

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE, et al.,

*Plaintiffs,*

v.

BUREAU OF THE CENSUS, et al.,

*Defendants.*

Case No. 8:18-cv-00891-PWG

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs National Association for the Advancement of Colored People, Prince George's County Maryland, Prince George's County Maryland NAACP Branch, Robert E. Ross, and H. Elizabeth Johnson respectfully move this Court for a preliminary injunction directing Defendants to expend already appropriated funds to (1) increase outreach and communications to no less than 2010 Census levels as directed by Congress; (2) deploy a number of core enumerators whom Defendants are already hiring (but do not intend to use in the field) at no less than 2010 Census levels; and (3) increase the Bureau's presence within Hard-to-Count communities by increasing the number of fixed Questionnaire Assistance Centers, field offices, and/or mobile assistance units within those communities at levels commensurate to 2010.

Plaintiffs' arguments in support of this motion are fully set forth in the attached Memorandum of Law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Michael J. Wishnie, certify that copies of the foregoing Motion for Preliminary Injunction, were served this 21st day of January 2020 upon all counsel of record by ECF.

/s/ Michael J. Wishnie

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR  
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## INTRODUCTION

Equal representation is a core principle embedded in the Enumeration Clause’s requirement of an “actual enumeration” of the population every ten years. U.S. Const. art. I, § 2, cl. 3. At one time, the Enumeration Clause expressly undercounted African Americans, counting only three-fifths of the slave population. Mem. Op. and Order, ECF No. 64, at 2. But the passage of the Fourteenth Amendment “removed [that] inequality,” *id.* at 2, and consistent with that history, the census must now strive to equally and accurately enumerate *all* persons. Consistent with this core principle, this Court is obligated to ensure that “[t]o the extent possible, the census must be conducted in a way that will not thwart the goal of equal representation, because the accuracy of the census impacts how representation is apportioned.” *Id.* at 20 (citing *Wisconsin v. City of New York*, 517 U.S. 1, 19-20 (1996)). Defendants’ radical alterations to the design of the 2020 Census flout that obligation despite readily available funds and binding Congressional directives. Plaintiffs seek emergency relief to prevent the largest differential undercount of minority populations in modern history.

For the 2020 Census, public sources and evidence obtained in discovery in this case establish that Defendants prioritized achieving an arbitrary and unnecessary cost restriction over meeting their constitutional obligation to seek distributive accuracy in the census. Defendants have drastically reduced the key resources that they know are needed to reach Hard-to-Count populations, including: (1) slashing resources for partnerships and community outreach to Hard-to-Count populations, in violation of congressional directives to match 2010 Census levels, adjusted for inflation; (2) deploying *two-thirds* the level of enumerators used in 2010, despite a larger population and increased challenges in reaching minority populations; (3) cutting the number of field offices *in half*; (4) heavily relying on in-office procedures over fieldwork for



assembling the Master Address File, despite documented high error rates in doing so; and (5) relying on incomplete administrative records instead of field workers to count certain homes.

Defendants' changes to the 2020 Census threaten a massive undercount of African Americans and other communities of color, leading to losses in federal funding and political representation for the communities Plaintiffs represent. These decisions are unreasonable on their face; they are even more unreasonable considering Defendants admit that they have carried over \$1.3 billion from Fiscal Years 2018 and 2019 unspent, a decision a Congressional committee recently called "disingenuous" and one that could "put the 2020 Census at risk during the most critical year of its operation." Declaration of Michael J. Wishnie ("Wishnie Decl."), Exhibit 1 at 14 ("2020 Appropriations House Report"). Congress has since allocated an *additional* over \$7 billion for Fiscal Year 2020. Wishnie Decl., Exhibit 2 at 72 ("2020 Appropriations Package"). In refusing to spend its funds, the Bureau has ignored Congressional directions—in 2018, 2019, and 2020—to spend appropriated money on outreach and programs designed to count Hard-to-Count communities. Defendants are not reasonably exercising their discretion based on the goal of achieving accuracy, as required. Rather, Defendants' stated goal is to avoid using those funds at all. As a result of the Bureau's decisions, even if the Bureau were to spend those funds much later in Fiscal Year 2020, it would be too little, too late to avoid a historically severe undercount. This Court's immediate intervention is therefore needed to prevent that discriminatory undercount from occurring.

Plaintiffs allege that Defendants' five design choices listed above violate the Constitution, individually and collectively. To remedy these violations, Plaintiffs request a preliminary injunction directing Defendants to expend \$770 million of the \$1.3 billion in already-appropriated funds that they have declined to spend, in three specific areas: (1) to increase outreach and

communications to no less than 2010 Census levels as directed by Congress (\$127.8 million); (2) to deploy a number of core enumerators whom Defendants are already hiring (but do not intend to use in the field) at no less than 2010 Census levels (\$597.2 million); and (3) to increase the Bureau's presence within Hard-to-Count communities by increasing the number of fixed Questionnaire Assistance Centers, field offices, and/or mobile assistance units within those communities at levels commensurate to 2010 (\$45.6 million). Plaintiff NAACP represents Hard-to-Count communities across the country and seeks this relief on a nationwide level.

### **BACKGROUND**

The decennial count of the U.S. population requires careful planning and enormous resources to ensure that everyone is counted once and in the right place. By longstanding design, that process proceeds in three stages. *First*, Census Bureau (the "Bureau") employees canvass the nation's addresses to create a Master Address File ("MAF"). *Next*, the Bureau engages in outreach campaigns to increase the self-response rate. This includes sending mail to every housing unit in the MAF, but also hiring partnership staff from Hard-to-Count communities to encourage those groups to respond to the census, engaging in advertising campaigns targeted at Hard-to-Count communities, and deploying the Bureau's enumerators to nonresponding housing units in Nonresponse Followup ("NRFU") visits. *Last*, the Bureau enumerates the population.

