19-1863

United States Court of Appeals

for the

Fourth Circuit

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; PRINCE GEORGE'S COUNTY, MARYLAND; PRINCE GEORGE'S COUNTY MARYLAND NAACP BRANCH; ROBERT E. ROSS; H. ELIZABETH JOHNSON,

Plaintiffs-Appellants,

v.

BUREAU OF THE CENSUS; STEVEN DILLINGHAM, Director, Bureau of the Census; WILBUR ROSS, Secretary of the Department of Commerce; THE UNITED STATES,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland

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INTRODUCTION

The 2020 Census is barreling towards a dramatic miscount. African-Americans are at risk of the most substantial *de facto* undercount in modern history, more than a century after the Civil War amendments ended the *de jure* undercounts once mandated by the Three-Fifths Clause. Defendants' final plans for the 2020 Census slash resources for outreach and community partnerships; gut the number of enumerators; and establish nearly half the number of field offices as in 2010. And as Plaintiffs allege, Defendants have made these decisions despite virtually no testing, a larger population that is more distrustful of government, and concrete evidence of the severe unreliability of these new methods.

Plaintiffs brought claims under the Enumeration Clause and the Administrative Procedure Act ("APA") challenging six specific and unlawful decisions by Defendants that the NAACP, Prince George's County, and other Plaintiffs alleged would result in a massive differential undercount of African-Americans. This undercount will deprive communities of millions of dollars of federal aid and political representation.

Rather than address the merits of Plaintiffs' claims, the District Court dismissed them as non-justiciable on grounds that the government largely does not defend on appeal. *See* JA 564-618 (*NAACP v. Bureau of the Census*, No. 8:18-cv-00891-PWG (Jan. 29, 2019)) [hereinafter January Opinion]; JA 623-648 (*NAACP v.*

Bureau of the Census, No. 8:18-cv-00891-PWG (Aug. 1, 2019)) [hereinafter August Opinion]. The government also fails to address the ramifications of the most immediate and relevant precedent, the Supreme Court's conclusion only months ago that APA claims challenging discrete agency action related to the 2020 Census are reviewable. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568-69 (2019).

In fact, and contrary to the District Court's holding, Plaintiffs have standing and properly target final agency action under the APA. They challenge discrete actions that directly implicate Plaintiffs' rights and obligations and that are not committed to agency discretion. Likewise, the District Court erred in failing to find Plaintiffs' Enumeration Clause claim ripe and appropriate for review. Plaintiffs should have had an opportunity to seek preliminary relief based on the discovery they had previously obtained, and the government should have been obliged to produce an administrative record that would permit meaningful judicial review.

In their opposition brief, Defendants mostly abandon the District Court's reasoning and instead proffer an entirely new justification for their decisions: technological innovation. There are compelling reasons to be skeptical of this justification. More importantly, this is an improper ground for dismissal of Plaintiffs' claims *on the pleadings*, and its invocation is contrary to the basic rule that agency action cannot be upheld based on *post hoc* justifications.

As Census Day draws near, Plaintiffs urge this Court to expeditiously reverse the District Court's dismissal of Plaintiffs' claims so that Defendants may be held responsible for the derogation of their constitutional and statutory obligations. Without judicial intervention, there is little hope that Defendants will count Plaintiffs' communities and other communities of color accurately and equally.

ARGUMENT

I. PLAINTIFFS' APA CLAIMS ARE JUDICIALLY REVIEWABLE.

The District Court erred in dismissing Plaintiffs' APA claims. From the outset of this litigation, Plaintiffs have been clear that they "challenge six discrete decisions," not the overall operations of the census. Br. 50.[1] These actions are not committed to agency discretion by law, and this Court can review them against familiar and judicially manageable standards. Defendants' attempts to introduce new explanations for their decisions at this stage are improper, and this Court should not consider them.

