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.

No. 8:18-cv-00891-PWG

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' PRELIMINARY-INJUNCTION MOTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Docket Materials

INTRODUCTION

This complaint marks Plaintiffs' third attempt (in this court alone) to challenge the operations of the 2020 Census before a single person was counted. Plaintiffs' claims have evolved—from claiming the Census lacked confirmed leadership and adequate funding in their first complaint to now claiming that it has too much unspent money and should be ordered to hire more temporary field staff in this most recent effort. These changes underscore the deficiencies in Plaintiffs' suit, which, if successful, would harm the efforts of the Census Bureau to obtain an accurate 2020 count. The Court should deny Plaintiffs' motion for emergency relief, dismiss the Complaint, and enter judgment for Defendants.

Fundamentally, Plaintiffs get the 2020 Census design backwards. The 2020 Census has been designed precisely to *focus agency resources on harder to count areas and populations* by reducing unnecessary expenditures on counting those who will be easily counted. The 2020 Census design achieves this balance, while reserving a significant amount of funding in order to successfully count the population in the event of any unforeseen problem—be it natural disaster, terrorist attack, or even the census design not working as planned.

In their preliminary-injunction motion, Plaintiffs ask the Court to substitute its judgment for those of the career professionals who have been planning the census for a decade and order the Census Bureau to waste nearly $800 million of taxpayer dollars on non-solutions for problems (i) that are moot, (ii) that may never materialize and (iii) that the Census Bureau has the resources, expertise, and contingency planning to actually solve if they do. Plaintiffs do so based on the unfounded assumption that current expenditures should track those of the 2010 Census, even though that census was designed in materially different ways.

Such blunt force logic is inapplicable to this year's census; as established by declarations from long-term Census Bureau employees, the 2020 Census reflects substantial and noteworthy departures from prior censuses. Indeed, precisely because the Census Bureau is continually refining its work and Plaintiffs' proposed solution—to spend money on broad programs—are so far removed from the (unfounded) concerns they raise, two of the three items of relief they request are essentially moot. Their proposed relief would undermine

the decade-long efforts of thousands to ensure the best possible count of this country's people and this continued litigation distracts the professionals in charge of seeing that work successfully completed.

Plaintiffs' claims are as insubstantial legally as they are unfounded factually. Their sole claim is that the 2020 Census operational plan creates the risk of undercounting the population in violation of the Constitution's Enumeration Clause. But the Constitution does not require a perfect count, let alone any particular number of enumerators or physical offices. If there is any standard to apply in this area, it requires, at most, that the Census Bureau conduct an enumeration that bears a "reasonable relationship" to counting the population. The Bureau's diligent efforts far exceed that threshold. And the Court has no jurisdiction to entertain these meritless claims in any event. The Court should deny Plaintiffs' motion for preliminary injunction, grant Defendants' motion to dismiss (and/or summary judgement), put an end to this litigation once and for all, and allow the Census Bureau to do its job unimpeded.

BACKGROUND

I. Procedural History

This represents Plaintiffs' third substantive challenge to the 2020 Census in this action.[1] Plaintiffs' initial complaint alleged that the 2020 Census was underfunded, ECF No. 38 ¶¶ 32–54, the Census Bureau was understaffed as a result of a federal hiring freeze in effect for only four months in early 2017, *id.* ¶¶ 55–59, the Census Bureau lacked a permanent director, *id.* ¶¶ 60–66, and the 2020 Census contained putative "design flaws" including use of online forms and inadequate protection from "cyber threats," *id.* ¶¶ 67–94. This Court dismissed all except the underfunding claim, reasoning that the government shutdown in effect in early 2019 created an extraordinary circumstance in which a narrow declaration from the Court directed at Congress would redress a proven shortfall in funding. *See* ECF No. 64 at 51.

[1] Plaintiffs' counsel also filed a complaint in the Southern District of New York on November 26, 2019, making substantively identical allegations to the present complaint under both the Enumeration Clause and the Administrative Procedure Act. *See Center for Popular Democracy Action, et al. v. Bureau of the Census, et al.*, No. 19 Civ. 10917 (S.D.N.Y.).

Plaintiffs proceeded to discovery on their underfunding claim, *id.*, while amending their Complaint to add APA claims challenging a *different* set of aspects of the census design, abandoning their claims regarding "cyber threats," use of online census forms, and the lack of a Census Bureau Director. *Compare* ECF No. 91 ¶ 67 *with* ECF No. 38 ¶ 68. This Court dismissed the remainder of Plaintiffs' claims, and Plaintiffs appealed. *See* ECF Nos. 154–55. In the meantime, discovery in this matter had revealed that the 2020 Census was not underfunded. Plaintiffs thus abandoned their underfunding claim on appeal. The Fourth Circuit affirmed this Court's dismissal of Plaintiffs' APA claim and reversed its dismissal of Plaintiffs' constitutional claim.

On remand, Plaintiffs' Third Amended Complaint (TAC) recasts their lone constitutional claim to contend that the Census Bureau has *too much* money that it has not spent and a further challenge a slightly different set of aspects of the census design. TAC at p.3 & ¶¶ 37, 153, 185, ECF No. 168. Specifically, Plaintiffs contend the Census Bureau has planned to (1) "significantly reduce the Bureau's communications and partnership program"; (2) hire a "small number of enumerators"; (3) "drastically reduce the number of Bureau field offices"; (4) "replace most In-Field Address Canvassing with In-Office Address Canvassing"; and (5) "make only limited efforts to count inhabitants of units that appear vacant or nonexistent" in the Non-Response Follow Up Operation (NRFU). *Id.* ¶ 37. In their preliminary-injunction motion, Plaintiffs ask this Court to order the immediate expenditure of nearly $800 million to address the first three of these perceived deficiencies in Plaintiffs' preferred manner.