Across each phase, the Bureau has radically altered and cut back on operations, while reserving more than \$1 billion in unexpended appropriations from Fiscal Years 2018 and 2019. The Bureau has refused to expend these funds despite Congress's instruction that they be spent on discrete activities to prevent a differential undercount. And, as described further below, the Bureau has made a series of unreasonable and sweeping changes that will exacerbate the absolute undercount and the differential undercount of Hard-to-Count populations. The Bureau cannot

rationality defend its decisions; it has improperly prioritized the cost of the enumeration over constitutionally mandated accuracy and compliance with Congressional funding directives.

**I. The Bureau's Unreasonable Decision-Making in Underfunding Census Programs.**

To cut costs for the 2020 Census, the Bureau has made five design choices that individually and collectively create an imminent risk of a massive differential undercount of African American and other Hard-to-Count populations. The Bureau has decreased resources for outreach, advertising, and community partnerships, despite express Congressional direction to spend money on these programs. Moreover, it is reducing the number of enumerators by one-half, has cut the number of field offices by the same amount, and has eliminated physical assistance centers entirely. The Bureau's decisions to decrease staff on the ground, local partnerships, and a significant brick-and-mortar footprint threaten the Bureau's ability to conduct an actual enumeration and will disproportionately impact Hard-to-Count communities.

**A. The Bureau Has Significantly Reduced the Staffing and Infrastructure of the Communications and Partnership Programs.**

The outreach phase of the census is "critical" to raising awareness among the population as a whole and particularly among Hard-to-Count communities. *See* Wishnie Decl., Exhibit 3 at 1, 9; Wishnie Decl., Exhibit 4 at 100 ("Final Operational Plan"). The two complementary programs that comprise this phase of the census—the Partnership Program and the Integrated Communications Program—are also key to assuaging people's fears about participation in the census. *See* Declaration of Dr. Mark Doms at ¶ 10, 23 ("Doms Decl."); Declaration of Professor Sunshine Hillygus ("Hillygus Decl.") at ¶ 20. Such fears are particularly acute among minority populations, who are more likely to have negative attitudes about the census and to report fears that their questionnaire answers will be used against them. *See* Doms Decl. at ¶ 23; Hillygus Decl. at ¶ 50(c).

Through the Partnership Program, the Bureau “traditionally focuses on establishing partnerships with organizations that represent hard-to-count populations.” Final Operational Plan at 209. Nevertheless, the Bureau has decreased the size of the Partnership Program from 2010 to 2020. In 2010, the Bureau hired a total of **2,961** partnership staff. Doms Decl. at ¶ 11. For 2020, the Bureau has cut those numbers almost in half, with just **1,630** positions planned. *Id.* at ¶ 12. Adjusted for inflation, the partnership budget has been cut by 29%. Doms Decl. at ¶ 13.

The Integrated Communications Program is also significantly underfunded. The Communications Program includes paid media advertising, partnership efforts in local communities, and social media communications. *See* Wishnie Decl., Exhibit 5 at 13-14. On a per-individual basis, the Bureau’s spending on advertising compared to 2010 has remained flat. Doms Decl. at ¶ 14. This level of funding will cause an undercount for Hard-to-Count communities: given cuts to the Partnership Program and other outreach activities, and the increased costs of airtime due in part to the 2020 presidential election, *more* spending is required to reach Hard-to-Count communities even just to match 2010 levels of awareness. *Id.* at ¶ 41.

Further, the Bureau has drastically reduced funding and staffing for the Partnership and Communications Programs despite express Congressional instruction to expend “no less than the level of effort for outreach and communications that was utilized in preparation for the 2010 Decennial Census, adjusted for inflation.” Wishnie Decl., Exhibit 6 at H10962 (“Explanatory Statement”). The Bureau has the funds to comply with this instruction but has chosen not to use them: It refuses to spend over \$1 billion that Congress appropriated to it in Fiscal Years 2018 and 2019. *See* Wishnie Decl., Exhibit 7 at CEN-51 (“2020 Budget Request”). The Bureau has flatly ignored Congress’s “direct[ions] . . . to prioritize a strong engagement strategy with partners and trusted voices” and spend additional funds on outreach programs. 2020 Appropriations House

Report at 15.

**B. The Bureau Plans to Hire an Unreasonably Small Number of Enumerators.**

Because Hard-to-Count populations historically self-respond at much lower rates than the general population, an adequate number of enumerators is essential for reducing the differential undercount. Hillygus Decl. at ¶ 30. But in order to avoid the costs of these in-person follow-ups, the Bureau plans to significantly reduce the scale of NRFU operations—despite evidence demonstrating that more, and not fewer, enumerators will be needed to obtain responses from Hard-to-Count communities.

The population of the United States has increased since 2010, from 308.7 million to approximately 334.5 million people. *See* Wishnie Decl., Exhibit 8 at 2; Wishnie Decl., Exhibit 9 at 1. In addition, the total number of housing units has increased by 12.7 million compared to 2010. *See* Wishnie Decl., Exhibit 10 at 145 (“2020 BoE”). Based on the increased population alone, an increased NRFU workforce is necessary to reach the 2010 response rate. Doms Decl. at ¶ 24. But the Bureau is employing more than two hundred thousand *fewer* enumerators than in the 2010 Census.

