

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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3 CENTER FOR POPULAR DEMOCRACY
ACTION, et al ,

4 Plaintiffs,

5 v. 19 CV 10917 (AKH)

6 BUREAU OF THE CENSUS, et al,

7 Defendants.
8 -----x

9 New York, N.Y.
10 March 18, 2020
2:40 p.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN,
13 District Judge

14 APPEARANCES

15 YALE LAW SCHOOL
Attorneys for Plaintiffs
16 BY: MICHAEL JOEL WISHNIE
LISA CHEN
17 NIKITA LALWANI

18 UNITED STATES ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF NEW YORK
19 Attorneys for Defendants
BY: BY: LUCAS ESTLUND ISSACHAROFF

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1 (In chambers; via telephone)

2 THE COURT: All right. We're ready to begin. This is
3 judge Alvin Hellerstein. The case is Center for Popular
4 Democracy Action v. Bureau of the census, 19 CV 10917.

5 Because of the national emergency, we are doing this
6 remotely. Counsel for the plaintiff and for the defendant are
7 in their respective locations, each connected to the Court by
8 telephone. I'm in chambers. We have a court reporter of our
9 staff taking this down.

10 And now would you please identify yourselves. First
11 for the plaintiff. Mr. Wishnie.

12 MR. WISHNIE: Good afternoon, your Honor. Michael
13 wish for plaintiff. There are a number of students and
14 attorneys on the line that I will not take the time to
15 identify, but with me are two law students prepared to address
16 the two motions, Lisa Chen on the motion to dismiss and Nikita
17 Lalwani on the motion for preliminary injunction.

18 THE COURT: Very well. We have to be disciplined in
19 this way. Since I'm on speaker phone here and since you
20 probably are on speaker phones in your respective locations,
21 one person can't speak over another. So whoever is speaking
22 needs to have strategic stops along the way to permit me to ask
23 a question, if I have one.

24 We'll start first with the motion to dismiss, and when
25 that's concluded, we'll argue the motion for preliminary

1 injunction.

2 On the motion to dismiss, it's the government's
3 motion. Mr. Issacharoff, would you please begin.

4 MR. ISSACHAROFF: Thank you, your Honor. May it
5 please the Court.

6 The Constitution confers, in the words of the
7 Supreme Court in *Wisconsin v. City of New York* virtually
8 unlimited discretion on Congress in carrying out the 2020
9 census, and Congress has delegated that authority to the
10 Secretary of Congress and the Census Bureau.

11 The Census Bureau has that taken that authority and
12 responsibility with the utmost seriousness and has spent nearly
13 a decade planning the 2020 census with the goal of increasing
14 the accuracy of the count by focusing efforts on the
15 hardest-to-count populations.

16 Version 1.0 of the operational plan that plaintiffs
17 now challenge was set out in 2016 after a four-year process and
18 has been refined over the subsequent years through a process of
19 testing and consultation with Congress, experts, and interested
20 parties.

21 This is precisely the process contemplated by Congress
22 and the Constitution, dedicated experts consulting with
23 affected parties to carefully design an integrated program to
24 carry out the enormous logistical challenge of the census in a
25 country of 300 million people.

1 Plaintiffs are now attempting an end-run around that
2 process. Exactly two weeks before census day and well into
3 critical census operations, plaintiffs seek to mandate how the
4 Census Bureau spends its reserve contingency funds and to
5 appoint themselves to monitor over ongoing census operations.

6 This request, which at no time would find support in
7 either the Administrative Procedure Act or the enumeration
8 clause, is particularly gnawing under the current
9 circumstances.

10 I'd like to focus on the three separate and
11 independently sufficient reasons why plaintiffs fail to state a
12 claim under the Administrative Procedure Act.

13 THE COURT: Before you do that, Mr. Issacharoff, could
14 you please establish the chronology. You mentioned that we
15 have census day in two weeks. Develop the chronology from
16 that.

17 MR. ISSACHAROFF: Yes, your Honor, as laid out in more
18 detail in the Stempowski declaration in opposition to the
19 preliminary injunction motion, the first access phase of the
20 2020 census was the address-canvassing phase which has since
21 then completed, as plaintiffs recognize and have now dropped
22 that portion of their claim.

23 As you have likely hopefully already received in the
24 mail, the census has already begun the process of sending out
25 mailings to encourage self-response during the self-response

1 phase.

2 THE COURT: I have not received one yet.

3 MR. ISSACHAROFF: Most households -- personally, I
4 know that I have received multiple mailings, but I believe
5 those mailings are in process and will continue up to and
6 through census day.

7 I believe the latest numbers is the Bureau has already
8 received over 11 million online self-responses as part of this
9 process and will continue to receive and to emphasize the
10 importance of online or telephonic self-response.

11 As of at least two weeks ago, and obviously plans are
12 changing very rapidly. The schedule was intended to later this
13 spring and summer would begin the nonresponse follow-up
14 operations.

15 That would involve sending enumerators door to door to
16 review households that had not self-responded to determine
17 whether those households were vacant or unoccupied or whether
18 they were occupied and failed to self-respond.

19 That process was planned to involve a number of
20 follow-up visits, unless the initial visits, along with
21 multiple corroborated administrative records, demonstrated that
22 the household was in fact vacant or unoccupied.

23 If the households were occupied and the multiple
24 follow-up visits failed to obtain a response, then the next
25 step would be to seek out a proxy, such as a landlord or a

1 neighbor, who might be able to answer relevant information,
2 most critically the number of occupants of the housing unit.

3 If a proxy were not able to be obtained, the final
4 step would be what is called imputation or hot deck imputation
5 which would be to extrapolate from neighboring units, similar
6 units, the likely statistical profile of that household, most
7 particularly the number of occupants. That process was set to
8 take place over the summer and into the fall.

9 And through that point, the Census Bureau would be
10 compiling information in order to present this to the executive
11 towards the end of 2020 as required under statute.

12 THE COURT: What's the statute date?

13 MR. ISSACHAROFF: I don't have offhand the precise
14 date, your Honor. But I believe -- I'm sorry. I believe it's
15 within nine months of the census date of April 1. So that
16 would be January 1 of 2021.

17 THE COURT: Thank you. Please proceed.

18 MR. ISSACHAROFF: I'm sorry, your Honor. I didn't
19 hear that.

20 THE COURT: I said, thank you. Please proceed.

21 MR. ISSACHAROFF: Thank you, your Honor.

22 So the challenge under the Administrative Procedure
23 Act fails to state a claim for three independently sufficient
24 reasons: First, as both the District of Maryland and the
25 Fourth Circuit unanimously concluded, you cannot disentangle.

1 Plaintiffs' challenge is not to a discrete decision or
2 three discrete decisions of the Census Bureau. It is a
3 systemic challenge to an integrated census operation that can
4 only -- each part of which can only be considered in relation
5 to the whole.

6 I'd offer a few examples of this entanglement.
7 For example, plaintiffs challenge the sufficiency of the number
8 of enumerators. Now, the number of enumerators that will
9 ultimately be required is a function of several factors.

10 THE COURT: May I stop you for a moment.

11 On a motion to dismiss, I'm looking at the complaint
12 and evaluating if there are plausible allegations stating a
13 claim for relief. However, the complaint incorporates, I
14 believe, the Final Operations Report which makes that part of
15 the pleading.

16 You're arguing now not so much on the basis of the
17 allegations but with respect to allegations infused by all the
18 aspects of the operational plan.

19 Am I correct?

20 MR. ISSACHAROFF: In part, your Honor, I would agree
21 with that. I think that one can divine even from the complaint
22 itself the necessary entanglement of plaintiffs' allegations.

23 So that, for example, in the portion of the complaint
24 in which plaintiffs allege that there's an insufficient number
25 of area census offices, they allege that, in part, because they

1 state that the number of area census offices is inadequate to
2 support the address-canvassing program.

3 Where plaintiffs challenge the sufficiency of the
4 Partnership Program, they believe that the Partnership Program
5 is insufficient, in part, because they had originally alleged
6 that the Census Bureau was not spending sufficiently on the
7 communications program.

8 They allege that the number of enumerators are
9 insufficient. They allege that in part, because they believe
10 that the Census Bureau is over-relying on technology and has
11 overly optimistic projections of self-response rates.

12 THE COURT: If you look at paragraph 36 of the
13 complaint, which is paragraph that purport to state five
14 discreet acts which allegedly are arbitritiously and
15 capriciously found, don't you have a sufficient claim with
16 relation to the problem of discreet or systemic?

17 MR. ISSACHAROFF: No, your Honor. I don't believe
18 that you do. I believe that you are required to accept
19 plausibly pleaded factual claims such as that the Bureau is
20 reducing its field offices. But your Honor is not required to
21 accept the legal characterization of those challenges as
22 discrete.