A. The Government's Defense of the 2020 Census Design Flaws Is Improper and Unsupported by Evidence.

Defendants devote a substantial portion of their brief to an explanation of the "innovations" of the 2020 Census. *See* U.S. Br. 4-10. But these justifications are improper and critically flawed: (1) the District Court granted the Government's request to dismiss this action *on the pleadings*, when Plaintiffs' well-pleaded

[1] The challenged actions are "(a) a plan to hire an unreasonably small number of enumerators; (b) a drastic reduction in the number of Census Bureau field offices; (c) cancellation of crucial field tests; (d) a decision to replace most in-field address canvassing with in-office address canvassing; (e) a decision to make only extremely limited efforts to count inhabitants of housing units that appear vacant or nonexistent based on unreliable administrative records; and (f) a significant reduction in the staffing of the Bureau's partnership program." JA 19-60 (Second Amended Complaint ("SAC") ¶ 67).

allegations must be taken as true and Defendants' factual proffers are improper; (2) Defendants' explanations are classic *post hoc* rationalizations that the Supreme Court has rejected as insufficient to justify agency action, which must be evaluated on the agency's own administrative record, and (3) even if the Court were to consider these *post hoc* rationalizations, the available evidence—including the Bureau's own reports—demonstrates that the challenged actions are arbitrary and capricious and should be set aside. Defendants' new claims—advanced for the first time on appeal and without proper evidentiary support—only highlight the need for prompt production of an administrative record and adjudication of Plaintiffs' APA claims based on that record.

First, the Court should not consider Defendants' newly advanced cost-saving theory for the Bureau's actions as they are improper merits arguments. Defendants introduce novel contentions regarding the "innovations" of the 2020 Census on this appeal of an order granting a motion to dismiss. *See* U.S. Br. 4-10. But it is a well-established principle that "[a] motion to dismiss . . . does not resolve contests surrounding the facts [or] the merits of a claim." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (on Rule 12(b)(6) motions); *see also Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (on Rule 12(b)(1) motions). Because the District Court dismissed Plaintiffs' APA claims without

allowing for production of the administrative record, it is neither possible nor appropriate to evaluate Defendants' factual assertions at this stage.

Second, APA decisions of this Court and the Supreme Court foreclose Defendants' attempt to justify agency action with *post hoc* rationales introduced in court briefings. "[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action." *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 468 (4th Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). "[A] court must only consider the record made before the agency at the time the agency acted . . . [a]nd a reviewing court may look only to these *contemporaneous* justifications in reviewing the agency action." *Id.* at 467-68. Defendants' selective presentation of facts through briefing is no substitute for the administrative record and "clearly d[oes] not constitute the 'whole record' compiled by the agency: the basis for review required by § 706 of the [APA]." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). Defendants' *post hoc* rationalizations should be disregarded.

The deficiencies in Defendants' justifications only underscore the importance of the APA relief sought by Plaintiffs: an order reversing the District Court's dismissal and remanding with instructions that the government promptly

produce the administrative record. Doing so would allow proper resolution of Plaintiffs' APA claims.

Third, even if the Court were to consider Defendants' proffered explanations via briefing, the available evidence demonstrates that they are insufficient to answer Plaintiffs' challenge that these actions are arbitrary and capricious. To survive arbitrary and capricious review, an agency's action must evince a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation omitted). But Defendants' brief simply repeats the Bureau's public talking points regarding the agency's sharp deviations from historical practice, which are unresponsive to Plaintiffs' well-pleaded allegations demonstrating the irrationality of the actions.

For example, Defendants assert that the Bureau's Integrated Partnership and Communications Operation is adequate for the 2020 Census because it is "hyper-focused on reaching [hard-to-count] populations," citing the hiring of 1,500 partnership specialists and the questionnaire's availability in twelve languages. *See* U.S. Br. 9-10 (internal citations omitted). Defendants fail to mention, however, that the Bureau is hiring fewer partnership staff in 2020 than it did in 2010, SAC ¶ 171, that its 2020 budget for partnership and communications is *25 percent smaller* than it was in 2010, without accounting for inflation, SAC ¶ 170, and that it has reduced the number of non-English languages supported from twenty-seven in 2010 to

twelve in 2020.[2] The Bureau proceeded with this reduction despite its own data revealing that only 67 percent of households were "extremely likely" or "very likely" to complete the 2020 Census, a full *twenty percentage points* lower than the analogous figure in 2010. SAC ¶ 81, 83. The response rates are even lower for people of color. SAC ¶ 84. This disconnect between the Bureau's own findings showing the need for additional outreach and its drastic reduction of the partnership and communications program is simply too great to survive arbitrary and capricious review.