In 2010, the Bureau employed **516,709** enumerators. *See* Wishnie Decl., Exhibit 11 at 222. In 2020, the Bureau intends to train approximately 399,938 enumerators, but plans to employ only **260,829** “core enumerators.” *See* Wishnie Decl., Exhibit 12 at 117:1-117:15 (“Taylor Dep. Tr.”). That is, while the Bureau plans to train 77.4% as many enumerators as in 2010, it intends to actually deploy in the field *a mere 50.5%* of the 2010 enumerator workforce. Based on the Bureau’s own data, the Bureau is planning to *reduce* the pool of trained enumerators by 32.6% even though it anticipates the underlying demand for NRFU resources to *increase* by 16.8%—and perhaps more if the self-response rate falls below expectations. Doms Decl. at ¶ 25.

And it is likely that the self-response rate will fall below expectations. The Bureau

estimates that, six weeks after it sends out questionnaires and invitations to respond to the census online, 60.5% of households will have done so—an unreasonable and arbitrary estimate. *See* Taylor Dep. Tr. at 127:12-127:25. In the 2018 End-to-End Test in Providence, Rhode Island—a less diverse community than those represented by Plaintiffs and one with greater internet access—the self-response rate was only 56%. *See* Wishnie Decl., Exhibit 13 at 4 (“Fontenot Presentation”). Among Black responders, the self-response rate was 39%, and for people of Hispanic origin, it was 43%. *Id.* at 4, 8. No test in the 2020 Census life cycle has *ever* produced a self-response rate of 60%, Taylor Dep. Tr. at 131:2-10, and it is particularly unreasonable to expect such a response from Hard-to-Count populations.

The Bureau has attempted to justify its estimate by claiming that new technology will improve enumerator productivity. *See* Final Operational Plan at 25. However, in the limited testing the Bureau conducted as part of the 2018 End-to-End Test, these technologies did not always work as planned. *See* Wishnie Decl., Exhibit 14 at 9-12 (“GAO, IT Challenges”). The assumptions regarding increased household self-response and enumerator productivity are thus unreliable, and the Bureau’s plans to employ a mere half of the 2010 enumerator workforce are correspondingly inadequate.

**C. The Bureau Has Drastically Reduced the Number of Census Field Offices.**

Just as the Bureau has reduced the number of enumerators for NRFU, it has also changed both the number and locations of Area Census Offices (“ACOs”), the brick-and-mortar offices out of which the enumerators and their supervisors work. The Bureau has reduced the number of ACOs from 495 in 2010 to just 248 in 2020.<sup>1</sup> *See* Wishnie Decl., Exhibit 15 at 1 (“OIG, NRFU Workload

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<sup>1</sup> In 2010, there were 494 local census offices and one area census office. The Final Operational Plan calls for just 248 area census offices for the 2020 Census.

Demands”). Thus, the number of enumerators per ACO has increased by 41% to a staggering 1,034 enumerators per ACO. *See id.* at 6. The OIG found that the Bureau had not assessed the effect of this increase and “*could not* know what impact these increases will have on NRFU operations, other than increased costs.” *Id.* (emphasis added).

The Bureau has also jettisoned a program critical to capturing households that are left out of the MAF, and that are therefore “missed” during the self-response and NRFU phases of the count. It eliminated nearly 40,000 staffed Questionnaire Assistance Centers (“QACs”) and unstaffed Be Counted (“BC”) sites, and replaced them with only mobile questionnaire assistance that have no fixed presence. *See* Wishnie Decl., Exhibit 16 at 6 (“2010 QAC Assessment”); *see* Wishnie Decl., Exhibit 17 at 94:06-96:01 (“Kobilarcik Dep. Tr.”). However, in 2010, 65% of people who used a QAC reported that they found it by seeing it in person. *See* 2010 QAC Assessment at xiv. Therefore, it is unreasonable to expect people left out of the MAF, who are disproportionately from Hard-to-Count communities, to find and use mobile-based systems that lack the clear physical presence of a QAC.

**D. The Bureau Has Replaced Most In-Field Address Canvassing with In-Office Address Canvassing.**

In previous censuses, the Bureau generated the MAF by sending temporary Bureau employees called “listers” to walk every block in the nation. *See* Wishnie Decl., Exhibit 18 at 4 (“GAO, Actions Needed to Improve”). But in 2020, for the first time in the history of the census, the Bureau canvassed only 35% of blocks in the field.<sup>2</sup> *See* Doms Decl. at ¶ 39. The Bureau is vetting the accuracy of the remaining addresses using only a combination of sources that include satellite imagery, local government records, and information from “third-party data providers”

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<sup>2</sup> The Bureau originally stated in the Final Operational Plan that it would canvass 38% in field, Final Operational Plan at 91, but it ultimately canvassed only 35%.

(which they call “in-office” address canvassing). *See* 2020 BoE at 20; Final Operational Plan at 93; GAO, Actions Needed to Improve at 4-5; Wishnie Decl., Exhibit 19 at 1 (“OIG, Address Canvassing Risk”).

The Bureau barely tested “in-office” canvassing prior to implementation, and the End-to-End Test showed significant problems with the new process. The OIG found that “in-office address canvassing results differed from in-field results *in 61 percent of the blocks tested.*” OIG, Address Canvassing Risk at 3 (emphasis added).<sup>3</sup> Rather than finding the high error rate alarming, the Bureau proceeded with in-office canvassing despite the fact that it “does not know which populations or regions will be most affected by the missed household in passive blocks.” *Id* at 11.