23 The District of Maryland did not do so. The Fourth
24 Circuit did not do so. They looked at the complaint as a whole
25 and stated that the complaint made obvious that looking at the

1 allegations related to each other and looking at the "design
2 choices" as they were elaborated throughout the complaint, it
3 was obvious that there were not in fact five discrete
4 challenges or six discrete challenges but an overall challenge
5 as to how the Bureau has determined to carry out the 2020
6 census.

7 THE COURT: That is supported by the operational plan
8 which speaks about holding in reserve the question of how many
9 enumerators there shall be hired and when and how they shall be
10 deployed, which have a systemic aspect to it.

11 Similarly with the field offices, whether they should
12 be fixed or mobile and where they should be deployed. That's
13 true I think with each one of these things.

14 The point I'm making is if I'm judging this complaint
15 devoid of the operational plan, there is a greater aspect of
16 discreteness to it. But if I take it in conjunction with the
17 entire plan as a whole, what you say is much more strongly
18 supported.

19 Would you agree?

20 MR. ISSACHAROFF: I would agree with that
21 characterization, your Honor. And I think the Court should
22 certainly take the operational plan as incorporated by
23 reference.

24 THE COURT: That was what I was leading up to. I'm
25 sorry to interrupt, but that's what I was leading up to.

1 MR. ISSACHAROFF: Thank you, your Honor.

2 THE COURT: There's always a preliminary question,
3 what is the complaint. What is it that I'm to judge. This is
4 a motion under 12(b)(1) which is jurisdictional and which
5 allows me to go outside the complaint. And there's a motion
6 under 12(b)(6) which purports to have me focused on the
7 complaint itself.

8 Here, I believe -- and I'm going to ask Mr. Wishnie or
9 one of his students -- I guess it would be Ms. Chen -- to
10 comment on this.

11 Where the complaint is so obviously incorporating the
12 operational plan, doesn't the entire operational plan become
13 part of the complaint for evaluating if a 12(b)(6) claim is
14 viable? If a complaint is viable, notwithstanding the
15 challenge under 12(b)(6).

16 Ms. Chen?

17 MS. CHEN: Your Honor, plaintiffs believe that for a
18 12(b)(6) motion, the focus of the Court should be on the
19 complaint. However, if your Honor were to incorporate the
20 operational plan as well, plaintiffs would like to point out
21 that when it comes to discreteness of the actions here, both
22 Judge Furman and the Supreme Court recently affirmed in
23 *Department of Commerce v. New York* --

24 THE COURT: It's not time for your argument yet.

25 MS. CHEN: Okay.

1 THE COURT: Shall I incorporate the Census Operational
2 Plan version 4.0 as part of the complaint for purposes of the
3 12(b)(6) motion?

4 MS. CHEN: No, your Honor. Plaintiffs do not
5 challenge the entire operational plan here, only the discrete
6 actions set forth in paragraph 36. So not in its entirety, no.

7 THE COURT: I find that there is a sufficient
8 incorporation of the operational plan in the complaint to
9 require me to look at the operational plan in relationship to
10 the allegations made in the complaint to evaluate their
11 plausibility.

12 Mr. Issacharoff, please proceed.

13 MR. ISSACHAROFF: Thank you, your Honor. I do believe
14 that is the correct determination. I also believe that
15 your Honor could, in the alternative, find that the allegations
16 in the complaint in relationship to each other also
17 sufficiently establish the lack of discreteness as the Fourth
18 Circuit suggested.

19 THE COURT: I'm aware of the Fourth Circuit holding,
20 but I think it will be a much more difficult chore to rule
21 against discreteness if I were to look at the complaint itself.

22 MR. ISSACHAROFF: Thank you, your Honor. Understood.

23 THE COURT: If you were to look at paragraph 36, it
24 purports to state five discrete elements that are being
25 attacked. It's the plan itself that creates a context for each

1 of those points and which I believe supports your argument.

2 Please proceed.

3 MR. ISSACHAROFF: Thank you. I understand the Court's
4 position, your Honor.

5 I also think that turning beyond discreteness, there
6 are additional independent reasons why the APA claim fails.
7 First, this is not properly a challenge to set aside agency
8 action as plaintiffs contest.

9 Plaintiffs attempt to characterize their complaint as
10 one arising under Section 706(2) of the APA. It is quite
11 clear, when you look at both the relief they seek in the
12 complaint and the relief that they have elaborated and modified
13 in the motion for a preliminary injunction, that they are
14 seeking to mandate agency action rather than set it aside.

15 Such a complaint agency action to mandate agency
16 action is properly under Section 706(1). Section 706.1
17 requires an additional higher threshold for the Court to order
18 the agency to take action sought by the plaintiff.

19 In order to succeed under that section, plaintiffs
20 must identify an action "unlawfully withheld or unreasonably
21 delayed," and that action must be legally mandated (706.1).

22 Plaintiffs are not able to identify that legal
23 mandate. What they point the Court to is the explanatory
24 statements of an appropriations act. The language of the
25 Appropriations Act itself clearly states that the Bureau may

1 spend additional funds on partnership and communications
2 activity, but it is given a lump-sum appropriation to spend as
3 discretionary.

4 The Supreme Court has said in *Lincoln v. Vigil* and
5 elsewhere that where a lump-sum appropriation is given, there
6 is no authority for the courts to order it to be directed in
7 particular way.

8 And the courts have further stated that where there is
9 an apparent conflict between a lump-sum appropriation and an
10 explanatory statement that suggests that the funds could or
11 should be used in a certain way, it is the language of the
12 Appropriations Act that controls.

13 Now, plaintiffs cite a *Stanford Law Review* article for
14 the proposition that the explanatory statement effectively is
15 the language of the Appropriations Act or can provide the legal
16 mandate.

17 That is a severe mischaracterization of that article,
18 as well as the governing law. As we point out footnote 7 of
19 our reply brief. What the article is actually saying, if you
20 read the full sentence, is that 44 respondents to a survey
21 believe that the purpose of the committee report was
22 essentially to legislate.

23 That minority survey belief is what plaintiffs are
24 reporting as established law. The law review article goes on
25 to say that the Supreme Court has held precisely the opposite

1 and has specifically rejected the position that plaintiffs take
2 here.

3 What the article says is: "With respect to
4 appropriations legislative history, the court appears to apply
5 precisely the opposite presumption as do congressional insiders
6 and agents. The court gives particularly little credence to
7 it."

8 Indeed, in one of the most famous statutory
9 interpretation cases involving an appropriation statute,
10 *Tennessee Valley Authority v. Hill*, the court expressly relied
11 on the fact that the relative explanatory information was in
12 the legislative history rather than in the text of the bill
13 itself and had reason to disregard that information.

14 THE COURT: This is a statement of Chairperson Lowey.
15 Is that right?

16 MR. ISSACHAROFF: Your Honor, I didn't quite hear that
17 question.

18 THE COURT: What I have in the Congressional Record is
19 the house report.

20 MR. ISSACHAROFF: Yes, your Honor. You have the
21 ranking committee members report, but you also have the
22 relevant language of the Appropriations Act itself that makes
23 texturally clear that it is a lump-sum appropriation.

24 THE COURT: So the House report states: "The
25 agreement also supports no less than the level of effort for

1 outreach and communications that was utilized in preparation
2 for the 2010 decennial census adjusted for inflation."

3 Does that have the aspect of law to it or legislative
4 history?

5 MR. ISSACHAROFF: Your Honor, that's legislative
6 history, and it's precisely the type of legislative history
7 that the Supreme Court has instructed courts to disregard when
8 determining the effect of an Appropriations Act.

9 THE COURT: The act itself has to be approved by the
10 Senate and then approved by the president or not vetoed by the
11 president.

12 Is that correct?

13 MR. ISSACHAROFF: Yes, your Honor.

14 THE COURT: Not the explanation of the House report.
15 The bill originates with the House. The House added the
16 explanation. And the Appropriations Bill by itself -- that
17 became Public Law 116-69 of the 116th Congress provides in
18 Division A, Section 101(2): "Notwithstanding Sections 101 and
19 104, amounts are provided for Department of Commerce, Bureau of
20 the Census, periodic census and programs at a rate for
21 operations of \$7,000,284,319,000, of which not less than \$90
22 million is for the delivery of mobile questionnaire assisted
23 centers." That's the law.

24 MR. ISSACHAROFF: Yes, your Honor.

25 THE COURT: What is the argument under that? Are you

1 spending at least \$90 million for the delivery of mobile
2 questionnaire assistance centers?

3 MR. ISSACHAROFF: Yes, your Honor. As set forth in
4 the Stempowski declaration, as well as I believe the Wright
5 declaration -- I'm sorry. Maybe the Taylor declaration -- the
6 Bureau is currently planning to spend between \$100 billion and
7 \$120 billion on the mobile questionnaire assistance program.