II. Census Operations

The goal of the decennial census is to count each resident of the United States once, only once, and in the right place. Stempowski Decl. Ex. A at 201. It is a huge and difficult undertaking—approximately 330 million people living over 3.8 million square miles will be counted in just a few months—that takes a decade of planning. Stempowski Decl. ¶ 10, 68. The entire census operation is designed with the objective of achieving that goal and counting everyone, and this effort includes the specific aspects of the census design challenged in Plaintiffs' TAC. Stempowski Decl. ¶¶ 4, 6. Accordingly, great efforts and the most resources are expended on those populations are most difficult to count. Stempowski Decl. ¶ 9; Taylor Decl. ¶¶ 18–19; *see*

Cantwell Decl. ¶¶ 9, 32. In the 2020 Census, these efforts will be facilitated by incorporating a wealth of newly available technology that will make counting easier and more efficient, enabling additional resources to be focused on the hardest to count populations. Stempowski Decl. ¶¶ 9, 33, 46-49 51; Taylor Decl. ¶¶ 18–19.

Address Canvassing: Census operations began last year with the address canvassing operation, completed in October 2019. Stempowski Decl. ¶ 11. The address canvassing operation was an immense effort involving repeated checks among numerous sources of data that were continually updated. Every address in the nation was reviewed by comparing imagery from both government and commercially available satellite imagery to confirm addresses were still current. Bishop Decl. ¶ 34. And the Census Bureau then confirmed through an in-person visit 35% of the addresses in the nation, which included all of the 12% of blocks in which there was any question that the address data had changed since the prior census. *Id.* ¶¶ 36–37. These efforts were validated by tribal, state, and local governments, including Prince George's County, that collectively validated nearly 107 million addresses and are continuing to provide information about any new construction that could result in updates right up to Census Day, April 1, 2020. *Id.* ¶ 27–30. This process has resulted in the most complete and accurate address list in the history of the Census Bureau. *Id.* ¶ 42.

Mailings and In-Field Follow-Up: Beginning next month, this address list will be used to mail residents instructions to answer the 2020 Census through the internet, by mail, or over the phone. Stempowski Decl. ¶¶ 14–17. In areas with unreliable internet access, residents will receive a full paper questionnaire on the first mailing. *Id.* ¶¶ 14–15. Regardless, every household will receive a full paper questionnaire on the fourth mailing if it has not otherwise responded to the census. *Id.* ¶ 15.

If a household does not respond after six mailings to that address, the Bureau will analyze post office undeliverable information to determine whether that address is likely to be vacant or nonexistent. But the Bureau will not rely on those records alone to conclude that an address is vacant. *Id.* ¶ 26. Instead, it will send an enumerator—a Census Bureau employee—to confirm in-person that the address is in fact vacant or nonexistent. *Id.* ¶¶ 26–28. Even if both the postal records and the in-person inspection both confirm the address is unoccupied, the Census Bureau will still send an additional mailing encouraging self-response. *Id.* ¶ 29. If

they determine that the address is occupied, but no one is present after an in-person visit, the Census Bureau will review and cross-reference federal records, including tax and Medicare enrollment information, to determine whether the data are reliable enough to enumerate all residents of that location. *Id.* ¶¶ 28, 33, 65.

If federal records are inadequate to verify residents at the address, the Census Bureau will send an enumerator to the housing unit again up to six times to conduct an in-person enumeration. *Id.* ¶¶ 18, 32, 65. If necessary, the hardest-to-count residences may receive more than six visits. *Id.* ¶ 18. If in-person enumerators cannot reach members of the household directly, they may also gather information about the household—most crucially, the number of residents—from a "proxy," such as a neighbor or landlord. *Id.* ¶ 32.

Enumerators: Because enumerators in the 2010 Census relied heavily on the use of paper—questionnaires, maps, address listing pages, training materials, field manuals, time reports, and expense reports—large and numerous regional offices were needed to support the paper-based 2010 Census. *Id.* ¶ 46. Enumerators met with their supervisors on a daily basis to exchange completed time and expense forms, receive new assignments and materials, and to submit completed assignments which were then taken to the Local Census Office for check-in and processing. *Id.* In contrast, enumerators in the 2020 Census will use mobile devices to collect census responses, to receive their assignments, to submit time and expense information, and to plan their route between each location they have been assigned to visit. *Id.* ¶ 47. This includes an advanced Field Operational Control System, which uses an optimizer to determine the most efficient set of cases to assign the enumerators and determines the most efficient routing of their field work. *Id.*

The Census Bureau currently plans to hire and deploy somewhere between 320,000 and 500,000 enumerators for the 2020 Census. Stempowski Decl. ¶ 50; *see* Taylor Decl. ¶¶ 32–34. This range of enumerators is purposeful: the Census Bureau can and will adjust its deployment of enumerators as necessary after Census Day. Stempowski Decl. ¶¶ 52-53. Any number of unforeseen disruptions are possible—from natural disasters, terrorist attacks, or an epidemic, to an unexpectedly large number of people failing to self-respond. Stempowski Decl. ¶ 58; Taylor Decl. ¶ 14. The Bureau has already prepared for some contingencies, both expected and

unexpected—and through this planning the Census Bureau retains the ability to be flexible and devote resources where needed, rather than being hamstrung by deploying its resources up front without any indication of self-response rates. Stempowski Decl. ¶¶ 57–59; Taylor Decl. ¶¶ 20, 34.