**E. The Bureau Will Make Only Very Limited Efforts to Count Households That Appear Vacant or Nonexistent Based on Unreliable Administrative Records.**

For the 2020 Census, the Bureau is relying on administrative records to classify housing units as occupied, vacant, or nonexistent, and even to enumerate housing units. *See* Final Operational Plan at 125. However, non-Hispanic White and economically advantaged communities are more likely to be represented in administrative records than Hard-to-Count communities. *See* Wishnie Decl., Exhibit 20 at 5 (“GAO, Administrative Records”). Accordingly, the Bureau’s reliance on administrative records will likely *increase* the differential undercount by enumerating more non-Hispanic White people than people of color. *See* Hillygus Decl. at ¶ 46. Further, the Bureau’s own testing showed the inaccuracy of administrative records, with 30 percent of housing units identified as nonexistent and 18 percent of those identified as vacant found to be in fact occupied. Wishnie Decl., Exhibit 21 at 64. This only heightens the need for more

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<sup>3</sup> This figure does not account for lister error: The OIG found that three of ten observed listers in the End-to-End test did not follow Bureau procedures. *See* OIG, Address Canvassing Risk at 9. The Bureau’s lead cost estimator did not know whether noncompliance with procedures was accounted for in the 2019 BoE. *See* Kobilarcik Dep. Tr. at 127:24-128:12.



enumerators, rather than fewer, to ensure that such households from Hard-to-Count communities are not disproportionately undercounted.

**II. The Bureau Has Adequate Funds but Will Not Spend Them.**

The Bureau's unreasonable constraint on census spending has led it to carry over appropriated funds, rather than spend them on programs that would deliver an accurate count and as directed by Congress. The Bureau has likely carried over \$1.3 billion into Fiscal Year 2020 unspent. Taylor Dep. Tr. at 177:16-178:6. These unspent funds do not need to be held over in light of the more than \$7 billion appropriated to the Bureau, 2020 Appropriations Package at 72, and would help fix the serious problems identified in the Bureau's own data and analysis and pay for a census design that will accurately count Hard-to-Count communities. Adjusted for inflation and for the population increase between 2010 and 2020, the Bureau has cut \$127.8 million from the Partnership Program, \$597.2 million from NRFU operations, and \$45.6 million from QACs, compared to 2010 spending. Doms Decl. at ¶ 15. These total approximately \$770 million, less than the Bureau's unspent \$1.3 billion. Spending its appropriated money on the programs Plaintiffs have identified would minimize the differential undercount and conform Defendants' conduct to its legal obligations.

**III. Defendants' Massive Cuts Will Disproportionately Harm Plaintiffs and Other Hard-to-Count Communities.**

The Bureau's five unreasonable changes to the census create an imminent risk of a dramatic increase in the differential undercount because they disproportionately disadvantage Hard-to-Count communities, including the Plaintiffs. As described above, the Bureau has slashed resources devoted to programs that, at each stage, ensure Hard-to-Count communities, and particularly people of color, are counted. As a result of these cuts, Plaintiffs' expert Professor Sunshine Hillygus predicts that the African American self-response rate is likely to fall by 7 to 11 percentage

points. Hillygus Decl. at ¶ 50(a). The resulting differential undercount is likely to be at least two percentage points higher for African American communities under a conservative estimate, and correspondingly higher for other racial groups and Hard-to-Count communities, than it otherwise would have been. Hillygus Decl. at ¶¶ 2, 50(e).

Such an undercount will significantly harm Plaintiffs, which include a historically undercounted, racially diverse county; two residents of that county; a national organization devoted to the equality of racial minorities; and a local affiliate of that organization. Prince George's County is a majority African American county in Maryland, and the Census Bureau has characterized parts of the County as Hard-to-Count. *See* Wishnie Decl., Exhibit 22. The County has consistently suffered from undercounts in recent censuses. In the 1990, 2000, and 2010 Censuses, the County's net undercounts were 3.0 percent, 1.91 percent, and 2.3 percent, respectively. *See* Wishnie Decl., Exhibits 23, 24, 25. The 2010 figure represented the highest net undercount in Maryland and was among the highest net undercounts nationwide for a county with 100,000 residents or more. *See*; Declaration of Euniesha Davis ("Davis Declaration") at ¶18; *see also* Wishnie Decl., Exhibit 27 at Attachment 1.

The undercounts observed in recent censuses have hurt the County's finances. Following the 1990 Census, the Chairman of the County Planning Board concluded that the 3.0 percent undercount the County suffered that year would cost it roughly \$200 million in grants and loans over the following decade. Wishnie Decl., Exhibit 26. This is more than the 1990 undercount, placing the County at risk of losing more funds than the \$200 million lost after the 1990 Census. This drastic loss of funds would seriously harm the County and the individual Plaintiffs—Robert

Ross and Elizabeth Johnson<sup>4</sup>—who reside there. Members of Prince George’s County Maryland NAACP Branch likewise face imminent harm from the County’s potential loss of federal funding. *See* Declaration of Bob Ross (“Ross Decl.”) at ¶ 22.

A significant undercount of Prince George’s County residents would also dilute the political representation that the County’s residents and NAACP members living in the County are afforded in Congress. It would increase the risk that Maryland would lose a seat in the House of Representatives and lead to larger portions of the County being placed within individual Congressional districts during the redistricting process. Maryland relies on census data for intrastate redistricting, M.D. Const. art. III, § 5, and an undercount of Prince George’s County could reduce residents’ representation in the Maryland General Assembly.