8 As I will note when we turn to the preliminary
9 injunction motion, that is more than double the amount that
10 plaintiffs originally requested be spent on questionnaire
11 assistance, including potentially mobile questionnaire
12 assistance.

13 THE COURT: And the language at a rate for operations
14 of seven billion, 200 some odd million, focusing on the phrase
15 "at a rate," suggests that this is being disbursed or
16 appropriated for disbursement along a period of time and not
17 all at once. It's the rate for operations, not the full amount
18 necessarily all at one time.

19 MR. ISSACHAROFF: Your Honor, that would appear to be
20 what the language in quotes suggest, although I am not entirely
21 sure of the mechanics of disbursements via the Appropriations
22 Act.

23 THE COURT: You point out in your papers that a
24 decision of the Census Bureau to hold some money back as a
25 reserve to amplify its ability to react to circumstances and

1 put more money in where it's needed to prevent an undercount is
2 an important aspect of the overall plan. And I'm pointing out
3 that the language of the Appropriations Bill supports that.

4 MR. ISSACHAROFF: Yes, your Honor. The language of
5 the Appropriations Bill does support a robust contingency fund,
6 and I believe that ongoing events support the wisdom of the
7 Census Bureau in maintaining a robust contingency fund, as well
8 as highlighting the inappropriateness of attempts to mandate
9 how that fund is spent based on the assumption that the 2020
10 census should be exactly the same as the 2010 census.

11 THE COURT: Now, we were looking at the declaration of
12 Deborah Stempowski, paragraph 41, concerning the amount of
13 planned expenditure on mobile response initiatives of \$110- to
14 \$120 million.

15 Isn't that outside the record?

16 MR. ISSACHAROFF: That is outside the record on the
17 motion to dismiss, but plaintiffs' motion to dismiss does not
18 itself challenge the mobile questionnaire. Yes, your Honor.

19 The allocation is outside the motion to dismiss, but
20 there is no allegation in the complaint itself that plaintiffs
21 are failing to fulfill a particular congressional mandate in
22 terms of public questionnaire assistance.

23 They're claiming that the overall partnership in
24 communications spending is inadequate to congressional
25 directives, is legally precluded by the Supreme Court's

1 explanation of the distinction between statutory text and
2 legislative history.

3 THE COURT: In response to your argument that there is
4 no legal obligation to support a court's command to the Census
5 Bureau, that is to say, there can't be a court remedy under
6 (1), there is discussion of the statute, and there's discussion
7 of allegations of paragraph 36 of the complaint.

8 I'm looking at paragraph 36 and not finding within it
9 any legal obligation which I could use to command the Census
10 Bureau in any respect. The complaint seeks a remedy by which I
11 force expenditures which looks like a (1) argument.

12 Where is my legal obligation which would support such
13 a command?

14 MR. ISSACHAROFF: I believe there is no such
15 obligation, but if that question is directed to plaintiffs,
16 I'll let them respond.

17 THE COURT: I'm just setting them up for what bothers
18 me. I'm using you as a foil, Mr. Issacharoff.

19 MR. ISSACHAROFF: Happy to oblige, your Honor.

20 THE COURT: Go ahead, please.

21 MR. ISSACHAROFF: So having covered the failure of the
22 plaintiffs to bring a discrete APA challenge and their failure
23 to identify an obligatory duty under Section 706(1), as
24 your Honor recognizes or suggests, their final failure of their
25 APA claim is that there is no final disposition of rights or

1 obligations, which is one of the requirements for a final
2 agency action.

3 Plaintiffs have identified a series of concerns that
4 they believe that in the aggregate and through a complicated
5 process of future action, may ultimately result in a
6 differential undercount which could affect their rights through
7 the operation of intrastate redistricting or federal spending.
8 However, there are a number of intervening steps between what
9 the actions that plaintiffs challenge and those claimed in each
10 of these.

11 Furthermore, there is nothing preventing plaintiffs
12 from -- if the injuries that plaintiffs allege actually do
13 arise, plaintiffs are entitled to bring a post-census challenge
14 seeking to have the census figures adjusted on the basis of an
15 actual differential undercount that arises.

16 In other words, there is nothing from the census
17 operations themselves that are challenged that gives a final
18 limitation on plaintiffs' ability to obtain what they believe
19 to be the appropriate intrastate redistricting or allocation of
20 federal funding.

21 All of that depends upon a complex series of
22 interactions that are speculatively alleged and that ultimately
23 lead to a highly uncertain outcome that can, in any case, be
24 addressed after the fact, should it actually materialize.

25 THE COURT: Does the availability of a remedy after

1 the fact impact a remedy before the fact? That is to say --

2 MR. ISSACHAROFF: It does quite directly in terms of
3 the availability of injunctive relief. In terms of the
4 availability of an APA claim, I'm not sure that there is a
5 formal preclusion of an APA claim based upon the fact that
6 relief might be obtained through a different avenue. So
7 your Honor is correct in that.

8 And the lack of a final effecting of rights and
9 obligations is to rest more upon the number of analytic gaps
10 between the processes of the Census Bureau and any actual
11 effect to plaintiffs.

12 THE COURT: I think there's enough finality here to
13 warrant an appeal from the final decision of the Census Bureau.
14 The 2020 Census Operational Plan, Version 4.0, issued
15 December 2018, is the operative methodology guiding what the
16 Census Bureau plans to do with regard to the census.

17 I do understand that by referencing in a note to the
18 reader on the second page that this is Version 4.0 and it's as
19 of October 31, 2018, suggests that there will be later versions
20 and later issuances; that this is an iterative document relying
21 on much work in the past and continuing into the future.

22 But there is enough flesh in this operational plan to
23 warrant an appeal at this particular point. If I relegate it
24 to a post-census remedy, there would be a great deal of
25 difficulty in remedying the deficiencies that are alleged.

1 Without regard to the merits of the allegations, I
2 hold that there is sufficient finality for appeal from a final
3 decision of an agency.

4 How about saying a word about standing.

5 MR. ISSACHAROFF: Yes, your Honor. I would just very
6 briefly note that I don't believe that even if your Honor found
7 that there was sufficient finality, that it would indicate that
8 there was sufficient discreteness or the sufficient
9 identification of the obligatory duty.

10 THE COURT: I agree. I have not ruled on those
11 subjects.

12 MR. ISSACHAROFF: Thank you, your Honor.

13 Turning to standing, the two deficiencies that
14 defendants identify are failure to establish a nonspeculative
15 harm and a failure to identify a redressable harm.

16 On the first point, as I alluded to earlier, the link
17 between any one of these actions that plaintiffs purport to
18 identify and the ultimate injury is incredibly attenuated and
19 speculative.

20 So, for example, in order for a household not to be
21 counted. It must fail to respond to at least six mailings, it
22 must fail to self-respond at the prompting of the integrated
23 partnership and communications program.

24 Then an enumerator physically visiting would have to
25 misidentify it as vacant and have that misidentification

1 corroborated by multiple reliable administrative records.

2 THE COURT: To what extent are you mixing merits into
3 a jurisdictional argument?

4 MR. ISSACHAROFF: I do believe that there is
5 significant overlap between the standing analysis and the
6 merits argument because of the fact that you must scrutinize
7 the complaint as a whole and compare allegations against each
8 other.

9 And I would note that if your Honor were to find a
10 lack of standing, I would urge the Court to rule in the
11 alternative on whether or not plaintiffs would have stated a
12 claim just in order to render the decision as certain and as
13 sensible as possible.

14 But I do believe that your Honor can scrutinize the
15 standing on the basis of the complaint, including, as you
16 suggested, incorporating the final operational plan.

17 So plaintiffs rely heavily upon the citizenship
18 question case. That was a quite discrete and clear connection
19 between the harm alleged and the action challenged.

20 The allegation was that due to the presence of a
21 particular question on the census, certain households would
22 disproportionately refuse to respond. That is it. That is all
23 that was required.

24 Here, however, there is an enormously complex
25 interaction of operational details that would have to take

1 place in order for a failure to be counted, and that incredibly
2 complex interaction of operational failures would have to have
3 them at a disproportionate rate to the households whose
4 interests here are represented by plaintiff.

5 I do not believe that plaintiffs can make out that
6 standing, and I think that that argument is inconsistent with
7 the Supreme Court's standing jurisdiction argued in *ACLU v.*
8 *Clapper*.

9 The second prong is that the harm must be redressable
10 by the courts. As your Honor has noted and as we have argued,
11 there is no authority on the basis of the allegations here to
12 order the Census Bureau to spend a lump-sum appropriation in a
13 particular way.

14 Moreover, there is no reason to believe -- on the
15 basis of the allegations that have been made in the complaint
16 as incorporated in the final operational plan, there is no
17 basis to believe that ordered additional spending on
18 enumerators, for example, would redress any of these harms.