Imputation: Finally, even if the Census Bureau has not obtained the count of an occupied address through six mailings, multiple in-person visits, and proxy interviews, the housing unit will still not receive a count of zero. Instead, a number of residents will be imputed to that housing unit based on number of residents in a nearby housing unit with similar characteristics. Cantwell Decl. ¶¶ 12–15; Stempowski Decl. ¶¶ 19, 44.

Publicity and Partnerships: Throughout this robust enumeration process, the Census Bureau will conduct an unprecedented Integrated Partnership and Communications campaign to communicate the importance of participating in the Census and encourage self-response from all people living in the United States, with a particular focus on increasing the participation of hard-to-count communities that have been historically undercounted. Among other innovations for the 2020 Census, the Integrated Partnership and Communications program will include micro-targeted advertising and the ability to shift focus in real time to any areas or populations that appear to be responding at a lower rate. Reist Decl. ¶ 10. In 2020 dollars, the Census Bureau plans to spend about $128 million more on the Integrated Partnership and Communications program for the 2020 Census than it did for the 2010 Census. Reist Decl. ¶ 27.

A perfect census count has never been achieved. The endeavor is too challenging and complex. But the Census Bureau tries every ten years to do the best possible count, incorporating lessons from its previous efforts. *See, e.g.*, Cantwell Decl.¶ 32 ("Over the decades, many researchers at the Census Bureau, include[ing] me, have devoted their life's work trying to achieve a complete and accurate enumeration, and to reduce the differential undercount."). The 2020 Census has been carefully designed to do the best possible job—and the best job yet.

LEGAL STANDARDS

"A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. A party 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." *Roe v. Dep't of Def.*, --- F.3d ---, 2020 WL 110826, at *7 (4th Cir. Jan. 10, 2020) (citations and internal quotation marks omitted). The Fourth Circuit has long recognized that "[m]andatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances." *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994).

"Summary judgment is proper when the moving party demonstrates, through 'particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . ., admissions, interrogatory answers, or other materials,' that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Ferebee v. Lexy Corp.*, 2014 WL 1682015, at *2 (D. Md. Apr. 28, 2014) (Grimm, J.) (quoting Fed. R. Civ. P. 56(a), (c)(1)(A)). "If the party seeking summary judgment demonstrates that there is no evidence to support the nonmoving party's case, the burden shifts to the nonmoving party to identify evidence that shows that a genuine dispute exists as to material facts." *Id.*

For the relevant legal standards governing motions to dismiss, Defendants respectfully refer the Court to their motion to dismiss Plaintiffs' First Amended Complaint. ECF No. 43-1 at 5–6.

ARGUMENT

I. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION SHOULD BE DENIED

A. Plaintiffs Are Unlikely to Succeed on the Merits

To obtain a preliminary injunction, Plaintiffs bear the burden of establishing that they are likely to succeed on the merits. Plaintiffs argue that the relevant standard here is that set forth in *Wisconsin v. City of New York*, 517 U.S. 1 (1996), namely that the Secretary of Commerce's conduct of the census "need bear only

a reasonable relationship to the accomplishment of an actual enumeration of the population."[2] *Id.* at 20. This extraordinarily deferential standard derives from the fact that "the Constitution vests Congress with virtually unlimited discretion" in conducting the census (which Congress has in turn vested in the Secretary of Commerce) and from the practical recognition that no matter what effort is made, a perfect enumeration is virtually impossible, if not wholly impossible. *Id.* at 19; *see id.* at 6 ("Although each [census in United States history] was designed with the goal of accomplishing an 'actual Enumeration' . . . no census is recognized as having been wholly successful . . . .").[3] In other words, the Constitution does not require a specific number of dollars spent on any operation, a specific number of employees, or a specific manner of conducting the census. At most, all that is required under the Constitution is that the Census Bureau (a) attempt to count the population, rather than estimate it statistically and (b) do so reasonably.

Plaintiffs come nowhere close to making their required showing with respect to *any* of the challenged aspects of the 2020 Census plan. Even if Plaintiffs' criticisms of the 2020 Census design were reasonable, their mere disagreement with the manner that the Census Bureau has carefully planned, with numerous tests, revisions, and improvements over the course of a decade, would not be adequate to meet their constitutional burden. But Plaintiffs' criticisms are not reasonable. At base, Plaintiffs' case is grounded in contradiction: they claim that, even though past censuses resulted in a differential undercount, the Census Bureau should not be permitted to innovate and should operate in exactly the same way as the censuses that produced prior undercounts. To advance this inherently faulty premise, Plaintiffs manufacture criticisms of the 2020 Census design based on unfounded speculation that more spending, staffing, and offices are necessarily better, regardless of what the money is spent on and what functions the staff and offices actually fulfill. They also ignore key aspects of the 2020 Census design and presume that expenditures incurred in the 2010 Census dictate the

[2] Defendants contend that the *Wisconsin* standard is no standard at all, and this case is therefore nonjusticiable, *see infra* Argument Section II.A. But for purposes of this preliminary-injunction motion, Defendants assume that the *Wisconsin* standard applies.

[3] Plaintiffs' reliance on *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), a split decision from the Second Circuit, is inapposite, as it predates *Wisconsin* and fails to apply the deferential *Wisconsin* standard.

required amount of expenditures to effectively implement the entirely different design of the 2020 Census. The approximate cost of the 2020 Census overall will be slightly higher than the 2010 Census. But because of the design changes, the allocation of certain costs will have changed. Plaintiffs appear to believe that spending more money on human brute force is preferable to spending on technological innovation. That difference of opinion does not entitle them to succeed on the merits, or in any way make the 2020 Census design not "reasonably related" to conducting an actual enumeration.