The NAACP is the nation’s oldest and largest grassroots-based civil rights organization, with a mission to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. Declaration of Jamal Watkins, Vice President for Civic Engagement, NAACP at ¶ 2 (“NAACP Decl.”). The NAACP’s members reside across the United States, but they are disproportionately represented in states with higher-than-average concentrations of African American residents, including Maryland, and they are also disproportionately likely to reside in Hard-to-Count communities. *Id.* at ¶¶ 4, 7. An enumeration that significantly undercounts African Americans and Hard-to-Count communities will deprive the NAACP’s members of Congressional seats and public funds allocated based on census data. *Id.* at ¶¶ 16-17. To counter these consequences, the NAACP has undertaken considerable expense and effort to encourage participation in the census. *Id.* at ¶ 13. The Prince

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<sup>4</sup> Both individual Plaintiffs drive on roads in Prince George’s County that depend on federal funds for upkeep and repair. *See* Declaration of Bob Ross (“Ross Decl.”) at ¶ 2; Declaration of H. Elizabeth Johnson (“Johnson Decl.”) at ¶ 2-3.

George’s County Branch has also expended substantial resources to educate community members about the importance of the 2020 Census and to encourage them to respond to the census questionnaire. Ross Decl. at ¶ 19.

Without immediate relief, the differential undercount of the 2020 Census will be historically high, unconstitutionally compromising the distributive accuracy of the census and causing significant harms to Plaintiffs.

### LEGAL STANDARD

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). “A plaintiff need not establish a certainty of success,” but only make “a clear showing that he is likely to succeed at trial.” *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (internal quotation marks omitted).

### ARGUMENT

#### **I. Plaintiffs Are Likely to Succeed on the Merits of the Constitutional Claims.**

The Enumeration Clause requires that Defendants’ actions bear a “reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census,” which is to fairly and accurately “determine the apportionment of the Representatives among the States.” *Wisconsin*, 517 U.S. at 20; *see also Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (“*New York*”). In *Wisconsin*, the Supreme Court concluded that a “preference for distributive accuracy (even at the expense of some numerical accuracy)” follows from this constitutional purpose. *Wisconsin*, 517 U.S. at 20. Plaintiffs are likely to succeed on the merits of their claims that the challenged decisions about the conduct of the 2020 Census bear no reasonable relationship to an accurate enumeration of the

population as a whole. The Bureau has made cuts to key community outreach and field operations programs and withheld appropriated funds in violation of congressional directives. These actions create an imminent risk of a gross differential undercount of African Americans and other Hard-to-Count communities.

Courts have concluded that systemic failures in even less dire circumstances may establish an Enumeration Clause violation and provide grounds for a preliminary injunction. In *Carey v. Klutznick*, the Second Circuit concluded that the plaintiffs had established a likelihood of success on their Enumeration Clause claim, when they complained of “grossly inadequate” “master address registers”, and that the “follow-up check” of those address registers was inadequate and disproportionately affected minority residents. 637 F.2d 834, 836, 839 (2d Cir. 1980). That court affirmed the district court’s finding that the plaintiffs “sufficiently established a factual predicate for their claims to the effect that a census undercount is inevitable, that the undercount is particularly large among minority populations that are heavily concentrated in New York, and that Census Bureau procedures were inadequate in New York to avoid this disproportionate undercount.” *Id* at 839. Plaintiffs have made a similar showing here, demonstrating glaring inadequacies that will compound the differential undercount. Moreover, the remedy sought by Plaintiffs—expenditure of approximately \$770 million on three existing programs—is less than the more than \$1.3 billion of appropriated funds Defendants refuse to expend.

**A. The Five Challenged Decisions, Individually and Collectively, Do Not Bear a Reasonable Relationship to the Accomplishment of a Fair and Accurate Census.**

For each of the challenged decisions, Plaintiffs are likely to establish that Defendants have violated the Enumeration Clause because their actions “will exacerbate the undercount” that Plaintiffs “historically experience[]”, and that “proceeding as Defendants are with the 2020 Census will ‘unreasonably compromise[] the distributive accuracy of the census.’” Mem. Op. and Order,

ECF No. 64, at 54-55. This decrease in distributive accuracy will harm Plaintiffs by, among other things, diluting their political representation and depriving them of federal funding that is vital to their communities.

**1. Reducing Communications and Partnership Programs Does Not Bear a Reasonable Relationship to Achieving an Accurate Enumeration.**

Congress has directed the Bureau to ensure that communications and outreach activities be conducted at a level of effort no less than that used for the 2010 Census, adjusted for inflation. *See* Explanatory Statement at H10962. However, in place of the “aggressive and innovative outreach campaigns” that Congress expects, *see Beyond the Citizenship Question: Repairing the Damage and Preparing to Count ‘We the People’ in 2020: Hearing Before the H. Comm. on Oversight & Government Reform, 116th Cong. (2019)* <https://oversight.house.gov/legislation/hearings/beyond-the-citizenship-question-repairing-the-damage-and-preparing-to-count-we> (“House Oversight Committee, Preparing to Count”). Defendants have slashed funding and operations for the communications and partnership programs, significantly reducing their outreach to Hard-to-Count communities from prior years. Such decisions will unreasonably compromise the distributive and overall accuracy of the 2020 Census, in violation of the Constitution.