19 As the final operational plan makes clear, the number
20 of enumerators ultimately deployed will simply be a function of
21 the NRFU workload.

22 THE COURT: These are merits arguments.

23 MR. ISSACHAROFF: I do believe that there is
24 intersection with the merits. But I think that in analyzing
25 the standing, your Honor can ask and is in fact required to

1 ask, if I granted the relief sought, would that redress the
2 problem alleged.

3 And the answer here is no. Ordering the Census Bureau
4 to hire and deploy additional enumerators would not result in
5 any substantive change to nonresponse follow-up operations.

6 THE COURT: But plaintiffs allege that it would.

7 Don't I have to accept --

8 MR. ISSACHAROFF: Plaintiffs do not plausibly allege
9 that it would when comparing their allegation to the final
10 operational plan incorporated by reference into the complaint.

11 THE COURT: I believe that's a merits argument.

12 MR. ISSACHAROFF: I understand, your Honor. And I'm
13 happy to return to the merits and address the enumeration
14 clause claim.

15 THE COURT: Yes. We'll get to it.

16 For purposes of standing, it seems to me that the two
17 plaintiffs allege injuries in fact, namely, that an
18 undercounting, as they complain, would result in a loss of
19 dollars that otherwise could be allocated or would be allocated
20 to serve their populations. And that's really sufficient.

21 The second prong of the standing argument is
22 traceability. Again, according to allegations, if there were
23 more people hired and more offices spread around and the like,
24 there would be less of an undercount, if any. Regardless of
25 the merits of that argument, that's sufficient to show

1 traceability.

2 As to redressability, I have serious questions about
3 that because the remedies that are sought all have to do with
4 the Court's involvement in the process -- requiring more
5 expenditures of this or that aspect of the appropriations,
6 checking up on the Census Bureau if indeed it has hired more
7 people, and so on. So I question this redressability, and I'll
8 hold my ruling until I hear from Ms. Chen on that particular
9 point.

10 But that's the one issue that I think gives me pause
11 in finding standing. *Carey v. Klutznick* holds in a similar
12 relationship that there is standing.

13 Wouldn't you agree, Mr. Issacharoff?

14 Are we still connected?

15 MR. ISSACHAROFF: I'm sorry, your Honor. I had you on
16 mute in order to preserve the line.

17 Your Honor, as I was attempting to say *Carey v.*
18 *Klutznick* did find standing in the context of that case.
19 However, *Carey v. Klutznick*'s standing analysis is inconsistent
20 with the subsequent 40 years of Supreme Court precedent that
21 has elaborated standing doctrine.

22 I would further note the comparative narrowness of the
23 challenge in *Carey v. Klutznick* that plaintiffs were arguing
24 that certain census -- that the failure of the Census Bureau to
25 sufficiently conduct its operations in New York City had

1 resulted in an undercount there and that keeping the certain
2 field offices open longer, which was subsequently dropped. But
3 continuing to accept "Were You Counted" forms after the
4 official close of the period to assess those would result in
5 additional persons being counted.

6 That was all that was being sought in *Carey*, and it
7 was tied directly to the preliminary showing that plaintiffs
8 had made in that case. Now, ultimately --

9 THE COURT: It was a discrete act, a focused discrete
10 remedy, ordering the administrative agency to consider certain
11 items narrowly focused, much different from this case.

12 MR. ISSACHAROFF: Yes, your Honor.

13 THE COURT: I want to draw your argument to a close,
14 Mr. Issacharoff. You've given me two reasons why there has
15 been a failure to state a claim. One is the lack of
16 discreteness. Second is the lack of finality on which I've
17 ruled. And I think you said there was a third.

18 MR. ISSACHAROFF: My third was the failure of a final
19 disposition of rights, which I believe your Honor has indicated
20 you do not intend to rule in the government's favor on.

21 THE COURT: I didn't say that.

22 What do you mean by no final disposition of rights?

23 MR. ISSACHAROFF: One of the requirements for an APA
24 challenge is that there be final agency action, and courts have
25 described the requirement of final agency action as essentially

1 altering the legal regime in which plaintiffs operate or
2 altering the rights or obligations of affected parties.

3 Although Operational Plan 4.0 is in a sense the final
4 operational plan in that no Operational Plan 5.0 is
5 contemplated, it did not prevent the Census Bureau in any way
6 from continuing to modify and refine its operations in that
7 plan.

8 THE COURT: I'm sorry. I confused the arguments.

9 There were three arguments: Lack of discreteness;
10 lack of finality, which is the one you were just arguing on
11 which I did rule against the government; and third, no legal
12 obligation to support the remedies that are being sought. And
13 I think those are the three points.

14 MR. ISSACHAROFF: Yes, your Honor.

15 THE COURT: Is there another argument with regard to
16 the enumeration clause that you need to make?

17 MR. ISSACHAROFF: Yes, your Honor, there is. As I
18 previously noted -- I'm sorry.

19 Starting from the top, the Supreme Court has never
20 identified a substantive enumeration clause standard by which
21 to measure census operations. What plaintiffs rely upon is
22 effectively stray dicta in *Wisconsin* that characterized the
23 Secretary of Commerce's decision as evincing an interest in
24 accuracy which the court supports, as, of course, does the
25 Census Bureau.

1 But the court never suggested that there was a
2 substantive ability of courts to identify a constitutional
3 standard of accuracy that was required and measure plaintiffs'
4 proposed Census Bureau operations against that standard.

5 Plaintiffs also suggested in their opposition that the
6 Court could identify that sort of substantive standard from the
7 *Carey v. Klutznick* decision that we were just discussing.

8 But as we've pointed out in our briefing, *Carey*, when
9 it suggested a standard that the census must be as accurate as
10 possible, was relying upon the one person; one vote line of
11 cases that arose in the context of the apportionment challenges
12 in the 1960's.

13 The Supreme Court in *Wisconsin* decisively rejected the
14 applicability of the one person; one vote line of cases to the
15 enumeration clause and the Census Bureau operations.

16 Now, even if your Honor accepts -- and as the
17 government -- the government recognizes that if there is any
18 standard at all that exists here for evaluating Census Bureau
19 operations, it is provided by the court in *Wisconsin*. That
20 standard states that the Census Bureau's decisions need bear
21 only a reasonable relationship to conducting an actual
22 enumeration.

23 That standard is incredibly lenient, and there is
24 simply no way for plaintiffs to plausibly allege that,
25 for example, reallocation of funding from partnership

1 assistants to partnership specialists does not bear a
2 reasonable relationship to conducting an actual enumeration.

3 It is not plausible to allege, again, incorporating by
4 reference a final operational plan, that using a flexible
5 approach to enumerator hiring and deployments where enumerators
6 are deployed based on actual observed self-response rates,
7 rather than a number plucked in advance based on a previous
8 census, does not bear a reasonable relationship to conducting
9 an actual enumeration.

10 It is not plausible to suggest that reallocating
11 resources away from a fixed questionnaire assistance center
12 program that was extraordinarily inefficient in prior censuses
13 does not bear a reasonable relationship to the conducting of an
14 actual enumeration.

15 The only cases in which the Supreme Court has
16 suggested -- and it has not even in fact ever found for the
17 plaintiffs in an enumeration clause challenge, but the only
18 context where the Supreme Court has suggested that the standard
19 might have some teeth is when there is a challenge to whether
20 agency action effectively amounts to statistical sampling
21 rather than the conducting of an actual enumeration. That was
22 the challenge to hot deck imputation and *Wisconsin*.

23 That's not what we have here. Plaintiffs are
24 suggesting that the text of the enumeration clause, the
25 virtually unlimited discretion that it confers upon Congress,

1 in the words of the court, allow the court to scrutinize the
2 number of enumerators, the number of area census offices, the
3 precise deployment and resources between partnership
4 specialists and assistants, the communications budget under
5 that standard. There is no textural support for that argument,
6 and plaintiffs do not plausibly allege any enumeration clause
7 violation.

8 THE COURT: All right. Thank you very much.

9 Ms. Chen.

10 MS. CHEN: Good afternoon, your Honor. My name is
11 Lisa Chen appearing for the plaintiffs.

12 Before I begin, I wanted to acknowledge for the record
13 that representatives of the City of Newburgh and CPD action are
14 on the line with us today.

15 THE COURT: Thank you.

16 MS. CHEN: Thank you, your honor. Before I begin, I
17 want to acknowledge for the record that representatives of the
18 City of Newburgh and CPD Action are on the line with us.

19 Plaintiffs depend on the accuracy of the census, your
20 Honor. CPD Action's members and Newburgh's residents are
21 concentrated in what Defendants deem to be hard-to-count areas.
22 They disproportionately lack internet access, are less likely
23 to be accurately represented in administrative records, and
24 often must be counted in person.