1. The Census Bureau Has Expanded the Partnership Program, Nearly Doubling the Number of High-Value Professional Staff from the 2010 Census

Plaintiffs begin by attacking the Census Bureau's partnership program. As an initial matter, their requested relief for nearly $128 million "to increase outreach and communications to no less than 2010 Census levels" is now largely moot. Mot. at 2-3. Plaintiffs' calculations are based on the understanding that the Bureau's advertising spending in 2010 "amounts to $447.8 million adjusted for inflation" and that the current planned advertising spend was $480 million. Doms Decl. ¶ 14. In fact, the Census Bureau is planning to spend at least $583 million on advertising, over $100 million more than Plaintiffs contend and more than $135 million more than Plaintiffs claim was spent for the 2010 Census. Reist Decl. ¶¶ 27, 37; Taylor Decl. ¶ 36. More money may be spent if necessary. *See* Stempowski Decl. ¶ 57.

Their criticisms are also unfounded. Plaintiffs' lead argument in support of their preliminary-injunction motion that the Bureau "cut . . . almost in half" the number of "partnership staff" since the 2010 Census. Mot. at 5. This argument disregards both the different positions encompassed by the term "partnership staff" and the different needs for the 2020 Census. In the 2010 Census, the Bureau hired approximately 2,000 administrative staff members called "partnership assistants" from a last-minute grant of stimulus funding. Reist Decl. ¶ 23. This role—which was new to the 2010 Census—did not add significant value to the goal of community outreach, and largely aided the effort by simply managing the large volume of paper that was a feature of the 2010 Census' design. Reist Decl. ¶¶ 23-24.

But all jobs are not created equal. As a result of both the Census Bureau's experience with the limited value of partnership assistants and the 2020 Census's updated design to rely more on digital technology and reduce the need for managing large volumes of paper, the decision was made to eliminate the partnership assistant role. Reist Decl. ¶ 24. That decision enabled the Census Bureau to nearly *double* the number of partnership *specialists*—the skilled professionals that do the substantive work central to the partnership program by actually forming and maintaining relationships with trusted partners. Reist Decl. ¶ 20, 25; Taylor Decl. ¶ 25. In other words, by eliminating an obsolete clerical job, the Census Bureau has been able to vastly expand the *substance* of the partnership program to an unprecedented degree. In short, Plaintiffs' argument is like suggesting a neurosurgery practice has decreased its commitment to medicine by getting rid of its pool of typists—employees whose skills are both collateral to the core mission and have been overtaken by technology.

The faulty premises undergirding Plaintiffs' lead argument also eviscerate the analyses of their putative experts. Dr. Hillygus explicitly relies on the incorrect assumptions that "each partnership staff person contributed equally to the partnership contract rate," and its corollary, that each dollar spent has an equivalent effect on participation. Hillygus Decl. ¶ 22. This reliance invalidates Professor Hillygus's claim that the changes from the 2010 program will have any negative effect on African Americans' self-response rate to the census. *See id.* Dr. Doms advances the argument that the elimination of partnership assistants "raises the risk that partnership staff will be . . . less effective" because they are at "just 55% of the staffing level of 2010." Doms Decl. ¶ 10. But he is surely aware of the distinction between partnership specialists and partnership assistants, as he had "direct, extensive experience . . . in the planning for the 2020 Census" while Under Secretary for Economic Affairs during the very years in which the Census Bureau made many of the decisions he now criticizes. Doms Decl. ¶ 6; *see* Bishop Decl. ¶¶ 44-49 (explaining Doms' support for the design decisions of the 2020 Census he now criticizes); Reist Decl. ¶¶ 39-40 (same); Taylor Decl. ¶ 21 (same). Either way, his conclusions about the effectiveness of 2020 Census partnership staff cannot be credited.

Such criticisms of the partnership program are further undermined by Plaintiffs' attempt to remove it from its context. In fact, the partnership program is only part of the Integrated Partnership and Communications program, which is the part of the census operations designed to increase participation of hard-to-count communities. In making the unreasonable claim that the elimination of an obsolete and unnecessary clerical position imperils the 2020 Census's outreach, Plaintiffs wholly ignore the other half of the Integrated Partnership and Communications program, the Integrated Communications Contract. This is a $583 million program, and it is expected to reach 99.9% the population, with advertising specifically directed at each individual hard-to-count community, impressing on them the importance of participation in the census. Reist Decl. ¶¶ 9, 12, 28. As Plaintiffs concede, this program has expanded since the 2010 Census.[4] *See* Doms Decl. ¶ 14.

Nor has the Census Bureau declined to spend a particular amount on the partnership program despite being "directed by Congress" to do so. *See, e.g.*, ECF 169-1 at 7, 9; *see also* ECF 168 at 3. Congress appropriated a lump sum to the Bureau; it *explicitly declined* to direct any amount for advertising and outreach. Both the 2019 and 2020 appropriations acts state that "from amounts provided herein, funds *may* be used for promotion, outreach, and marketing activities," without mandating *any* amount be so spent. Wishnie Decl. Exs. 2 & 31 (emphasis added). This is in marked contrast to the way funds are allocated in the same provision in each law to the Department Office of Inspector General, which directs a specific amount of funds be allocated to that office for the specific purpose of investigating and auditing the Census Bureau. *See id.*

Even the statement cited by Plaintiffs in support of their claim does not back it up. In the explanatory statement cited by Plaintiffs—a single statement by a committee chairperson and not a duly enacted statute—does not in fact represent an "express Congressional instruction" to spend a certain amount on outreach, as Plaintiffs suggest. ECF No. 169 at 5 (citing Wishnie Decl. Ex. 6); *cf.* Wishnie Decl. Ex. 6; *NLRB v. SW Gen.,*

[4] While Professor Hillygus claims that "all evidence points to [the census's advertising and communications campaign] failing to close the expected gap in differential undercount," she cites none of this purported "evidence" and provides no analysis to support her claim. Hillygus Decl. ¶ 23. Her conclusions should be disregarded as speculation. *See, e.g.*, *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 249–50 (4th Cir. 1999).