The same can be said for any of the other five challenged agency actions. Defendants extol the benefits of administrative records as replacements for enumerators despite the Bureau's own field testing demonstrating their unreliability (18 percent of housing units identified as vacant and 30 percent identified as nonexistent by administrative records were actually occupied). SAC ¶ 163. Defendants praise the "efficiencies" of in-office address canvassing, U.S. Br. 6, when the Bureau's sole end-to-end test for the 2020 Census revealed that in-office address canvassing results differed from in-field results in *61 percent* of blocks tested. SAC ¶ 151. Because the available evidence demonstrates that the Bureau has repeatedly "offered . . . explanation[s] for its decision[s] that run[]

[2] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-599, ACTIONS NEEDED TO ADDRESS CHALLENGES TO ENUMERATING HARD TO-COUNT GROUPS 13 (2018), https://www.gao.gov/assets/700/693450.pdf.

counter to the evidence before [it]," *State Farm*, 463 U.S. at 43, the Court should remand this matter and direct that Defendants immediately produce the full administrative record for review.

B. Plaintiffs Challenge Discrete and Circumscribed Agency Actions.

1. The District Court Erred in Deeming the Challenged Actions Non-Discrete.

Plaintiffs challenge only six discrete decisions about the conduct of the 2020 Census. A court can assess each of the challenged activities independently without consideration of the others. Although the District Court erroneously found that challenges to the number of field offices and enumerators could not be assessed in isolation, it nonetheless concluded that "Defendants have not identified any relationship between any of Plaintiffs' four other challenges . . . and other aspects of the Final Operational Plan." Aug. Op. at 19.[3]

The District Court further found that setting aside these six discrete actions "would . . . compel[] [the agency] to enact another plan in accordance with the

[3] Instead of deeming each of Plaintiffs' challenges to be discrete agency action, the District Court improperly assessed these claims with reference to the injunctive relief Plaintiffs sought for separate constitutional claims. Aug. Op. at 20-21. *Norton v. Southern Utah Wilderness Alliance*'s (*SUWA*) preclusion of APA claims where relief would "inject[] the judge into day-to-day agency management" applies, on its face, only to claims *under the APA*. 542 U.S. 55, 67 (2004). The District Court's conclusion that the injunctive relief would "invit[e] the Court to 'reach into the internal workings' of the Bureau" inaccurately characterizes Plaintiffs' constitutional claims and is irrelevant to the discreteness of actions for APA purposes. Aug. Op. at 20 (citation omitted).

Court's order." *Id*. at 21. This conclusion was entirely unfounded, and Defendants do nothing to defend this decision beyond arguing, in conclusory fashion, that Plaintiffs are seeking a "sweeping overhaul" to the Bureau's plans. U.S. Br. 18. Setting aside some or all of these actions would have no bearing on the numerous other decisions in the Bureau's 220-page Final Operational Plan.

The Court's conclusion that "the Bureau's decision to reduce the number of enumerators is inextricably intertwined with its decision to 'use new technology and new protocols'" is a case in point. Aug. Op. at 19 (citation omitted). Even assuming *arguendo* that the Bureau based its drastic reductions in enumerators solely on the use of new technology, nothing about that new technology precludes hiring more enumerators or opening additional field offices. Nor would doing so disrupt the use of new technology. For this reason, the District Court's determination – without benefit of an administrative record – that the decisions to hire fewer enumerators and open fewer field offices are closely related to the Bureau's rollout of new technology does not make them non-discrete for purposes of review.

Indeed, Defendants have never alleged these actions are mutually exclusive, nor have Plaintiffs challenged the Bureau's decision to incorporate new technology into its plans. Rather, Defendants claim that additional field staff would be "redundant." U.S. Br. 7. That is precisely the point of the APA review that the

District Court improperly denied: to determine whether the agency's decisions are supported by evidence in the administrative record or are arbitrary and capricious. Rather than ordering prompt production of the administrative record so as to make this familiar APA decision, however, the District Court improperly credited Defendants' arguments and dismissed the action.

2. Ordinary APA Review Is Sufficient to Resolve Plaintiffs' Administrative Law Claims.

Affording the relief requested by Plaintiffs does not require "a sweeping overhaul to the [Bureau's] Operational Plan." U.S. Br. 18 (quoting JA 643). This Court need only reverse and remand so that the District Court can review the administrative record and set aside any of the challenged agency actions that it concludes are arbitrary and capricious.

Defendants argue that "[P]laintiffs' claims are not meaningful[ly] distinguishable" from those in *City of New York v. U.S. Department of Defense*, 913 F.3d 423 (4th Cir. 2019). U.S. Br. 19. But *City of New York* was clear on its own terms that "[g]overnment deficiencies do not become non-reviewable simply because they are pervasive." 913 F.3d at 433. That is, the number of discrete deficiencies does not, on its own, make a challenge a "programmatic attack." *Id.* at 431 (quoting *SUWA*, 542 U.S. at 64). Further, this case is distinct from *City of New York* for three reasons.