Outreach in general, and specifically the Partnership Program, was an essential component for reducing the differential undercount of African American communities in 2010, as interactions with partnership staff were a strong predictor of mail response rates. *See* Wishnie Decl., Exhibit 28 at 143 (“Datta, CIPCE”).<sup>5</sup> However, the Bureau has cut the Partnership Program staff in half

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<sup>5</sup> Similarly, when asked how people missed in the Where to Count phase might still be counted, both of the Bureau’s witnesses pointed to the Communications and Partnership Programs. *See* Taylor Dep. Tr. at 135:11-136:14; Kobilarcik Dep. Tr. at 164:16-165:2.

and has not increased spending on the Communications Program on a per-household, inflation-adjusted basis compared to 2010 despite evidence that an increase would be needed to simply raise awareness of the census to 2010 levels, given increased distrust in government and a more crowded media market. *See* Doms Decl. at ¶¶ 12, 14, 23. As the GAO recognizes, and as Plaintiffs' experts demonstrate, these deficiencies are likely to reduce the response rates in Plaintiffs' communities, and thus will increase the differential undercount. In the last census, interactions with partnership staff was one of the strongest predictors of mail response rates for African Americans. *See* Hillygus Decl. at ¶ 21; *see also* Datta, CIPCE at 143. The Bureau's refusal to spend appropriated funds to reach 2010 levels is thus particularly unreasonable.

**2. Reducing Enumerators Does Not Bear a Reasonable Relationship to Achieving an Accurate Enumeration.**

Defendants' drastic cuts to staffing in the field, including its decision not to deploy the full number of enumerators it will hire, will further increase the differential undercount because there will be insufficient personnel to follow up with members of Hard-to-Count communities. As explained by Dr. Doms, the Bureau has cut its enumerator staffing by over 25% compared to 2010, constituting a loss of hundreds of thousands of enumerators, despite a nearly 6% increase in the total U.S. population in that same period. *See* Doms Decl. at ¶¶ 19, 24. Further, the Bureau does not plan to deploy all of the enumerators it hires, but only a subset of "core enumerators." *See* Doms Decl. at ¶ 20. These cuts will disproportionately impact Hard-to-Count communities. Enumerators and staff in the field are necessary to reach non-responding individuals and have been used for this purpose in recent censuses. *See* Doms Decl. at ¶ 17; *see also* Hillygus Decl. at ¶ 44. Without such resources, communities such as Plaintiffs' that have higher non-response rates are more likely to be missed by NRFU operations.

Contrary to the Bureau's statements in the Final Operational Plan, the reduction in

enumerators will not be offset by the increased productivity of individual enumerators and a decrease in the NRFU workload. *See* Final Operational Plan at 9. The Bureau's claim that enumerator productivity will increase is based on unreliable and insufficient data about the use of new technology and protocols that have been only partially tested in a single dress-rehearsal held at a site that does not provide a reliable proxy for the nation as a whole. *See* GAO, IT Challenges at 9-12. The Bureau's assumptions regarding a reduced NRFU workload are irrationally optimistic for three additional reasons. First, the Bureau fails to account for the fact that its own studies indicate that self-response rates are likely to be at least ten percentage points lower in 2020 than in 2010. *See* Wishnie Decl., Exhibits 29 at 11 (67% of householders who participated in Census Barriers, Attitudes and Motivators Study for 2020 were "extremely likely" or "very likely" to fill out a census form, compared to 86% of CBAMS participants surveyed in the leadup to 2010). Second, the Bureau unreasonably assumes that soliciting online census responses will increase the self-response rate, despite evidence to the contrary from the End-to-End Test in which just 56% of individuals self-responded, not the 60.5% assumed by Defendants. *Compare* Fontenot Presentation at 4, *with* 2020 BoE at 50. Moreover, only 54% of the African Americans who responded used Internet Self-Response, compared to 65% of the general test population (an overall response rate by internet of 21% for the African American population). *See* Fontenot Presentation at 4-5; Doms Decl. at ¶ 22. Third, the Bureau assumes without adequate testing that enumerating households based on administrative records will significantly reduce the NRFU workload. *See* Final Operational Plan at 9.

**3. Reducing Field Offices Does Not Bear a Reasonable Relationship to Achieving an Accurate Enumeration.**

The Bureau has also drastically and irrationally reduced its field offices, slashing the number nearly in half. Field offices play a critical role in recruiting, hiring, training, and



supervising field staff for address canvassing and NRFU. *See* Wishnie Decl., Exhibit 30 at 4-5. Field offices also help to organize staff to address problems that arise during address canvassing and NRFU, which is even more important in 2020 given the introduction of novel methods and technologies. *See* Doms Decl. at ¶ 31. The Bureau has also not studied how fewer field offices will affect NRFU operations. *See* OIG, NRFU Workload Demands at 6. Moreover, these vastly reduced resources have been allocated to the detriment of Hard-to-Count communities; for example, the Bureau has eliminated the ACO in Prince George’s County entirely, instead keeping the ACO in Hanover, Maryland—a higher income, predominantly non-Hispanic White community. These decisions bear no relationship to census accuracy.

The Bureau also eliminated other forms of physical outreach. In a drastic departure from the use of “expanded questionnaire assistance operations” lauded by the Supreme Court in *Wisconsin*, 517 U.S. at 8, Defendants have eliminated in-person “QACs” altogether, even though in the 2010 Census such sites added 760,748 additional people to the count. *See* 2010 QAC Assessment at xvi. The mobile initiative proposed to replace QACs is insufficiently tested and cannot replace the nearly 40,000 physical sites used last census. *See* Hillygus Decl. at ¶ 32, 35. By reducing the number of individuals counted in Hard-to-Count communities, these decisions will inevitably increase the differential undercount.

**4. Reducing In-Field Address Canvassing Does Not Bear a Reasonable Relationship to Achieving an Accurate Enumeration.**

The Bureau’s decision to reduce in-field address canvassing and replace it with in-office address canvassing for the first time is unreasonable and will negatively impact the accuracy of the 2020 Census. *See* Hillygus Decl. at ¶ 41. In deciding to rely on in-office procedures, the Bureau has cited only the need to reduce costs. However, the OIG as well as the Bureau’s limited field testing have shown that the use of address lists developed mostly in-office is significantly less

accurate than using lists developed in-field; indeed, the Bureau's own testing indicated that as many as 1.4 million households could be missed as a result. *See* OIG, Address Canvassing Risk at 11. As demonstrated by Professor Hillygus, these households are disproportionately likely to come from Hard-to-Count communities. *See* Hillygus Decl. at ¶¶ 39, 42. Accordingly, Plaintiffs' response rates will be lower, and the differential undercount will increase.