Inc., 137 S. Ct. 929, 942, (2017) ("The [statutory] text is clear, so we need not consider . . . extra-textual evidence [such as legislative history]"). The statement merely notes that the total budgetary amount "*supports* no less than the *level of effort* for outreach and communications" in the 2010 Census should the Bureau choose to allocate the appropriation in that manner, and suggesting no specific amount of funds for that purpose. Wishnie Decl. Ex. 6 at 10962 (emphasis added). The Bureau's plans heed that suggestion and reflect a level of effort on outreach and communications that is significantly greater in the 2020 Census than the 2010 Census.[5] *See* Reist Decl. ¶ 34, 36, 38; *see id.* at ¶¶ 10, 19-22, 27-33.

Indeed, the Integrated Partnership and Communications program is both expanded in scale and superior in quality to the 2010 Census. *See* Reist Decl. ¶¶ 10, 19-22, 28, 34, 26, 38. Plaintiffs do not attack the 2010 Census's equivalent program as unconstitutional, and appear to request that it be replicated, so their claim should fail for that reason alone. Either way, however, Defendants' expenditure of over three quarters of a billion dollars on the Integrated Partnership and Communications program to create over 1,000 different advertisements in 13 languages, expected to reach 99.9% of the country, and to hire 1,500 employees creating 300,000 partnerships, all in order to encourage self-response to the census can hardly be seen as not bearing a "reasonable relationship" to an actual enumeration.[6] *Wisconsin*, 517 U.S. at 20; Reist Decl. ¶¶ 12, 17, 20, 28; *see* Doms Decl. ¶¶ 13-14.

2. Plaintiffs Misunderstand the Planned Use and Number of Enumerators

The Census Bureau plans to spend whatever funds are necessary on as many enumerators are needed to complete NRFU, and it has the resources to do so. Stempowski Decl. ¶¶ 50-53; Taylor Decl. ¶¶ 19, 31-32, 34. Plaintiffs' request—that this Court order the immediate spending of $600 million to deploy a specific

[5] Contrary to Plaintiffs' arguments, the Chairwoman's explanatory statement actually supports denying Plaintiffs' requested injunction, as it proposes specifically allocating nearly $1 billion of the 2020 appropriation to for contingency—as the Census Bureau is doing. Taylor Decl. ¶ 13; *see infra* Argument Section I.A.6.

[6] Given that the Integrated Partnership and Communications program is collateral to the person-by-person count of the population, there can be no constitutional requirement to have such a program at all, let alone to have it employ a certain number of individuals or cost a certain amount. *Cf. Wisconsin*, 517 U.S. at 20.

number of enumerators—is wasteful, and their arguments reflect fundamental misapprehensions of the Census Bureau's plans and the cost of deploying enumerators.

To begin, the Census Bureau does not "plan to employ only 260,829" enumerators. Mot. at 6. The Census Bureau plans to deploy the number of enumerators needed to complete the NRFU workload, which it currently anticipates being between 320,000 and 500,000, consistent with the approximately 400,000 enumerators estimated in the 2019 Life Cycle Cost Estimate. Stempowski Decl. ¶¶ 50–53; Taylor Decl. ¶ 34; *cf.* Mot. at 6.

But the actual number of enumerators that will be deployed, and critically, *where* they will be deployed, is as yet unknown. Stempowski Decl. ¶¶ 51–53. The primary factor driving the need for enumerators (and the resultant cost) is the NRFU workload. *Id.* ¶ 51. This will govern both the amount of work overall, and the geographic areas where that work is needed. Neither will be known until the self-response operation is well underway, because the enumerators' job is to follow up by visiting and counting the residents at those addresses where residents did *not* self-respond. Stempowski Decl. ¶¶ 51–53.

Plaintiffs apparently base their misunderstanding of the Census's Bureau's plans on certain materials related to the 2019 Life Cycle Cost Estimate that refer to the Bureau anticipating a need for approximately 256,000 "core enumerators." TAC ¶ 111. This term refers to the number of enumerators that Defendants actually predict—based on the projected workload, productivity, and schedule—will be required to complete the NRFU workload *if its median assumptions hold*. Taylor Decl. ¶ 34. In other words, this number is not the number that the Census Bureau intends to hire or deploy; it is just an output—the number the Census Bureau expects use in completing its work when all is said and done, assuming the middle of its range of assumptions is realized. *See* Wishnie Decl. Ex. 12 at 117.

But this number exists only for planning purposes, and it is based solely on informed projection. Using this number to mandate hiring ignores the Census Bureau's contingency planning, which is based on a range of potential outcomes in order to hire and deploy whatever number of enumerators the workload ultimately calls for. Stempowski Decl. ¶¶ 51–53; Taylor Decl. ¶ 19. There can be no question that this plan—reserving

funds for and planning to hire whatever number of enumerators the job calls for—has a reasonable relationship to actual enumeration. *Wisconsin*, 517 U.S. at 20. Plaintiffs' plan to order a specific expenditure and mandate a specific number of enumerators now, regardless of the scope and location of the workload, would be a waste of resources at best. Taylor Decl. ¶ 34.

3. The Number and Location of Field Offices Has No Relationship to Achieving an Accurate Enumeration

Plaintiffs next complain that the redesign of the 2020 Census resulted in the elimination of local offices relative to the 2010 Census. Plaintiffs wrongly imply that Area Census Offices (ACOs) are a form of "physical outreach" to the community, Mot at 18, but this is not true. Importantly, the number of ACOs will not affect whether or not any individual is counted in any way. Stempowski Decl. ¶ 44. Enumerators will travel to the people that must be counted, regardless of where any office is; no individual is more or less likely to be counted because their home is near or far from an ACO.[7] *Id.* ¶ 44–45.