First, the plaintiffs in *City of New York* challenged the *result* of underlying agency action rather than the action itself. They sought to "compel DOD's full reporting of disqualifying information to the Attorney General." *Id.* at 429. This would be akin to a demand in this case for the Bureau to count every single person in the 2020 Census in order to achieve an "actual enumeration." But that is not this case; Plaintiffs challenge discrete components of the census's design, rather than the efficacy of the census as a whole or its outcome. Accordingly, the Court can address Plaintiffs' challenge with ordinary judicial review of whether these six decisions were arbitrary and capricious and need not take on "a day-to-day managerial role over agency operations." *Id.* at 434 (quoting *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 194 (4th Cir. 2013)).

Second, the plaintiffs in *City of New York* explicitly requested ongoing judicial management of agency decisions in their prayer for relief. They asked the court to compel the Department of Defense "on 'a schedule to be set by the Court,' . . . [to] 'conduct a thorough review of [its] records and procedures,' 'submit to the Court for approval a compliance plan,' and provide 'a monthly report to the Court detailing [its] progress' . . . 'until such time as the Court is satisfied.'" *Id.* (citation omitted). While such relief surely runs afoul of *SUWA*, Plaintiffs here request no such judicial supervision under the APA and instead request relief of the kind routinely granted under 5 U.S.C. § 706.

Third, this Court's characterization of the relief sought in *City of New York* differs from that requested by Plaintiffs in this case. There, this Court wrote that "the sort of public policy problem that often requires reallocating resources, developing new administrative systems, and working closely with partners across government" was not sufficiently discrete to meet the APA's requirements for reviewability. *Id.* at 433. None of these issues apply to the APA claims in this case. The Bureau does not need to *reallocate* resources—it has over $1 billion in unspent appropriated funds it can use to address these deficiencies. JA 558. Plaintiffs are not requesting that the Bureau develop new administrative systems but instead that the Bureau adequately fund and staff *existing* systems. Br. 51. And, unlike the interdepartmental information-sharing program at issue in *City of New York*, granting Plaintiffs' requested relief would not implicate other agencies' operations. It rests solely on the Census Bureau's shoulders.

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

Claims under the APA benefit from a "strong presumption favoring judicial review." *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1653 (2015). The exception to that presumption is a "very narrow" one. *Overton Park,* 401 U.S. at 410. It applies only where "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), or the "action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2).

Defendants' argument for their census-related conduct to be exempt from judicial review flies in the face of decades of precedent affirming that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," *Mach Mining*, 135 S. Ct. at 1651, and contravenes the Supreme Court's ruling just last term that "the taking of the census is not one of those areas traditionally committed to agency discretion." *New York*, 139 S. Ct. at 2568. The exception under 5 U.S.C. § 701(a)(2) applies only in the "rare instances where 'statutes are drawn in such broad terms that. . . there is no law to apply.'" *Overton Park*, 401 U.S. at 410. This is not one of them.

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

The six discrete challenged actions do not fall under the narrow exception for actions committed to agency discretion by law. In *New York,* the Supreme Court rejected the government's assertion that census procedures are committed to agency discretion. The Census Act "confers broad authority on the Secretary . . . [b]ut [the Act's provisions] do not leave his discretion unbounded. . . . The taking of the census is not one of those areas traditionally committed to agency discretion." 139 S. Ct. at 2568. The Court thus held that the inclusion of a citizenship question on the census questionnaire was reviewable. *Id.* Defendants offer no explanation for why the Bureau's challenged actions here—which fall within the "taking of the census"—would meet this narrow exemption from APA reviewability.

Even prior to the Supreme Court's ruling in *New York*, courts held that operational deficiencies in the conduct of the census are reviewable under the APA. The Second Circuit in *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), reviewed a challenge to the inadequacy of the Census Bureau's operational procedures, including the preparation and follow-up checks of the master address registers. The court "recognize[d] that there is no power to review agency action that is 'committed to agency discretion by law,' . . . but [that] this is not one of those 'rare instances.'" *Id.* at 838. The challenged actions in *Carey* are almost identical to those challenged in this case. Despite Defendants' insistence that census procedures involve a "complicated balancing" and therefore are committed to agency discretion, U.S. Br. 23 (citation omitted), the Second Circuit's reasoning in *Carey* makes it abundantly clear that such matters are not foreclosed from judicial review.