25 On this motion to dismiss, plaintiffs' allegations

1 must of course, as your Honor knows, be accepted as true.
2 plaintiffs have standing, and they have properly alleged claims
3 under the Administrative Procedure Act and the enumeration
4 clause.

5 I'll begin with standing first. Newburgh is one of
6 the hardest-to-count communities in New York State, with only
7 57 percent of residents self-responding to the census in 2010.
8 I know your Honor is concerned about the Court's ability to
9 redress plaintiffs' impending injuries.

10 But at this, point it is enough that plaintiffs have
11 alleged that their injuries can be redressed by this Court, for
12 example, by increasing enumerators and by increasing the field
13 presence by the Bureau.

14 The defendants' motion to dismiss under Rule 12(b)(6)
15 also fails. The Bureau has a constitutional and legal
16 obligation to count communities of color equally.

17 Instead, the Bureau has made census design decisions
18 without adequate and reasoned explanations, often contradicting
19 their own evidence in ways that will exacerbate the
20 differential undercounts in plaintiffs' communities.

21 Regarding plaintiffs' APA claim, plaintiffs properly
22 target discrete final agency actions made by the Bureau.
23 Plaintiffs have taken arbitrary and capricious actions under
24 the APA such as slashing enumerators below 2010 levels when the
25 population has grown since then, and the current political

1 climate and public health crisis will likely lead to lower
2 self-response rates.

3 Naturally, any agency action will necessarily
4 implicate other agency decisions. But this does not mean that
5 the actions themselves are not discrete.

6 This was recently affirmed by Judge Furman and the
7 Supreme Court in a decision regarding the citizenship question.
8 In that court opinion, it was acknowledged that the citizenship
9 question would specifically affect other aspects of the 2020
10 census plan; that it would require potentially more
11 enumerators, more advertising, more partnerships.

12 But that did not mean that the citizenship question
13 itself was an action that could be challenged as discrete, even
14 though it implicated other aspects of the Bureau's plan.

15 THE COURT: The focus of Judge Furman's decision had
16 to do with a single question or set of questions that was to be
17 addressed to the population.

18 And Judge Furman's decision was, yes, it can be; no,
19 it can't be. He held it can't be. It's much different from
20 what you're asking me to do.

21 MS. CHEN: Your Honor, plaintiffs here are similarly
22 challenging actions that can be set aside or not set aside.
23 So, for example, regarding the enumerators, the issue here is
24 that the number chosen by the Bureau is unreasoned. So that
25 action in itself, changing the number of enumerators, does not

1 have to implicate any other parts of the plan.

2 THE COURT: How many more people would be reasonable?

3 MS. CHEN: Plaintiffs obviously are aware that the
4 Bureau has the discretion to choose another number here, but
5 the main issue is that at this point, based off of the --
6 they've released a number of declarations which has changed the
7 number since our original complaint.

8 But as of the time of the complaint, it was 260,000
9 which was much less than the number used in 2010. In 2010,
10 they expected a self-response rate of 63 percent. In this
11 census, they're expecting a self-response rate of 60.5 percent.

12 THE COURT: Should I close my eyes to what's happened?

13 MS. CHEN: I'm sorry, your Honor. I missed what you
14 just said.

15 THE COURT: Should I close my eyes to what has
16 happened?

17 After all, the plan, which I've held is to be properly
18 incorporated into the complaint and read with the allegations,
19 states that the number of enumerators is of a certain amount
20 now, but we can hire more, and we can deploy them in ways that
21 seem to us appropriate, all in a manner to reduce the
22 differential undercount. So the plan itself contemplates that
23 there may be more people hired.

24 If that's what needs to be done to get as small as
25 possible differential undercount, the operational plan says

1 we'll do it. So how can you complain?

2 MS. CHEN: Your Honor, the concern is that as of this
3 point, although the Bureau claims that they will be hiring more
4 people as needed, the starting number is too low.

5 And recent news reports do indicate that the Bureau is
6 struggling with hiring more enumerators. The plaintiffs are
7 alleging that this would cause an undercount of their
8 communities, your Honor. And that's the standard for the first
9 phase.

10 THE COURT: You said the starting number is too low.

11 Is that what you said?

12 MS. CHEN: Yes, your Honor.

13 THE COURT: Well, if it's a starting number, aren't we
14 interested in the effective number that will be used
15 throughout? And as the number is needed and numbers are added,
16 the starting number becomes totally irrelevant.

17 MS. CHEN: Your Honor, the starting number is
18 irrelevant if the Bureau can successfully effectively hire the
19 necessary number.

20 THE COURT: They've done that. They've added.
21 They've added more people. Maybe they read your complaint and
22 said, we should hire more. The plan says we'll hire more.

23 The plan says that we're going to use these mobile
24 operational centers to find out where there is an undercount
25 and what can be done about it. They identify the various

1 problems they have in counting a census, in counting the
2 population so that all parts of the population are represented.

3 They say that there are too many people hired to deal
4 with people who will self-report and we need more in particular
5 areas and we know how to focus. We have different advertising
6 techniques now than existed in 2010.

7 All of this is in the operational plan. All of this
8 I'm reading in connection with your allegations in the
9 complaint. And you're telling me it's a starting number. A
10 starting number is irrelevant. It's the number that's needed
11 to have an effective count. And there is a plan that says
12 we'll do that.

13 Why should I distrust that? Does it have to be done
14 just the way you want it to be done?

15 MS. CHEN: No, your Honor. It does not have to be
16 done exactly the way that the plaintiffs want it to be done.
17 However, as far as the evidence that has been produced by
18 defendants on their decision, that has been lacking. And under
19 the APA, the defendants do need to be able to show that the
20 numbers they are choosing and the actions they are taking are
21 reasoned and justified.

22 THE COURT: Well, they say that they have a reasonable
23 relationship to their purpose which is to count everybody.
24 That's the goal.

25 How much deference do I give to that?

1 MS. CHEN: Your Honor, it makes sense to give
2 deference if the reasoning makes sense. But here, for example,
3 the Bureau is hiring -- in 2010, they hired 517,000 enumerators
4 assuming a 63 percent rate. Here in 2020, they were planning
5 on hiring 260,000 enumerators with, in effect, an even lower
6 self-response rate.

7 THE COURT: Is 2010 the gold standard? 2010 was, as
8 the Census Bureau points out, a paper response. The chore of
9 counting all the paper was labor intensive.

10 Now we have various aspects of technology and
11 statistical methodology that weren't in existence at that time.
12 We can focus advertising. We can focus to the block. We can
13 focus to the apartment house as we see in political campaigns.
14 It's a different world now.

15 So why is the number of people that were hired in 2010
16 a gold standard that would require me to measure the present
17 population of enumerators? It doesn't make sense.

18 MS. CHEN: Your Honor, the 2010 standard of
19 enumerators is not the gold standard. But it is a huge
20 deviation that defendants have taken.

21 Although they are now moving toward a digital census,
22 that is of course within their discretion to do. But
23 unfortunately, there was not adequate testing leading up to it.

24 So their own 2018 end-to-end result test showed a
25 response rate of 56 percent using these internet forms. That's

1 a very low number and much below their estimated self-response
2 rate for 2020 and the response rate of 2010.

3 So that's what's concerning here, that defendants have
4 taken actions that are untested and will likely harms the
5 communities that are most likely to not have access to the
6 internet.

7 Especially right now, given Coronavirus, a lot of
8 community centers where plaintiffs could be accessing the area
9 are now shut down. Libraries are not open. So the concern is
10 extremely grave at this point.

11 THE COURT: So we should hire more people and endanger
12 them by close contact with members of the population.

13 Your second assignment of error is drastic reduction
14 in the number of Bureau field offices. So the plan talks about
15 that. It talks about the necessity of field offices to count
16 all the paper.

17 Now we have different plans and different methodology
18 for focusing on particular undercounted populations which are
19 well set out in the operational plan.

20 How can I call that an error? Isn't that a reasonable
21 relationship to the chore and the goal of the Census Bureau?
22 To count everyone?

23 They have a methodology. They've set it out. They
24 show why the field offices that used to be in existence in 2010
25 are no longer needed to the same extent and that we need

1 something different.

2 Why shouldn't I not give deference to that reasonable
3 relationship that was found by the Census Bureau?

4 MS. CHEN: Your Honor, two points: Deference of
5 course is appropriate for an agency when they have given
6 reasoned justifications for the decisions that they are making.

7 But specifically in this case, at least under the
8 enumeration clause, there should be an eye towards distributive
9 accuracy. And the concern here is that the lack of field
10 offices, which is my second point here -- the bureau in their
11 own plan for the mobile questionnaires assistant centers states
12 the assumption that this is more effective because they can
13 figure out where to send people as they figure out the
14 populations that are responding less.

