No. 46-5 ("Reist Decl.") ¶ 27.[4] And, the 2020 Census partnership program is also larger than the one employed for the 2010 Census; as of February 10, 2020, the Census Bureau had already secured 266,000 local partners—more than the 257,000 local partners secured in total by the end of the 2010 Census. Reist Decl. ¶ 20. As of the filing of this motion, the Census Bureau has

[3] Plaintiffs suggest that the Bureau has "announced plans to hire more people" only in response to Plaintiffs' litigation alleging reduced enumerator hiring. P.I. Reply Br. at 7. This suggestion is completely without merit and should be rejected. As the Bureau has stated from the outset, its projected number of enumerators to be hired and deployed is merely a range, which allows the Census Bureau to adjust its deployment of enumerators as necessary based on any number of contingencies. Stempowski Decl. ¶¶ 50-53. Thus, the Bureau's plans, which it has been preparing for ten years, have always included hiring more enumerators if and when the need arose.

[4] Plaintiffs admit that they no long rely on "the reduction in communications spending as evidence in support of their constitutional claim." Pl. Reply at 3 n.3.

already surpassed its 2020 Census goal of 300,000 partners, ahead of schedule, and the number is continuing to grow. Suppl. Stempowski Decl. ¶ 5; Reist Decl. ¶ 20. This is in part due to the Census Bureau's decision to nearly double the number of Partnership Specialists, the professional staff that carry out the core mission of the partnership program who have a multiplicative effect on the number of partnerships, relative to the 2010 Census, and in hiring Partnership Specialists earlier in the decade relative to the 2010 Census. Reist Decl. ¶ 20. [5] To date, 383,198 partnership commitments have been completed, another 88,306 are confirmed, and 76,290 are being planned for the weeks ahead. Suppl. Stempowski Decl. ¶ 7.

Given that their requested relief has already been granted, Plaintiffs instead focus on the elimination of the Partnership Assistant position, arguing that the Census Bureau has downplayed the impact of the position on community awareness. But the Census Bureau has never claimed that Partnership Assistants had no use, only that, given changes in the way the 2020 Census will be conducted, the resources that otherwise would have been directed to them could be more productively spent. Reist Decl. ¶ 23. Indeed, while Partnership Assistants may have had some non-clerical duties, they "typically did not interact directly with partners" and thus had "little or no direct impact on the number of partnerships secured" and "only a limited impact on increasing participation in the census." *Id*. Accordingly, the Census Bureau made a strategic decision to increase hiring of Partnership Specialists, based on decades of experience showing that they would increase partnerships and community awareness. *Id*. ¶ 20. Conversely, Plaintiffs identify no basis, besides their own unsupported speculation, to conclude that restoration of the Partnership Assistant

[5] The fact that Census is continuously adjusting its plans only underscores the fact that there is no "final agency decision" regarding the 2020 Census, and further shows that the Census is being proactive and responsive to any changing needs in order to produce the most accurate and complete census possible.

position would "meaningfully support partner organizations." P.I. Reply at 12. This is insufficient to warrant granting injunctive relief especially given that the Census Bureau has exceeded 2010 spending levels regarding partnership and communications programs. There is no basis to require the Census Bureau to recreate a position that it has deemed unnecessary simply because Plaintiffs believe that position would somehow remedy any hypothetical undercount.

Moreover, Plaintiffs also offer no authority for the proposition that the APA or the Enumeration Clause require the Bureau to hire Partnership Assistants instead of a certain number of Partnership Specialists, or that it is appropriate for the Judiciary to decide whether to make that tradeoff. *See Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996); *Nat'l Ass'n for the Advancement of Colored People v. Bureau of the Census*, 399 F. Supp. 3d 406, 416 (D. Md. 2019) ("*NAACP II*) ("Plaintiffs want the Court to tell the Bureau when and how to spend the funds and, in effect, take supervisory control over the execution of the 2020 Census. That is not a remedy that a court has the authority, expertise, or time to provide. Rather, Congress determined that it was the Bureau that was best equipped to complete this task.").