Nor is this case analogous to actions traditionally excluded from agency review, such as those presented in *Heckler v. Chaney*, 470 U.S. 821 (1985). The actions Plaintiffs challenge, including the decisions to halve the number of field offices and to eliminate an entire class of partnership staff, do not constitute enforcement inaction and do not satisfy any of the three *Chaney* factors: (1) "a complicated balancing of . . . factors which are peculiarly within [an agency's] expertise"; (2) lack of "coercive power over an individual's liberty or property rights"; and (3) similarities with "the decision of a prosecutor . . . not to indict," 470

U.S. at 831-32. In fact, the Supreme Court has drawn an explicit contrast between the conduct of the census, which is reviewable, and "a decision not to institute enforcement proceedings," which is not. *New York*, 139 S. Ct. at 2568.

Defendants' contention that "the allocation of funds from a lump-sum appropriation is generally committed to agency discretion," U.S. Br. 25, fails as well, as *Lincoln v. Vigil*, 508 U.S. 182 (1993), is inapposite. In *Vigil*, the Court held that the agency had discretion to spend its funds on various programs "in what it sees as the most effective or desirable way." 508 U.S. at 192. But the Bureau here is not utilizing its discretion to meet its statutory responsibilities; it is slashing vital resources that the Bureau itself recognizes as instrumental for counting minority communities. Further, unlike in the funding program in *Vigil*, the Census Act, Consolidated Appropriations Act, and accompanying conference report provide independent standards by which the Court can judge the Bureau's actions. For example, the Appropriations Act's conference report provides strict directives to the Bureau about various programs it should spend money on, undermining Defendants' claim that census funding is even a lump-sum appropriation in the first place. *See* H.R. Rep. No. 116-9, at 611 (2019) (Conf. Rep.) ("[T]he Bureau shall devote funding to expand targeted communications activities as well as to open local questionnaire assistance centers in hard-to-count communities.").

2. There Are Judicially Manageable Standards Against Which to Assess the Challenged Actions.

Further, there is law to apply to assess the adequacy of the Census Bureau's procedures. Only months ago, the Supreme Court confirmed in *New York* that the Census Act furnishes a "meaningful standard" for review. 139 S. Ct. at 2568. "[B]y mandating a population count that will be used to apportion representatives . . . the Act imposes 'a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.'" *Id.* at 2568-69 (citations omitted).

Relevant appropriations bills and their committee reports further elaborate judicially manageable standards, as this Court has recognized in other contexts. *See, e.g., South Carolina v. United States*, 907 F.3d 742, 748 (4th Cir. 2018) ("In its consolidated appropriations bill for fiscal year 2016, Congress's explanatory statement asserted that the funds allocated for the construction of the MOX facility 'shall be available *only*' for that purpose."); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 980 (2013) ("[T]he purpose of the committee report in the appropriations context is essentially to *legislate*—that is, to direct where the money appropriated is going.").

As to the 2020 Census, the Conference Report accompanying the 2019 Consolidated Appropriations Act states: "[T]he Bureau *shall* devote funding to expand targeted communications activities as well as to open local questionnaire assistance centers in hard-to-count communities." H.R. Rep. No. 116-9, at 611 (2019) (Conf. Rep.) (emphasis added). The instruction that the Defendants "shall . . . . open local questionnaire assistance centers" provides law for a court to apply in determining whether the Bureau's refusal to open *any* local questionnaire centers is arbitrary and capricious. The same Report also explains that the cost estimate for the "2020 Decennial Census . . . assumes the need for additional in-person follow-up visits due to fewer households expected to initially respond to the Census." *Id.*

Congress mandated the Bureau to expend funding for at least two discrete, legally required activities in the Conference Report: (1) expanding targeted communications activities, and (2) opening local Questionnaire Assistance Centers in hard-to-count communities. H.R. Rep. No. 116-9, at 611. These actions are unlawfully withheld because Congress has "imposed a date-certain deadline on agency action," *South Carolina*, 907 F.3d at 755 (internal citation omitted). That deadline—the end of fiscal year 2019 on September 30, 2019—has passed. *See* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019). The text of the Act and the Conference Report make clear that Congress intended the funds to be used during the 2019 fiscal year.

The language of these appropriations bills and reports, together with the Census Act itself are sufficient to supply law to apply. Even the District Court recognized that the Census Act requires the Bureau "to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment," Aug. Op. at 22 (citing *New York*, 139 S. Ct. at 2569). As in *New York*, and contrary to Defendants' assertion, this case is reviewable, and there are meaningful judicial standards.