15 This of course assumes that they know which
16 populations are responding less. Transient populations,
17 homeless populations, and populations that are not fixed -- the
18 Bureau would not necessarily know that they're responding at a
19 lower response rate.

20 So plaintiffs are concerned that a fixed field office
21 presence, people who normally would happen upon these offices
22 as they wander, are no longer going to be counted in the same
23 number as before.

24 THE COURT: Go on.

25 MS. CHEN: So the concern here is that the reduction

1 in field offices and a field presence, although the defendants
2 have tried to account for that using a mobile questionnaire
3 assistant center program, does not address the underlying
4 problem of the Bureau not knowing when they are undercounting
5 populations that they don't know about.

6 Moving on from this, would you like me to address the
7 other types of relief, your Honor? I'm happy to move in any
8 direction that you prefer.

9 THE COURT: Just go on. Make your argument.

10 MS. CHEN: I believe, your Honor, you also were
11 concerned about plaintiffs' legal obligations under the APA. I
12 would like to point out that under the APA claims, plaintiffs
13 are specifically asking for a vacate and remand.

14 Plaintiffs here are bringing options under the
15 arbitrary and capricious section of the APA, not an unlawfully
16 withheld or unreasonably delayed. Which means that the actions
17 do not need to be legally required.

18 THE COURT: So do you want me to set aside the
19 arbitrary and capricious findings that were made?

20 MS. CHEN: Yes, your Honor.

21 THE COURT: Then what do I do?

22 MS. CHEN: Once you set them aside, your Honor, it
23 would of course be up to the Bureau to decide how they address
24 the set-aside actions. Plaintiffs' experts have --

25 THE COURT: So do you want me to remand to the Bureau?

1 MS. CHEN: Under the APA, yes. Under the enumeration
2 clause, we are seeking a preliminary injunction.

3 THE COURT: That's not what you asked me to do.

4 MS. CHEN: Yes, your Honor. In the complaint,
5 paragraph 194, plaintiffs are specifically asking for the Court
6 to hold unlawful and set aside defendants' discrete, arbitrary,
7 and capricious actions.

8 THE COURT: But you ask me to make a few orders, do
9 you not?

10 MS. CHEN: Yes, your Honor. Those orders would be
11 under the enumeration clause plaintiffs have brought.

12 THE COURT: So you just want me to set aside and
13 remand.

14 Is that what you want?

15 MS. CHEN: Yes. On the APA claims, your Honor. Yes.
16 Your Honor, we would also ask to order an injunction under the
17 constitutional claims, but specifically the legal requirement
18 under the APA is not necessary because plaintiffs are only
19 asking for a vacate and remand under the APA.

20 THE COURT: Paragraph 197 states the relief you want:
21 An injunction requiring the Census Bureau to implement a plan
22 to ensure that hard-to-count populations will be actually
23 enumerated in the decennial census -- "well, that's what they
24 set out to do -- "which shall include, but not be limited to, a
25 plan that restores the Bureau's 2020 Partnership Program to no

1 less than 2010 levels" and so on.

2 You're requiring me to inject my ideas on to the
3 Census Bureau because they have not done the same thing they
4 did in 2010.

5 Does that make sense?

6 MS. CHEN: Your Honor, plaintiffs are not asking
7 specifically -- I guess plaintiffs are not saying that 2010 is
8 the gold standard you suggested before, but it does make sense
9 here for the Bureau to at least adhere to what they were doing
10 in 2010 because the actions they've taken since then are so
11 drastically different and are likely going to exacerbate the
12 undercounts for plaintiffs' communities.

13 THE COURT: So they have to hire more people than
14 2010, and they have to have the same facilities in the same
15 places they had in 2010. You're wanting to have me make the
16 decisions that the Census Bureau is supposed to make. A judge
17 is not supposed to do that.

18 I think I've heard the arguments. We're just on
19 opposing wavelengths.

20 Let's move on to the preliminary injunction. For
21 that, I'll hear Ms. Lalwani.

22 MS. LALWANI: Thank you, your Honor.

23 Plaintiffs moved for preliminary injunction to correct
24 zero deficiencies in defendants' plans and preparations for the
25 2020 census which have created an imminent risk of a dramatic

1 differential undercount in the hard-to-count communities
2 plaintiffs represent.

3 To be clear, plaintiffs continue to assert that the
4 defendants' plan for enumerators, partnership programs, and a
5 field presence are arbitrary and unreasonable in violation of
6 the Administrative Procedure Act and the Constitution.

7 However, in light of the eight declarations from
8 defendants, including those filed less than a week ago with
9 their surreply, as well as the COVID-19 outbreak, which
10 plaintiffs recognize will impact census operations in ways that
11 are still not fully known, plaintiffs no longer seek much of
12 the relief identified in our preliminary injunction papers.

13 In particular, plaintiffs do not at this time request
14 an order compelling the Census Bureau to expend funds to remedy
15 the shortcomings in its enumerators, partnership programs, and
16 field presence.

17 Still, your Honor, large gaps remain in information
18 defendants have provided to the Court which plaintiffs had
19 never seen before and which defendants had not previously
20 released publicly.

21 THE COURT: Ms. Lalwani, let me stop you for a moment.

22 I'm looking at the conclusion of your motion for
23 preliminary injunction, and you have three categories of
24 relief.

25 Which shall I no longer pay attention to?

1 MS. LALWANI: Yes, your Honor. You should no longer
2 pay attention to the ask for an order to hire additional
3 enumerators, hire and deploy additional enumerators, as well as
4 to hire additional partnership staff and expand field presence.

5 THE COURT: So what's left?

6 MS. LALWANI: Plaintiffs therefore ask the Court to
7 order defendants to comply with certain transparency requests
8 as mentioned right after the paragraph you're mentioning in our
9 PI reply, including one-time disclosures regarding the
10 threshold circumstances that will trigger the deployment of
11 additional enumerators, the quality control measures defendants
12 have in place to ensure that partners successfully undertake
13 their commitments, the criteria for deploying mobile
14 questionnaire assistance teams, and the final decision-makers
15 corresponding to each of these decisions.

16 Plaintiffs also seek regular reporting, among other
17 things, the number of enumerators hired and deployed and the
18 number and location of deployed mobile questionnaire assistance
19 teams.

20 THE COURT: So I should disregard the conclusion
21 paragraph on page 33 of your motion for preliminary injunction
22 and look instead at the bottom paragraph on page 35 of your
23 reply memorandum for the relief you seek.

24 MS. LALWANI: That is accurate, your Honor.

25 THE COURT: Okay. So my question is this to you: How

1 can I put myself in the place of an administrative agency and
2 make the administrative agency report to me?

3 If what a court does is to give deference to the
4 findings of an administrative agency, here, give deference to
5 the findings of reasonable relationship to the purposes of
6 counting as many people as you can, ideally everyone, I now
7 will get reports on a weekly or biweekly basis of what the
8 Census Bureau is doing, presumably so I can review them, file
9 them on ECF, and have this extended hearing going on for the
10 next several months.

11 That's not what a judge does.

12 MS. LALWANI: Your Honor, plaintiffs do not ask
13 your Honor to substitute your judgment for the judgment of the
14 agency. But under the Administrative Procedure Act, your
15 Honor, there needs to be in the administrative record produced
16 to this Court a relationship between the facts found and the
17 decision made. And for none of the decisions that plaintiffs
18 are challenging is this the case.

19 Your Honor, the reason that plaintiffs are requesting
20 transparency measures is to address the gap that still exists
21 in the assertions that defendants have made to this Court in
22 the new declarations that they have submitted in the last few
23 weeks and especially just a few days ago.

24 To give an example of some of those gaps, your Honor,
25 consider the arguments that defendants make about enumerators.

1 As my colleague, Ms. Chen, pointed out, defendants have
2 drastically cut the number of enumerators they plan to deploy
3 from 2010, and they simply say that they will be able to
4 increase the number of enumerators from 320,000 to 500,000 if
5 necessary.

6 Your Honor, what is not included in the declarations
7 is any explanation of what threshold circumstances would
8 trigger the deployment of additional enumerators and when and
9 how that decision would be made.

10 Similarly, your Honor, defendants make certain
11 assertions about the Partnership Program, including that their
12 CRM system -- this was in the most recent Stempowski
13 declaration; that that system will catalog all of the
14 partnership commitments that partners make.

15 But nowhere do defendants explain what criteria
16 partners need to make and entities need to fulfill to be
17 considered partners, which is especially important, given how
18 thin the Bureau's partner staffing is when compared to 2010.

19 Your Honor, these are the kinds of gaps in what
20 defendants have produced to the Court that plaintiffs hope
21 certain transparency measures will speak to.

22 But if your Honor is not inclined to grant the kind of
23 transparency request that plaintiffs are seeking, then
24 plaintiffs would ask, in the alternative, that your Honor deny
25 the motion to dismiss and allow plaintiffs to move forward

1 expeditiously with discovery.