There is also no basis for the Court to require the Bureau to provide "evidence of the qualifications and standards used to designate a participating entity as an official partnership organization, including whether such organizations have made outreach commitments to which the Bureau can hold them accountable." P.I. Reply at 13. Such micro-managing is not justified under the APA or the Enumeration Clause. Indeed, the Census Bureau manages its 2020 partnership operation through the Customer Relationship Management ("CRM") system, a far more robust database and tracking system than was in place in 2010. Supp. Stempowski Decl. ¶ 6. All commitments and events being undertaken by 2020 Census partners are logged in the CRM, and Partnership Specialists use this tool to ensure that they are aware of partner activities,

communicating with them as appropriate. *Id.* The CRM has been deployed as mobile application so that Partnership Specialists can enter and review information on the go, increasing efficiency in maintaining these vital records. *Id.* ¶ 7. Furthermore, the management capabilities of the CRM ensure that the over 300,000 partners who have signed on to support the 2020 Census are following through on their pledges to help conduct a complete and accurate count of the population. *Id.*[6]

III. PLAINTIFFS' CLAIM REGARDING QUESTIONNAIRE ASSISTANCE SHOULD BE DENIED AND DISMISSED AS MOOT

In an attempt to avoid the indisputable conclusion that their claim regarding questionnaire assistance is moot, Plaintiffs also seek entirely new relief on that ground. Plaintiffs made clear in their initial motion and supporting brief that the expenditure of $45.6 million on brick-and-mortar questionnaire assistance centers ("QACs") *or* mobile questionnaire assistance would satisfy their third claim for relief. *See* Dkt. No. 47 (seeking injunction to "(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" (emphasis added), *and* Dkt. No. 48 at 33 (seeking injunction to "(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)" (emphasis added)). In opposition, Defendants established that they will spend more than

[6] Notably, Plaintiffs provide absolutely no support for their hypothesis that there would be "insufficient staff resources to meaningfully support partner organizations" because every partnership staff member would manage the relationships for 200 organizations each. P.I. Reply at 12-13. Indeed, their own complaint suggests otherwise—in the 2010 Census, which Plaintiffs seek to replicate, there were 849 Partnership Specialists as compared to 1501 for 2020 (Compl. ¶ 104), and it is Partnership Specialists, not Assistants, who interact with partners.

$100 million on mobile questionnaire assistance. Stempowski Decl. ¶ 41; Taylor Decl. ¶¶ 26, 33. Plaintiffs do not dispute this. Their claim regarding questionnaire assistance is now moot.

For the first time on reply, however, Plaintiffs demand that Defendants establish fixed questionnaire assistance centers regardless of any amount of expenditure on mobile questionnaire assistance. *See* P.I. Reply at 28 ("That Plaintiffs are also in favor of additional mobile QACs *on top of physical locations* does nothing to change Plaintiffs' ongoing interest in ensuring the Bureau establishes physical QACs." (emphasis in original)); *id.* at 35 (seeking injunction to "(3) increase the Bureau's presence within Hard-to-Count communities by increasing the number of fixed Questionnaire Assistance Centers, *as a complement to the Bureau's planned mobile assistance program* within those communities, at levels commensurate to 2010" (emphasis added)).[7] This belated request is procedurally improper and should be disregarded. Moreover, granting it would be another form of improper judicial micro-management of the Census. *See supra* at 7.

Plaintiffs' belated request for physical QACs is also moot. As Defendants established in their previously filed declarations filed in support of their opposition, "we are long past the time when the Census Bureau could open physical QACs, even if we believed this was a good idea, which we do not. Field enumeration has begun and self-response will begin in less than a month. There is not time to identify and lease locations, a process that requires years rather than months or weeks." Stempowski Decl. ¶ 40. Plaintiffs do not even attempt to contest this point or offer

[7] Plaintiffs claim that "the City of Newburgh specifically requested a fixed QAC leading up to the 2020 Census and has maintained this request as part of its requested relief since the initiation of this lawsuit." P.I. Reply at 14-15 (citing Dkt. No. 48 at 23-24). This is false. Plaintiffs noted in their opening brief in support of their motion for a preliminary injunction that the City of Newburgh had requested a physical QAC outside of this litigation, see ECF No. 48 at 23-24, but at no point in their Complaint, motion for a preliminary injunction, or opening brief in support of a preliminary injunction suggested that a physical QAC within Newburgh, or anywhere else, was a necessary component of the relief sought.

any facts to rebut it. *See, e.g.*, *County of Suffolk v. Sebelius*, 605 F.3d 135, 140 (2d Cir. 2010) ("[C]ourts' subject matter jurisdiction ceases when an event occurs during the course of the proceedings or on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party." (internal quotation marks omitted)).