D. Plaintiffs Need Not Show That the Challenged Decisions Are "Required by Law."

Plaintiffs do not need to show that the Bureau's challenged decisions are "required by law" because they do not seek injunctive relief under the APA. Plaintiffs did not plead any claim for relief under § 706(1). Defendants and the District Court mischaracterize Plaintiffs' requests for injunctive relief in the constitutional context as remedies for Plaintiffs' APA claims. *See* U.S. Br. 20 ("As the district court observed, the gravamen of plaintiffs' suit is not a challenge to final agency action, but a request, ' . . . to compel agency action.'" (citing Aug. Op. at 21)). However, as explained above, Plaintiffs' § 706(2)(A) claims seek to have the Bureau's actions "set aside" for being "arbitrary and capricious" and to have the District Court enter an injunction "prohibit[ing] Defendants . . . from re-enacting the unlawful agency actions." SAC Requested Relief ¶ 8. This relief would bar unlawful agency action, not compel required agency action.

II. PLAINTIFFS HAVE STANDING AND THEIR CLAIMS ARE RIPE.

Defendants do not defend the District Court's decisions on either ripeness or the political question doctrine. Accordingly, two of the four issues outlined in Plaintiffs' Statement of Issues have been conceded, and this Court should order reversal.

The District Court's sole basis for dismissing Plaintiffs' constitutional claim in the January Opinion was that the claim was unripe. In their opening brief, Plaintiffs explained at length why that decision was wrong. Br. 29-38. Because Plaintiffs alleged significant flaws with the Bureau's existing plans for the 2020 Census, the District Court erred by requiring Plaintiffs to wait until the 2020 Census commences before they seek relief, contrary to Plaintiffs' allegations and binding precedent. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999) (the Court need not "wait until the census has been conducted . . . because [delay] would result in extreme—possibly irremediable—hardship"). In their opposition brief, Defendants do not attempt to rebut Plaintiffs' arguments and do not contest that the District Court erred in dismissing Plaintiffs' claims as unripe. U.S. Br. 28. Accordingly, and for the reasons in Plaintiffs' opening brief, this Court should reverse the District Court's erroneous dismissal.

Defendants likewise fail to address Plaintiffs' arguments that the District Court erred in holding that the political question doctrine rendered Plaintiffs'

constitutional claim non-justiciable. Br. 45-48. The District Court's justiciability holding was contrary to abundant precedent and resulted from a misstatement of Plaintiffs' claims. Plaintiffs were not, in fact, asking the District Court to resolve "whether the appropriated funding [for the 2020 Census] is sufficient." Aug. Op. at 13. Defendants do not attempt to rehabilitate the District Court's erroneous ruling on justiciability. Indeed, Defendants do not even mention the political question doctrine in their brief. Accordingly, and for the reasons in Plaintiffs' opening brief, this Court should reverse the District Court's holding that Plaintiffs' constitutional claim presents a non-justiciable political question.

Finally, Plaintiffs' opening brief explained why the District Court correctly concluded in January that Plaintiffs have standing to challenge Defendants' violation of the Enumeration Clause, a finding not only consistent with that of nearly every lower court that has considered the question at the pleading stage, but also one that a unanimous Supreme Court subsequently confirmed. Br. at 38-45; *see also* Jan. Op. at 37-51.[4] Defendants argue in opposition that Plaintiffs have not sufficiently alleged standing on two grounds: that Plaintiffs' theory of injury is too

[4] Defendants suggest in a footnote that the District Court's original standing analysis related only to the "underfunding claim." U.S. Br. 30 n.6. This is not true. The District Court expressly stated that its analysis of Defendants' other justiciability arguments, including standing, pertained to all of Plaintiffs' claims, even those dismissed as unripe, "as they may be reinstated." Jan. Op. at 37 n.16.

speculative and attenuated to establish a concrete and imminent injury; and that Plaintiffs' alleged injuries are not redressable. Neither argument has merit.

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

At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). Plaintiffs have alleged sufficient actual and imminent injuries—the loss of federal funding, vote dilution, malapportionment, and diversion of organizational resources—resulting from Defendants' deprivation of the key resources for counting hard-to-count communities. *See* Br. 18-19. This Court should reject Defendants' argument that this theory of injury "rests on a 'highly attenuated chain of possibilities,'" U.S. Br. 29 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)), because this argument is directly contrary to binding precedent.