Plaintiffs' attempt to draw an unfavorable comparison between the number of local offices established in the 2010 Census and the 2020 Census also fails because any such comparison implies that the function of these offices is the same in both censuses. It isn't. *Id.* ¶¶ 46-47. The 2010 Census relied primarily on paper forms, and enumerators traveling door-to-door needed offices nearby to retrieve blank forms and deposit completed forms every day. *Id.* ¶ 46. This paper-based operation required a large amount of localized office space. *Id.*

But the 2020 Census operations will no longer be conducted exclusively on paper. Enumerators will perform their work using iPhones, and households will be encouraged to respond online. So local offices no longer serve the same function, and the need for many hyperlocal spaces for the pickup, return, and storage of paper no longer exists. *Id.* ¶ 47–49. Whether there are 500,000 local offices (with each enumerator's house

[7] Given the lack of relationship between the proximity of a census office and whether an individual is counted, Plaintiffs' gripe that there is not an ACO in Prince George's County is irrelevant. To the extent Plaintiffs impliedly suggest that the Census Bureau has an inadequate physical presence in Prince George's county because it lacks temporary office space, that contention is risible; Prince George's County is the site of the Census Bureau's *headquarters*.

being an "office") or zero local offices, the effect would be the same, and would be equally constitutional. The number of census "offices" has no bearing on the count itself, and as such no particular number of census "offices" are either required by the constitution or even especially significant.

Two mistakes—Plaintiffs' mistaken view that the number of ACOs has any bearing on "physical outreach" and their expert Dr. Doms' mistaken assumption that the census has not allocated any funding for purposes of localized questionnaire assistance—apparently lead Plaintiffs to request $46 million for some form of local presence in hard to count communities. Mot. at 18; Doms ¶ 15. But the Census Bureau has already allocated between $110 million and $120 million for mobile questionnaire assistance centers.[8] Stempowski Decl. ¶ 41; Taylor Decl. ¶ 33. This decision to provide more than double the resources for mobile assistance centers than Plaintiffs request fully moots this aspect of their request.

4. The 2020 Address Canvassing Effort Has Produced the Best Address List in the History of the Census

Plaintiffs next criticize the decision to reduce the percent of addresses verified in-field as opposed to using computer technology. At this point, the in-field address canvassing operations are complete and cannot be changed for the 2020 Census, Bishop Decl. ¶ 41; to the extent plaintiffs seek to change the method of address canvassing for the 2020 Census, their claim is now moot. *See, e.g.*, *Catawba Riverkeeper Found. v. N. Carolina Dep't of Transportation*, 843 F.3d 583, 588 (4th Cir. 2016) ("A case becomes moot, and thus deprives federal courts of subject matter jurisdiction, . . . when our resolution of an issue could not possibly have any practical effect on the outcome of the matter.") (citations and internal quotations omitted).

But Plaintiffs' concerns about the address canvassing effort are unsupported. The effort of developing the address list used in the 2020 Census is based on a consistent evolution from the approach used in previous

[8] Plaintiffs also criticize Defendants' decision to eliminate brick-and-mortar questionnaire assistance centers, which themselves were a legacy of a census based on paper forms and which on average resulted in just 20 additional people counted. Stempowski Decl. ¶¶ 35-37. But Plaintiffs provide no reason to believe that perpetuating this inefficient use of resources would be superior to the new mobile assistance centers.

censuses that harnesses exponential improvements in geospatial technology[9] over the past decade, carefully vetted and tested methodologies, and continuous updating and cross-referencing of information to ensure accuracy. *See* Bishop Decl. ¶¶ 5–36. With the improvement of this technology and the active participation of local governments to improve the address list over the decade, many addresses no longer required fieldwork to validate, in contrast to earlier censuses when purchased address files and the absence of reliable geospatial technology required complete in-field verification. Bishop Decl. ¶ 32; *see id.* ¶¶ 24–36. All addresses for the 2020 Census were checked by comparing the imaging from the time of the 2010 Census to more recent data, to determine on a block-by-block level whether any address had changed. Bishop Decl. ¶¶ 32–36. Wherever there was any question about either the data quality or any change to the block, the Census Bureau required in-field verification. Bishop Decl. ¶ 35. This enabled the Census Bureau to limit in-field verification to the subset of addresses in which there was any question about the completeness, currency, or reliability of the data, and rely on the imagery as cross-referenced with data provided by local governments and others to confirm addresses where there were no discrepancies or questions.

This detailed, careful plan, in which different data sources are cross-checked and continuously updated is without question "reasonably related to the actual enumeration of the population." *Wisconsin*, 517 U.S. 20. Plaintiffs small number of minor criticisms—themselves unsupported—do not suggest otherwise. Plaintiffs first rely on an Office of Inspector General (OIG) report noting some discrepancies between the results of in-field and in-office canvassing, but those statistics are misleading for several reasons. First, the figures include addresses that were classified by the in-office canvassing as needing to be verified in-field, so the statistics do not speak to the effectiveness of using only in-office canvassing. Bishop Decl. ¶ 41. Second, many of the purported errors do not reflect any issue with the address file that would prevent the households at issue from being contacted by the Census Bureau or enumerated. *Id.*

[9] This technology is the kind of digital mapping information used in Google Maps, for example. The Census Bureau's geospatial database is among the most sophisticated on earth. *See generally* Bishop Decl. ¶¶ 5–17 (describing Census Bureau's Geographic Support program).