2 Your Honor, put simply, plaintiffs are attempting to
3 be responsible both to the new information, new and untested
4 information, put forward by defendants, as well as to the fact
5 that we are in the midst of an unprecedented pandemic which of
6 course has already been changing the situation on the ground.

7 Your Honor, defendants have, throughout this
8 litigation and particularly in their last declaration, made a
9 sort of just-trust-us response that they will be able to deploy
10 the right number of enumerators eventually, that their partners
11 will be actively working with the community, and that they will
12 ultimately deploy a successful mobile questionnaire assistance
13 program.

14 Your Honor, as my colleague spoke to, if we wait until
15 after the census to figure out whether or not defendants got it
16 right, that will, frankly, be too late.

17 What plaintiffs hope transparency measures will do is
18 provide some insight into what are currently black boxes in the
19 operation of the census and which will allow plaintiffs to come
20 back to Court if it becomes clear that defendants are violating
21 their statutory and constitutional obligations.

22 THE COURT: Anything else?

23 MS. LALWANI: Your Honor, if you do not have any
24 further questions, then I'm happy to conclude.

25 THE COURT: All right. Mr. Issacharoff, I don't think

1 it's necessary for you to comment any further, unless you're
2 burning to do so. I think the motion to dismiss and the
3 discussion on the merits have given me all the information I
4 need to deal with both motions.

5 Is that all right?

6 MR. ISSACHAROFF: Yes, your Honor. If you believe you
7 have all the information you need, I'm happy to rest on the
8 arguments so far and the papers.

9 THE COURT: Let me rule. Ordinarily in a case of this
10 magnitude, I would want to come forward with a reasoned
11 decision. But in the circumstances of what's going on in terms
12 of the outside world; the pandemic in which we are thrust; and
13 the need for speed on the part of both parties; from the
14 plaintiffs' view, to vindicate their position and from
15 defendants' point of view, to obtain a settlement of the
16 disputes so that they can go on and do the business of the
17 census, a prompt decision is more important in this context.
18 Furthermore, what the Court of Appeals will be saying will be
19 dispositive. What a district judge will be saying is much less
20 so.

21 Accordingly, I will make my ruling extemporaneously.
22 I've studied the papers thoroughly. I think that may be
23 indicative of the comments I made during the course of the
24 arguments.

25 And I'm prepared to rule. I will ask to be excused in

1 advance for the lack of proper organization and a structure
2 that would be expected of something in writing.

3 With that apology to begin with, let me rule. The
4 government's motion to dismiss is granted. The plaintiffs'
5 motion for a preliminary injunction is denied.

6 The following are my reasons: First, is there
7 standing. I hold that there is. Clearly the plaintiffs have
8 alleged injuries in fact. If there is a substantial
9 differential undercount, as they allege, they will be harmed.

10 They will be harmed in the amount of money that will
11 be distributed to them in relationship to all other
12 communities, and they will be harmed with respect to the
13 representation that they would expect to have nationally and in
14 the state. So they have a legitimate complaint, and they're
15 legitimately before the Court.

16 Is the injury they allege traceable to the injury they
17 suffer? The answer is yes. If their allegations of a
18 substantial differential undercount are true, they will suffer.
19 And if the remedies they seek would be effective in redressing
20 that differential undercount, they would be in a better
21 position.

22 So without regard to the merits of the causation and
23 for purposes of the jurisdictional threshold, I hold that the
24 injuries are traceable to the allegations of injury.

25 With regard to their redressability, it's very hard

1 for me to distinguish between the merits and the allegations.
2 The allegations of having me order the Census Bureau to do the
3 specific things that are requested would put the Court into the
4 place of the administrator.

5 There are no criteria or general principles that I
6 could say were violated. There is no instruction, other than
7 administrative functions, that I could order the administrative
8 agency to do. And with regard to the substantive commands that
9 I'm asked to do, they're clearly inappropriate for a court of
10 law.

11 However, for the purposes of standing, the allegations
12 make it seem as if I do have this capability and that I can set
13 aside what is alleged to be arbitrary and capricious and I can
14 give sufficient commands to the agency to remedy the problem.
15 So, again, without regard to the merits, I hold that there is
16 standing.

17 Turning to the merits of the appeal from the
18 administrative agency, I hold that there is finality. There is
19 a plan which instructs the agency how to pursue its census,
20 although it is subject to change and although it is the
21 completion of an iterative process that has taken years and
22 much dialogue between the Census Bureau, the legislature, back
23 and forth.

24 This Census Operational Plan is sufficiently
25 definitive to warrant an appeal. So if there are grounds for

1 appeal, there is certainly finality for appeal.

2 With regard to the issue of discreteness, are there
3 discrete evils that are alleged, they are alleged in paragraph
4 36 of the complaint. It's hard to say that reading these
5 allegations are not discrete.

6 The plaintiffs ask for a remedy of hiring an
7 unreasonably small number of enumerators, of drastically
8 reducing the number of Bureau field offices, of significant
9 reduction in the Bureau Communication and Partnership Program,
10 including the elimination of local physical questionnaire
11 assistance centers, of the decision to replace most infield
12 address canvassing with in-office address canvassing and,
13 fifth, with decisions to make only limited efforts to count
14 inhabitants of units that appear vacant or non-existent based
15 on unreliable administrative records.

16 Without regard to the merits, I find it hard to say
17 that these are not discrete. The main problem here is one of
18 remedy and one of balancing discrete complaints with the nature
19 of an organic plan to manage the census.

20 Here, I have the firm belief that the government is
21 correct that you cannot take any of these points in and of
22 themselves. They are part of an organic whole, each element
23 being explained by and contributing to the other.

24 And for this reason, I take the complaint not only in
25 terms of its own allegations but also in the context of the

1 Census Operational Plan which I've held to be properly
2 incorporated into the complaint.

3 And now some words about this plan. On page 6, the
4 Census Bureau identifies the particular problems they expect to
5 encounter with regard to the 2020 census:

6 A more mobile population that existed previously; a
7 constrained fiscal environment where one of the elements of
8 instruction given by the Congress was to save money without
9 affecting the efficiency of the count; using rapidly changing
10 technology so that the Census Bureau can better focus on
11 exactly where the undercount is and devise remedies to find and
12 count the people; an information explosion where sometimes we
13 are inundated with too much information but which, properly
14 managed, can lead to the proper enumeration of people; a
15 popular distrust in government which makes it difficult to find
16 people.

17 With respect to the proposed remedy of a higher count
18 of enumerators, more employment, having people knock on doors
19 is probably not the most effective way of taking people away
20 from their distrust and hiding.

21 We all know of the many efforts being made by
22 populations who are concerned about immigration problems to
23 evade government officers. What makes us think that they will
24 readily identify themselves to the census enumerator.

25 The Census Bureau is quite right in developing

1 methodologies to deal with those problems by looking for
2 proxies and supers and the like and by doing a better
3 assessment in their offices of just where people are and how to
4 get to them.

5 Another problem is declining response rates. We're
6 all familiar with hanging up our telephone with someone wants
7 to do just another survey and declining to open up envelopes
8 that are forms inside. We're inundated with them. And there
9 will be resistance to having forms mailed or even given out to
10 them by enumerators.

11 A diverse population in formal, complex living
12 arrangements where people move in and out of places, sometimes
13 at a parent's house, sometimes with one spouse, sometimes at
14 another spouse. All these are identified by the Census Bureau
15 and present the particular problems they have to meet their
16 goal of counting everyone.

17 And then the operational plan has different
18 methodologies to deal with them. We've heard before in
19 argument about the changing population of enumerators,
20 postponing the hiring so that they can be deployed in a more
21 effective way; instead of having field offices that deal with
22 mounds of paper, having a mobile office that takes information
23 into an iPhone or other mobile device and to electronically
24 process that information; of having Google Maps of buildings
25 and the like to be able to trace just where people are likely

1 to live and to focus on how to get to those people.

2 All these are modifications of what was done in 2010.
3 Were the Census Bureau to be a business and were it to be
4 married to the methodologies of 2010 ten years later, that
5 would be a sure formula for failure. We have to applaud the
6 Census Bureau for devising new methods to find and count what
7 were substantially undercounts from previous years.

8 So for these reasons and others, what the plaintiffs
9 complain about in paragraph 36 are not discrete elements. The
10 number of enumerators is very much dependent on the findings of
11 in-office analyses.

12 The number of field offices is very much dependent on
13 where the undercounts are and how to reach them. The reduction
14 that's alleged in the Communications and Partnership Programs
15 are remedied by focused digital advertising; use of various
16 kinds of communications that are used to locate and speak with
17 people; all the social devices that we have today, Instagram
18 and Facebook. It's hard for someone who didn't grow up in that
19 generation to be able to enumerate the countless ways that
20 people speak to each other.