The Supreme Court in *New York* unanimously held that, like Plaintiffs here, the plaintiffs established standing because the Bureau's conduct would "depress the census response rate and lead to an inaccurate population count," causing a "diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources." 139 S. Ct. at 2565. In so holding, the Supreme Court rejected the same argument Defendants make here—that the harm is

too speculative to establish an imminent injury. Defendants attempt to distinguish *New York* on the grounds that plaintiffs' harm in that case was the "predictable effect" of the Bureau's conduct, whereas Plaintiffs' causal chain here is too attenuated. *Id.* at 2566. This distinction is not borne out by Plaintiffs' allegations.

Plaintiffs allege a drastic decrease in the resources needed to enumerate hard-to-count communities. *See, e.g.*, SAC ¶¶ 71-73, 115-21, 170-72. An increased differential undercount of those communities is the "predictable effect" of those cuts. *New York*, 139 S. Ct. at 2566. Defendants distort Plaintiffs' allegations in order to deem them speculative; for example, Defendants state that Plaintiffs' "theory rests on speculation that in-office address canvassing will produce worse results than in-person visits." U.S. Br. 29. Defendants omit that the Bureau's own data confirm Plaintiffs' allegations, already plausible on their face, that a significant reduction of field resources for address canvassing will lead to less accurate results. Br. 11-12.

As in *New York*, there is evidence that "[African American] households have historically responded to the census at lower rates than other groups," and Plaintiffs allege plausibly that the Bureau's decisions will exacerbate those low response rates. 139 S. Ct. at 2566. Nothing more is required. As Judge Furman held, *Clapper* dealt with a "significantly more attenuated" causal chain of "five discrete links" at the summary judgment stage. *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 787 (S.D.N.Y. 2018). In this case, as in *New York*, Plaintiffs' chain of causation

has only two steps: "Defendants' actions will increase non-response rates of certain populations and that the resulting undercount, in turn, will cause harm." *Id.*[5] Plaintiffs have demonstrated imminent harms resulting from Defendants' actions.

B. Plaintiffs Have Alleged Redressable Harms.

Plaintiffs have alleged several types of redressable harms that will result from Defendants reducing key resources for the 2020 Census. Although it is "unnecessary to predict" the "exact contours" Plaintiffs' relief will take at the pleading stage, Jan. Op. at 51, there are a number of remedies the Court could ultimately order, including enjoining any one of Defendants' severe reductions or ordering Defendants to expend funds expressly appropriated for certain purposes, *see* Br. 43-44. The relief afforded to Plaintiffs need not be total; it is sufficient that Plaintiffs' injuries will be "reduced to some extent." *Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007).

Defendants do not address the governing standards for redressability, and instead argue only that Plaintiffs' injuries are not redressable because the "court cannot order Congress to appropriate additional funds, and it cannot order a 'sweeping overhaul'" to the 2020 Census." U.S. Br. 31. But of the many possible remedies available to Plaintiffs, these two are not among them, and Plaintiffs do not

[5] Judge Furman also noted that in *Clapper*, the plaintiffs' standing "turned on [proving] injury to *particular* individuals," whereas Plaintiffs here allege harm that is "aggregate or communal in nature," and can be proved through surveys or statistical proof. *Id.* at 787.

seek them. To the extent that Defendants argue about whether the Court *should* remedy Plaintiffs' alleged harms, such a question is better reserved for consideration with the merits of this case. *See Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 99, 100 (4th Cir. 2011) ("This court assumes the merits of a dispute will be resolved in favor of the party invoking our jurisdiction. . . . [N]o explicit guarantee of redress . . . is required to demonstrate a plaintiff's standing."). Plaintiffs have alleged redressable harms.

III. PLAINTIFFS' CLAIMS ARE APPROPRIATE FOR REVIEW UNDER THE ENUMERATION CLAUSE.

Defendants do not defend the District Court's reasons for dismissing Plaintiffs' Enumeration Clause claim on the pleadings and instead appear to argue that Plaintiffs should not be permitted to pursue their claim because the "Supreme Court has never invalidated a census on the basis of the Enumeration Clause . . . [and] it has considered such claims only with respect to discrete actions otherwise susceptible to judicial review." U.S. Br. 16. However, as Defendants acknowledge, the Supreme Court and lower courts have regularly held such claims justiciable. *See* U.S. Br. 27-28 (discussing cases). Because the Constitution and Supreme Court precedent provide a clear baseline for assessing Enumeration Clause claims and Plaintiffs' claims mirror those in previous cases, the District Court erred in dismissing the Enumeration Clause claim as non-justiciable.