Plaintiffs further rely on Dr. Hillygus to suggest that minority households tend to be in areas requiring more in-field verification. Mot. at 18-19 (citing Hillygus Decl. ¶¶ 39, 40-41). But Dr. Hillygus's arguments and the underlying data on which she relies in fact support the Census Bureau's approach, which is to focus the in-field resources on areas that are difficult to canvass and conserve those resources by relying otherwise on in-office work. *See* Bishop Decl. ¶ 32 ("[T]he Census Bureau determined that a 100 percent in-field validation was redundant, wasteful, and would not improve quality."); *id.* ¶¶ 33–39. In particular, the minority neighborhoods that are the subject of the study on which she bases her conclusion are those in which an overwhelmingly high percentage were canvassed in-field for precisely the reason that they are the types of areas in which conclusive in-office canvassing is not possible. Bishop Decl. ¶¶ 52–54.[10]

5. Every Address that Appears to Be Vacant Will Have a Census Employee Conduct an in-Person Visit to Confirm It Is Unoccupied

Finally, Plaintiffs' contention that "unreliable" administrative records have been "excessively" relied on to determine whether a housing unit is in fact unoccupied is wrong on its face. Mot. at 9, 19. Administrative records will *never* be used on their own to classify a unit as vacant or unoccupied. Stempowski Decl. ¶¶ 25–32. Instead, an enumerator will visit each address that does not respond to the census after six mailings or submit a response via the mobile assistance center. *Id.* ¶ 22. If that visit does not result in a successful, in-person enumeration of the people in that location, the enumerator will make a determination about whether the unit is vacant or unoccupied. *Id.* ¶ 25. Although in many cases it will be obvious that a unit is either uninhabited (e.g., a vacant lot) or occupied, the Census Bureau will not simply take the enumerator's word. *Id.* ¶¶ 25–26. Instead, they will cross-check the enumerator's determination against postal service undeliverable lists and

[10] Notwithstanding Plaintiffs' contention that Defendants have not conducted enough in-field address canvassing or spent enough money on doing so, in support of their motion, Dr. Hillygus notes that "the Census Bureau has reduced the estimated percent of households to be correctly canvassed in office, significantly increasing anticipated costs." Hillygus Decl. ¶ 40. In other words, Dr. Hillygus acknowledges that the Census Bureau has decided to spend more and canvas more in-field when it perceives that doing so would increase quality. Dr. Hillygus's statement also implicitly approves the use of in-office canvassing to "correctly canvas" certain households without fieldwork.

other administrative records. *Id.* ¶ 27. Only if both the undeliverable list, the enumerator, and other administrative records concur will an address be treated as vacant or unoccupied. *Id.*

This is an axiomatically reasonable means to ensure that resources are deployed to count people at occupied locations while making certain that no one is mistakenly removed, without wasting resources on vacant properties. *Id.* And even those addresses deemed to be vacant will receive a final mailing as an additional check.[11] *Id.* ¶ 29. Plaintiffs may prefer to have Census Bureau employees returning time after time to vacant lots after an employee has verified that no residence exists, but the Constitution—which requires at most a "reasonable relationship" to enumeration—cannot possibly require this. *Wisconsin*, 517 U.S. at 20.

Nor do Plaintiffs offer any admissible evidence that this will either interfere with the quality of the count in general or result in a differential undercount in particular. Plaintiffs offer speculation—and nothing more—that use of administrative records "may" increase a differential undercount. *See* Hillygus Decl. ¶¶ 45–46 (quoting other authors' hypotheses that this design change "*could* increase some . . . undercount differentials" and "*may* . . . systematically underrepresent[]" some subpopulations and that it "*is not clear yet* that [use of administrative records] will not compromise quality," and hypothesizing without citation to any evidence or studies "two ways" the use of administrative records "*can* worsen the differential undercount") (emphasis added). This is plainly inadequate to support their claim. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 200 (4th Cir. 2001) ("A reliable expert opinion must be based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods.") (quoting *Oglesby v. General Motors Corp.*, 190 F.3d 244, 250 (4th Cir.1999)); *cf.* FRE 702.

[11] Plaintiffs do not even argue that the use of administrative records outside the context of vacant housing could diminish the data quality or increase a differential undercount, with good reason. Plaintiffs' suggestion that minority households would be less likely to have reliable administrative records, if accepted, implies that they would be more likely to receive additional visits by enumerators and be counted in person—a method Plaintiffs appear to view as superior. Stempowski Decl. ¶ 65.

6. Plaintiffs Cannot Demonstrate that the Bureau Has "Refused" to Spend Any Funds, Nor Is Plaintiffs' Requested Relief Appropriate

In addition to Plaintiffs' wholly unsubstantiated claims regarding the specifics of census operations, they make the equally empty contention that the Census Bureau has "refused" to spend appropriated funds. The Bureau has done no such thing.

The census is a vast undertaking that has undisputedly significant consequences for the nation. It is thus essential that the Census Bureau take care of its resources in order to ensure that the census is successfully completed, on the timeline mandated by federal law. *See* 13 U.S.C. § 141(b). In order to ensure that the 2020 Census is successfully and timely completed, the Census Bureau must retain a reserve of contingency funding in order to cope with any issues that may arise.

Despite the hard work of thousands of Census Bureau employees over the last decade in designing, testing, and improving the plan for 2020 Census operations, it is always possible that the real life outcomes could turn out to be unanticipated. This could be due to a large scale disaster, like a terrorist attack, environmental catastrophe or epidemic, or could be the result of small deviations in human behavior that are impossible to perfectly predict. Either way, the Census Bureau has allocated a substantial sum that it intends to spend on addressing whatever unexpected problems arise in the future. Taylor Decl. ¶¶ 17-20.