Finally, Plaintiffs have no likelihood of succeeding on the merits in demonstrating that Defendants' retirement of fixed QACs and introduction of the mobile questionnaire assistance program is arbitrary and capricious or not reasonably related to an actual enumeration of the population. In arguing otherwise, Plaintiffs rely on mischaracterizations of Defendants' position, arguing that "Defendants portray their M-QAC program as a considered approach to replace the fixed QAC program" used in 2010, when "in reality, Defendants had no plan to replace the physical QAC program" and did not propose the program before December 2019's appropriations act. P.I. Reply at 15. This garbles the story. As the Stempowski Declaration makes clear, the Census Bureau affirmatively chose not to repeat fixed QACs: (1) because their specific function—to distribute paper "Be Counted" forms that could be submitted without a Census ID—was made obsolete by the elimination of "Be Counted" forms and the Census Bureau's ability to accept responses by internet without a Census ID, and (2) because the fixed QACs had limited value, returning on average just 20 forms per QAC. Stempowski Decl. ¶¶ 35-37.

The mobile QAC program was born in April 2019 after Congress requested proposals for alternatives to QACs. *Id.* ¶ 38. In response to the Census Bureau's proposal, Congress expressed the desire for the Census Bureau to pursue this program by allocating additional funding to this project—not to fixed QACs. *See id.*; Taylor Decl. ¶ 15. In other words, the mobile QAC program is not viewed as necessary for an accurate enumeration, but the Bureau developed it at Congress's request to be as effective as possible, and the program has Congressional support. Stempowski

Decl. ¶¶ 35-38. In response, Plaintiffs provide no evidence of any kind that the mobile QAC program will be ineffective at all, only speculation that, because it differs from what was done in the 2010 Census, it must be inadequate. This is plainly insufficient.

Ultimately, Plaintiffs' claims regarding QACs should be dismissed as moot and their attempted re-characterization on reply rejected as improper. Even on the merits, Plaintiffs' claims fail because neither the Constitution nor the APA requires fixed QACs, or any QACs at all. Plaintiffs cite no law to the contrary, and they cannot. Nor does the APA or the Constitution require that the mobile QAC program—if the Census Bureau choses to implement one—be any particular size or be tested in any particular manner or degree. Indeed, Plaintiffs neither identify any law nor articulate any standard of what would constitute appropriate testing of a census program.

IV. THE COURT MAY CONSIDER DEFENDANTS' DECLARATIONS SUBMITTED IN OPPOSITION TO PLAINTIFFS' DECLARATIONS

Despite having submitted multiple briefs and declarations in support of their motion for a preliminary injunction, Plaintiffs now argue in reply that judicial review of an agency decision should be based only upon the administrative record. P.I. Reply at 5-7. Plaintiffs cannot have their cake and eat it too. While summary judgment on a final agency action should be based exclusively upon the administrative record (except for limited circumstances that Plaintiffs do not claim apply here), *see, e.g.*, *Kappos v. Hyatt*, 566 U.S. 431, 438 (2012) ("Under the APA, judicial review of an agency decision is typically limited to the administrative record."), that principle is inapplicable here.

As Defendants have consistently maintained (and as the District of Maryland and the Fourth Circuit concluded), there is no final agency action here for which an administrative record can properly be generated or relied upon. *See* Dkt. No. 27 (opposition to motion to expedite the

administrative record);[8] *NAACP II*, 399 F. Supp. 3d at 425 ("In sum, because the challenged acts are not discrete in character when considered in the context of the challenges Plaintiffs raise, are not required by law, and do not determine Plaintiffs' rights and obligations, judicial review is not available." (internal quotation marks omitted)); *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*") ("For these reasons, we hold that the plaintiffs have failed to identify any 'final agency action' subject to judicial review under the APA.").

Second, if this were to be considered an APA challenge, the principle of limiting the parties to the record would equally apply to bar Plaintiffs' extra-record evidence, in particular the Doms Declaration, and certainly would not provide any support for Plaintiffs' new request for discovery.

[8] Notably, when the Census Bureau produced records in response to the Court's order to do so, it specifically noted that it reserved all rights to argue that Plaintiffs had not challenged any "final agency action" under the APA and thus there was no administrative record. *See* Stempowski Certification to January 24, 2020 Production.

CONCLUSION

For the reasons set forth above and in Defendants' prior briefing, Plaintiffs' preliminary injunction motion should be denied, Defendants' prior motion to dismiss should be granted, and Plaintiffs' questionnaire assistance claims should be additionally dismissed as moot.

Dated: March 12, 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 12, 2020, I caused a copy of the foregoing Sur-Reply in Further Opposition to Plaintiffs' Preliminary Injunction Motion and In Support of Defendants' Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction to be served by ECF upon all counsel of record.

Dated: March 12, 2020
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