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

As in numerous past Enumeration Clause cases, Plaintiffs challenge discrete decisions about the conduct of the actual population count during the census. Plaintiffs specifically challenge the method of undertaking the count with fewer enumerators, radical cuts to partnership and outreach programs, and reduced field offices, in just the same way that plaintiffs in *Utah v. Evans* challenged the method of conducting the count using imputation, 536 U.S. 452, 457-59 (2002), and plaintiffs in *Franklin v. Massachusetts* challenged the method of enumerating overseas personnel, 505 U.S. 788, 791-95 (1992). In each of these cases, the Bureau's chosen methods threatened the accuracy of the enumeration and was thus appropriate for review.

Additionally, Plaintiffs' Enumeration Clause claims differ from the constitutional claims made in *New York*, despite Defendants' efforts to conflate the two. In that case, the Court denied review of Enumeration Clause claims relating to the citizenship question because it argued that such analysis was reserved for "decisions about the population count itself," not for "decisions about what kinds of demographic information to collect." *New York*, 139 S. Ct. at 2566. This limited holding on demographic information has no bearing on review of the decisions presented here about how to conduct the "population count itself." Rather, the

challenged decisions are precisely the kind traditionally considered appropriate for review.

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

In reviewing Enumeration Clause claims, the text of the Clause and subsequent case law provide a clear standard that the Bureau's decisions must meet. Its choices must bear a "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). The Bureau may alter its procedures, but those alterations must satisfy the "reasonable relationship" standard. When, as here, Defendants' actions fail to do so, courts need not defer to the Bureau's decisions.

Further, the Supreme Court has established that there is "a strong constitutional interest in accuracy." *Utah,* 536 U.S. at 478. This "interest in accuracy" includes ensuring distributive accuracy. *See Wisconsin*, 517 U.S. at 20-21 ("[A] preference for distributive accuracy (even at the expense of some numerical accuracy) would seem to follow from the constitutional purpose of the census, viz., to determine the apportionment of the Representatives among the States."). Plaintiffs properly alleged that the challenged actions by Defendants fail to promote numerical or distributive accuracy.

C. Defendants' Actions Violate This Constitutional Standard.

Plaintiffs adequately allege that Defendants' decisions to reduce the number of enumerators by almost one-third, SAC ¶ 71, slash partnership and outreach programs, SAC ¶ 170-71, and halve the number of field offices, SAC ¶ 116, will not result in an actual enumeration. These choices will disproportionally depress the count of communities of color and the areas home to such communities, thus reducing both the distributive and numerical accuracy of the 2020 Census.

Contrary to Defendants' arguments, Plaintiffs do not suggest that the entire operational plan "does not bear a reasonable relationship to the accomplishment of an actual enumeration." U.S. Br. 28. Rather, Plaintiffs contend that six specific actions set forth in the Final Operational Plan fail to satisfy the standard. For example, the Supreme Court has emphasized that an effort to achieve accuracy may be found "where all efforts have been made to reach every household." *Utah*, 536 U.S. at 479. Yet in 2020, the Bureau has abandoned its historic effort "to reach every household." Instead, based on unreliable data from the U.S. Postal Service's Undeliverable-As-Addressed list, certain households will be excluded from non-response follow-up and receive only a single field visit. SAC ¶¶ 157-58.

Plaintiffs have alleged that this decision and the five others that Plaintiffs challenge violate the Enumeration Clause, especially when the Bureau refuses to spend even the resources that Congress has already appropriated to meet this

constitutional obligation. JA 558. On remand, Plaintiffs should have the opportunity to present evidence, including discovery materials and the expert reports that were scheduled to be filed within days of the District Court's dismissal, demonstrating *inter alia* that the Bureau is refusing to expend approximately $1.3 billion in appropriated funds, which is more than sufficient to redress constitutional harms alleged by Plaintiffs.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and this matter should be remanded to the District Court.

Dated: October 7, 2019

Respectfully submitted,

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[Ψ] This motion does not purport to state the views of Yale Law School, if any.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). The brief contains 6,490 words (according to the Microsoft Word 2013 count function), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type style.

Date: October 7, 2019 BY: /s/ Michael J. Wishnie
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CERTIFICATE OF SERVICE

I, Michael J. Wishnie, certify that today, October 7, 2019, I have caused a true and correct copy of the foregoing Brief of Plaintiffs-Appellants to be filed with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit via the appellate CM/ECF, which will send a notice of this filing to all participants in this case, including counsel for appellees.

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