**5. Relying Excessively on Administrative Records Does Not Bear a Reasonable Relationship to Achieving an Accurate Enumeration.**

Finally, the Bureau's decision to rely heavily on administrative records in enumeration will undermine the accuracy of the 2020 Census, particularly for Hard-to-Count communities. In prior censuses, the Bureau relied solely on in-person enumeration of households. In 2020, however, the Bureau instead plans to rely on administrative records to classify housing units as occupied, vacant, or nonexistent, as well as to enumerate housing units that do not initially self-respond and cannot be reached after one visit. *See* Final Operational Plan at 125.

This will exacerbate the differential undercount of Hard-to-Count communities. Non-Hispanic White and economically advantaged communities are more likely to be represented in administrative records than Hard-to-Count communities and more likely to be enumerated as a result. *See* GAO, Administrative Records at 5. In addition, census research has found that households are more likely to be predicted vacant in areas with large shares of African Americans. Hillygus Decl. at ¶ 46. Accordingly, the Bureau's reliance on administrative records for this purpose will likely *increase* the differential undercount by enumerating more non-Hispanic White people than people of color. *Id.* The census needs more enumerators, not fewer, to ensure that such households are not disproportionately undercounted.

**B. Plaintiffs Are Likely to Show That the Bureau Has Refused to Spend Appropriated Funds That Would Reduce the Differential Undercount.**

The decisions outlined above are especially unreasonable in light of the Bureau's refusal

to spend funds Congress has appropriated for these very purposes. The Bureau carried over more than \$1 billion from Fiscal Years 2018 and 2019 unspent, *see* 2020 Budget Request at CEN-51, and was appropriated \$7.3 billion more for Fiscal Year 2020. *See* 2020 Appropriations Package at 72. However, the Bureau has failed to give a satisfactory explanation for failing to expend this money on key programs such as NRFU and outreach. *See* Taylor Dep. Tr. at 176:13-178:2. To the extent the Bureau has given reasons for drastically cutting such programs, it has claimed that it lacks funds to implement those programs at levels commensurate to 2010. *See* Doms Decl. at ¶ 27, 32-33. Those reasons are plainly belied by the Bureau's unspent appropriations.

In failing to expend these appropriated funds, the Bureau has also ignored explicit Congressional direction to engage in additional outreach and promotion. *See* Wishnie Decl., Exhibit 31 at 94 (“2019 Appropriations Bill”). Members of Congress have indicated the need for the Bureau to spend more on outreach. *See* House Oversight Committee, Preparing to Count (statement of Rep. Jamie Raskin at 3:33) (“In light of the damage done, I think the Bureau should increase outreach to hard to count communities instead of sitting on a billion dollars in appropriated funds . . . I fail to see a compelling reason for the delay.”); *see also* 2020 Appropriations House Report at 14-15. The Bureau's refusal to spend the money it already has to counteract harms that will flow from its census design defies reason.

This Court should hold unlawful the Bureau's refusal to spend appropriated funds on these vital resources and direct the Bureau to use these funds for the operations necessary to reach Hard-to-Count communities. *See, e.g., Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647, 659-60 (D. Md. 2018) (vacating HHS's decision to terminate grant to plaintiff where HHS did not “consider[] any of the[] Congressionally prescribed factors”). In similar circumstances as here—where an executive agency has refused to spend appropriated funds pursuant to the factors prescribed by

Congress—courts instruct the agency to spend those funds in the appropriate manner. *See id.* at 661 (ordering defendant agency to provide grants to plaintiff “consistent with [the court’s] opinion”). Even though an executive agency may have “policy reasons . . . for wanting to spend less than the full amount appropriated by Congress for a particular project or program,” the Executive Branch “does not have unilateral authority to refuse to spend the funds.” *In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (Kavanaugh, J.); *see also City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (“[T]he President does not have unilateral authority to refuse to spend the funds.”); *Guadamuz v. Ash*, 368 F. Supp. 1233, 1244 (D.D.C. 1973) (“Money has been appropriated by the Congress to achieve the purposes of both programs and the Executive has no residual constitutional power to refuse to spend these appropriations.”).

**C. Directing Expenditure of Appropriated Funds on Communications and Partnership Programs, Enumerators, and QACs is a Proper Remedy.**

The Bureau has more than enough funds to cure the deficiencies outlined above and to pay for a census design that will accurately count Hard-to-Count communities. Congress repeatedly directed the Bureau in 2018 and 2019 to spend appropriated funds on outreach, QACs, and programs designed to count Hard-to-Count communities, a command the Bureau has ignored. *See* 2019 Appropriations Bill at 94; *see also* 2020 Appropriations House Report at 14-15; Wishnie Decl., Exhibit 32 at 611 (“the Bureau shall devote funding to expand targeted communications activities as well as to open local questionnaire assistance centers in hard-to-count communities.”). In passing the Bureau’s most recent appropriations, the explanatory statement accompanying the final law specifically directed the Bureau to implement the 2010 baseline (adjusted for inflation) for outreach and communications activities, which would help prevent an inaccurate count of Hard-to-Count communities. *See* Explanatory Statement at H10962.