21 The president each evening will come out with some
22 kind of a broadside that reaches people outside of the media.
23 This is his methodology, like it or not, by which he inundates
24 the population with his message.

25 And the Census Bureau is adapting some of these same

1 kinds of methodologies to reach people that had previously been
2 not reached and having been able to reach them, to find a
3 particular way of going about getting answers to a
4 questionnaire.

5 So these five different supposedly discrete points
6 alleged in paragraph 36 are not discrete. They are part of a
7 systemic whole. And there's nothing discrete which the Court
8 can seek to remedy, even if the Court were to believe that a
9 remedy were appropriate. And I do not so believe.

10 Finally, the remedies. Typically, if an agency's
11 decision, its file decision, is found to be arbitrary and
12 capricious, the court will set it aside and either remedy it by
13 a discrete order, as Judge Furman did with regard to the
14 questionnaire on the census about citizenship, or set out
15 general principles which the agency should follow.

16 Here, it's impossible for me to give an order without
17 micromanaging what the Census Bureau has been delegated to do.
18 Congress has not delegated to district judges the function of
19 carrying out a census or even of ordering a census or even of
20 second-guessing a census. That discretion was given to the
21 Department of Commerce through its secretary and the Census
22 Bureau, and the Census Bureau has been carrying it out.

23 It would be totally improper for me to tell the Census
24 Bureau how many people to hire and when, where to have field
25 offices and where to have mobile offices, whether to have

1 assistants to partnership specialists or other kinds of
2 specialists, how much money to spend in advertising and where,
3 how much to use on social media and of what kinds.

4 These are areas that district judges are not learned
5 about. They have no capability of doing what an administrative
6 agency, what the Census Bureau, can do with its experience and
7 experts and judgment.

8 If the Court were to have no other cases, no criminal
9 docket, no civil docket, and invested its entire time in the
10 census, they could not do a shadow of what the Census Bureau
11 can do.

12 Yet I'm asked in the complaint to enter an injunction
13 that requires defendants to implement a plan to ensure that
14 hard-to-count populations will be actually enumerated in the
15 decennial sentence.

16 That's what they're trying to do. I don't need to
17 give them an injunction to help them do that. I read further:
18 "Which shall include, but not be limited, to a plan that
19 restores the Bureau's 2020 Partnership Program to no less than
20 2010 levels."

21 But the Census Bureau has pointed out that those
22 numbers were swollen with assistants who were counting papers
23 and what's needed is a different level of partnership
24 specialist who is able to deal with community organizations and
25 that the Census Bureau is doing just that. I couldn't improve

1 on that. I wouldn't know how.

2 Plaintiffs want me to augment the Bureau's 2020
3 integrated communications program to achieve coverage
4 equivalent to the 2010 census accounting for inflation,
5 population growth, and increased cost of advertising.

6 Well, people don't advertise in newspapers or on
7 television so much these days. They have other ways of
8 reaching people focused on particular areas, particular small
9 areas.

10 I just couldn't go about telling them how to do an
11 advertising budget. I don't know how to do advertising
12 budgets, and I wouldn't presume to tell the Census Bureau how
13 to do an advertising budget.

14 I'll read further: "Requiring opening a number of
15 in-person questionnaire assistance centers commensurate to that
16 used in the 2010 census."

17 Well, if people want to evade the enumerators and if
18 they want to evade persons in authority because they're afraid
19 of immigration, what makes us think they're going to pop into a
20 center to help them answer questions that they don't want to
21 answer.

22 Other methods have to be found. Having brick
23 facilities in a particular area is not the best way to reach
24 them, so the Census Bureau has found. And I'm not in any
25 position to say that they're wrong. Indeed I have to defer to

1 their decision that has different kinds of methods to
2 reasonably relate to their goal of counting everyone.

3 Another element of relief is to increase the number of
4 enumerators. We've dealt with that.

5 So for these reasons, the aspect of a systemic
6 approach which makes it inappropriate to make any kind of
7 remedy, and the total inappropriateness of the remedies being
8 sought lead me to believe that I cannot set aside and I should
9 not set aside what the Census Bureau has done.

10 I find that what they've done has a reasonable
11 relationship to their goal of counting everyone, and I must
12 defer to their decision, and I decline to set it aside.

13 Now, with regard to the preliminary injunction, I've
14 already held that the likelihood of success on the merits of
15 the plaintiffs is slim. There's real doubt whether the second
16 prong of sufficiently serious questions going to the merits to
17 make them a fair ground for litigation is relevant to the
18 public aspect of this exercise today.

19 It's been held in *Citigroup Global Markets, Inc. v.*
20 *VCG Special Opportunities Master Fund LTD*, 598 F.3d 30 at page
21 35, note 4 (2d Cir. 2010): "Where the moving party seeks to
22 stay governmental action taken in the public interest pursuant
23 to a statutory or regulatory scheme, the district court should
24 not apply the less rigorous serious question standard and
25 should not grant the injunction, unless the moving party

1 establishes, along with irreparable injury, a likelihood that
2 he will succeed on the merits of his claim."

3 I hold that the movant, the moving party, the
4 plaintiffs, do not have a likelihood of success on the merits.
5 Indeed, I do not think there are sufficiently serious questions
6 going to the merits.

7 As to irreparable harm, the Census Bureau has pointed
8 out the chronology of its work. It has a great deal of work to
9 do before the end of the year and its obligation to report to
10 the president.

11 Any interference with that by an order from me telling
12 them to do this or that would inevitably slow up what they have
13 to do. Their irreparable damage injures the public in a
14 clearer way than any claim for irreparable damage to the
15 plaintiffs.

16 Indeed, there's a question that the plaintiffs have
17 irreparable damage because if the world turns out to be as they
18 suspect, they are not precluded from bringing a claim even
19 after the fact or later on in this situation.

20 Now, plaintiffs have modified their requests for
21 relief in their reply papers. What they want me to do is to
22 inject myself into the process supposedly carried on by the
23 Census Bureau and to involve them as sensors of the Census
24 Bureau as the Census Bureau goes along with their projects.

25 What plaintiffs want is a continuing jurisdiction on

1 my part and a continuing presence on their part to second-guess
2 everything the Census Bureau does. They are not experts. They
3 are not appointed by Congress. They don't serve at the advice
4 and consent of the Senate. They're not appointed by the
5 president. They're not government employees. This would be
6 totally inappropriate for me to order.

7 I will not order, on a weekly basis or any other
8 basis, reports as to the number of enumerators hired to date
9 and the number and location of enumerator hours deployed in the
10 proceeding week.

11 I will not order on a biweekly basis the number of
12 partnership staff hired to do. I will not order by April 1,
13 2020, the criteria the Census Bureau uses to determine the
14 outreach commitments expected of organizations deemed eligible
15 to serve as partnership organizations and the resources made
16 available to those partners.

17 I will not order by April 1, 2020, the criteria or
18 threshold circumstances that will trigger the deployment of
19 additional enumerators above defendant's current low-end
20 targets of 320,000.

21 We've already spoken about that. We've already spoken
22 about the way that the government is hiring more as they go
23 along and as the need identifies itself.

24 And I will not order by May 1, 2020, the basis by
25 which they are deploying MQAC teams and the sites to which

1 they're being deployed. And I will not order a direction for
2 the defendants to identify the final decision-makers
3 corresponding to each of the aforementioned implementation
4 decisions.

5 In a word, all the aspects of the relief sought by
6 plaintiffs enumerated on page 35 of their reply memorandum I
7 deny.

8 Now, nobody knows to what extent the Census Bureau
9 will succeed in its stated goal of counting everyone. The
10 Census Bureau has adopted an operational plan which, on its
11 face, shows a reasonable relationship of their efforts to their
12 goal.

13 It is not for me or any other district judge to
14 displace that expertise. I have to give deference to how the
15 Census Bureau wishes to go about its work, and I do so.

16 So the motion of defendants to dismiss the complaint
17 is granted. The motion of plaintiffs for a preliminary
18 injunction is denied.

19 A summary order will be entered reflecting these
20 decisions probably today, and the aggrieved parties will then
21 be able to appeal to the Court of Appeals.

22 Is there anything further, Mr. Wishnie?

23 MR. WISHNIE: Nothing from plaintiffs.

24 THE COURT: Is there anything further,
25 Mr. Issacharoff?

1 MR. ISSACHAROFF: No, your Honor. Thank you.

2 THE COURT: I conclude this session with thanks for
3 excellent arguments and accommodation to Ms. Chen and
4 Ms. Lalwani for excellent expositions of their arguments. You
5 should go very far in the law. And Professor Wishnie should
6 have much increased strength to continue this program year
7 after year. Thank you all very much.

8 Mr. Issacharoff, I needn't to compliment you. You
9 won. That's the best compliment. Thank you all.

10 (Adjourned)

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