In addition, the Bureau still has sufficient time to expend some of those funds to deploy

more “core enumerators”, expand outreach efforts, and increase the number of in-person QACs and mobile assistance units. Indeed, the total cuts from 2010 levels to partnership programs, NRFU, and QACs add up to \$770 million, *less* than the amount the Bureau has on hand. *See* Doms Decl. at ¶ 15. Though the Court must act now to avoid irreversible harm to Plaintiffs, it is not yet too late for the Bureau to spend appropriated funds on these vital activities. There is still time to remedy Defendants’ constitutional violations arising from each of the five activities outlined here by expanding efforts for the first three activities: deploying more “core enumerators” in the field, expanding outreach efforts, and increasing the number of fixed QACs, field offices, and mobile assistance units.

## **II. Without Preliminary Relief, Plaintiffs Will Be Irreparably Harmed.**

There is an imminent risk of a massive differential undercount that cannot be remedied by any post-hoc relief. Defendants’ obstinacy in refusing to spend appropriated funds will irreparably harm Plaintiffs absent immediate judicial intervention.

If the deficiencies in the 2020 Census design are not immediately addressed, there will be no later opportunity for the Bureau to remedy its fundamental errors down the line. People who are not identified in the early phase of the census are virtually guaranteed to remain uncoun­ted later in the process as it becomes more difficult to access information about participation. People who do not come into contact with the Bureau’s outreach programs may not be counted, particularly in Hard-to-Count communities. And people who do not self-respond and are not targeted during the curtailed NRFU operation risk not being enumerated at all. These errors accumulate and become impossible to correct as the census progresses.

Professor Hillygus predicts that allowing the Census to proceed as currently designed would increase the differential undercount of Black communities by at least two percentage

points—which would represent the largest differential undercount in the modern history of the Census—and would result in similar undercounts for other minority groups. *See* Hillygus Decl. at ¶ 2. This significant differential undercount would harm Plaintiffs by leading to a substantial loss in federal funding and representation, since census data is used for allocating hundreds of billions of dollars in public funding, seat apportionment in the U.S. House of Representatives, voting rights enforcement, and drawing boundaries for Congressional districts and many state legislative districts, including in Maryland. These are precisely the types of harms—“diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources”—that the Supreme Court recognized just last Term. *New York*, 139 S. Ct. at 2565. In particular, the Court recognized that the plaintiffs had standing because if they were “undercounted by as little as 2%—lower than the District Court’s 5.8% prediction—they will lose out on federal funds that are distributed on the basis of state population.” *Id.* Plaintiffs’ injuries here are identical to those recognized by the Supreme Court and are sufficient to establish that Plaintiffs will be harmed as a result of Defendants’ constitutional violation. These harms will last at least until the 2030 Census, and they are irreparable, as they “cannot be fully rectified by the final judgment after trial.” *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 216 (4th Cir. 2019) (internal citations omitted). As a result, Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief.

### **III. The Balance of Hardships and Public Interest Strongly Favor Plaintiffs.**

Plaintiffs must also show “that the balance of equities tips in [their] favor.” *Di Biase*, 872 F.3d at 230. That is plainly the case here, in light of the enormous amount of political power and billions of dollars in federal funding at stake for the next ten years, and the impossibility of remedying a differential undercount after the fact. The burden on the Defendants is significantly

less than the burden to the Plaintiffs—and to the nation as a whole—if an inadequately conducted census results in a large differential undercount, which is inevitable if Defendants refuse to spend appropriated funds on the level of communications and partnership programs directed by Congress, deploy additional “core” enumerators, and increase QACs, field offices, and mobile assistance units. The Bureau already possesses the money to fix these design flaws and has been instructed to do so by Congress.

Finally, an injunction such as that sought by Plaintiffs to remedy the deficiencies in planning and preparations with increased activity in three areas—communications and partnership, enumerators, and questionnaire assistance for Hard-to-Count communities—will ensure a more accurate census and is indisputably “in the public interest.” *Di Biase*, 872 F.3d at 230. The constitutional command of an “actual Enumeration” requires “distributive accuracy,” which can only be accomplished by a census that is properly designed to count Hard-to-Count communities. *See* Mem. Op. and Order, ECF No. 64, at 54. The “public interest . . . requires obedience to the Constitution and to the requirement that Congress be fairly apportioned, based on accurate census figures.” *Carey*, 637 F.2d at 839 (further holding that “it is in the public interest that the federal government distribute its funds, when the grant statute is keyed to population, on the basis of accurate census data”). “Nothing is more existential to the preservation of the ‘Republic’ than requiring an ‘actual Enumeration’ without ‘partiality or oppression.’” *NAACP v. Bureau of the Census*, 945 F.3d 183, 194 (4th Cir. 2019) (Gregory, J., concurring) (internal citations omitted). Accordingly, this Court should grant the requested injunction to ensure an accurate census and avoid a differential undercount that would deprive Plaintiffs and other Hard-to-Count communities of the public funding and fair representation to which they are entitled.

## CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to immediate nationwide injunctive relief directing the Bureau to spend money already appropriated to (1) increase outreach and communications to no less than 2010 Census levels as directed by Congress (\$127.8 million); (2) deploy a number of core enumerators whom Defendants are already hiring (but do not intend to use in the field) at no less than 2010 Census levels (\$597.2 million); and (3) increase the Bureau's presence within Hard-to-Count communities by increasing the number of fixed Questionnaire Assistance Centers, field offices, and/or mobile assistance units within those communities at levels commensurate to 2010 (\$45.6 million). *See* Doms Decl. at ¶ 15 (calculating cuts to the programs).

Respectfully submitted,

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\* This motion does not purport to state the views of Yale Law School, if any.