Plaintiffs' motion—indeed, their entire case—comes down to their claims that (a) they know better than the thousands of Census Bureau employees who have spent an entire decade planning the largest census in American history, and (b) that money must be spent immediately on problems that Plaintiffs' experts have hypothesized—problems that may never materialize and that will be observed and corrected if they ever do—instead of reserved to address whatever actual problems arise during the course of conducting the census. Neither premise is valid. Congress expressly cited concerns about contingencies and risks when it allocated additional funds to the 2020 census. *See* Wishnie Decl. Ex. 6 at H10962 (explanatory statement notes that nearly $1 billion of that appropriation was expected to fund "contingency needs that may arise during the Census operation such as major disasters or other unforeseen risks realized" and "additional sensitivity risks"

like "any reduction in self-response rates beyond the current projections of the Census Bureau"). The census is thus proceeding in an appropriate and reasonable manner, which is also consistent with the intent of Congress. *See* Taylor Decl. ¶ 13.

Nor is there any support in law for what Plaintiffs request—an order that the Census Bureau must spend a lump sum appropriation in a specific manner; indeed, the Supreme Court has found to the contrary. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (explaining that "allocation of funds from a lump sum appropriation" is the type of "agency decision[] that courts have traditionally regarded as unreviewable"); *see* Wishnie Decl. Exs. 2 & 31 (demonstrating that 2019 and 2020 census appropriations were lump sum appropriations without any specific Congressional directive as to how the funds are to be used).

Plaintiffs' cited cases support this proposition; they make clear that "the Supreme Court has determined that courts have 'no leave to intrude' on the agency's chosen method of achieving the congressionally determined object of the appropriation," and that "asking whether the agency chose the best method to advance that object is unreviewable." *Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647, 657 (D. Md. 2018). Even the manner in which Plaintiffs describe these cases in their brief—cases in which "an executive agency has refused to expend funds based on factors prescribed by Congress," Mot. at 20—demonstrates how the current situation differs. Here, there is (1) a lump sum appropriation with *no* factors prescribed by Congress as to how the Census Bureau will go about conducting the Census, see Wishnie Decl. Exs. 2 & 31, and (2) Defendants have *not* refused to spend appropriated funds. *Cf. Healthy Teen Network*, 322 F. Supp. 3d at 658, 659-60 (listing factors set forth in appropriations act for which funds must be used and finding that the agency "has not shown that it considered any of these congressionally prescribed factors when making its decision"); *In re Aiken Cty.*, 725 F.3d 255, 257, 260 (D.C. Cir. 2013) (refusing to uphold agency refusal "to perform a statutorily mandated activity" "where previously appropriated money is available" but stating no limitation on executive agencies' implementation of policies "within statutory boundaries"); *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1233 (9th Cir. 2018) (addressing executive order that "directs . . . agencies . . . to withhold

funds appropriated by Congress in order to further the Administration's [unrelated] policy objective of punishing cities and counties that adopt so-called 'sanctuary' policies); *Guadamuz v. Ash*, 368 F. Supp. 1233, (D.D.C. 1973) (prohibiting termination of specific grant programs where "the announced reason . . . was totally unrelated to the purposes of the program" because "the Executive may not withhold funds from projects which the Congress has *specifically directed* because of such extraneous considerations") (emphasis added).[12]

B. An Injunction Would Be Against the Public Interest and the Balance of Equities Tips in Defendants' Favor

Here, both parties claim the goal of ensuring the most accurate count possible in the 2020 Census. But only Defendants have an actual plan for completing an accurate count in the deadline that has been imposed by law. Interfering with the Census's design at this late date and forcing the Census Bureau to spend nearly $800 million would significantly harm the public interest and the likelihood that the census will succeed.

First, derailing the plans for the 2020 Census on the eve of enumeration and forcing new and immediate changes to the design would disrupt the work of counting the population and consume the Census Bureau's time, preventing it from devoting itself to ensure an accurate count at this critical stage. Stempowski Decl. ¶¶ 58–59. The result of Plaintiffs' requested injunction, in short, would be an increased risk of an inaccurate count—the very evil Plaintiffs claim they wish to avoid.

Second, mandating a change to the Census's plans would expend a significant portion of the funding that has been reserved to resolve unforeseen crises when they arrive, depriving the Bureau of almost $800 million to deal with future unforeseen events. If the Court enters Plaintiffs' requested injunction, these funds will be squandered on pure speculation rather than reserved for specific, observed concerns to be addressed in a tailored manner when those concerns arise. *See* Taylor Decl. ¶ 17–20; 33–36.

[12] Nor do Plaintiffs' cited cases support the proposition that an agency is required to spend appropriated funds if it ultimately turns out that doing so would be unnecessary to achieve Congress' aims. *See Guadamuz*, 368 F. Supp. at 1243 (noting "[t]his case does not present a situation where congressionally mandated objectives can be achieved with unforeseen efficiency or economies").

Third, directing the expenditure of these funds would be against the public interest because it would require an immense waste of taxpayer dollars. While the Census Bureau is committed to spending any amount necessary to ensure an accurate count of the population, it remains a public agency entrusted to prudently spend taxpayer dollars. *See* Stempowski Decl. ¶ 49; Taylor Decl. ¶ 19. If its job can be properly done without expending the public's money, its duty is to do the job in that manner. In contrast, Plaintiffs would have the Bureau spend taxpayer money for the sake of spending it, without any detailed plan for its use or any basis to indicate it would resolve any problem at all.

Finally, Plaintiffs' entire case tacitly presumes that the census can never innovate or take advantage of new technologies that will both improve the accuracy of the count *and* save money. Plaintiffs note that previous censuses—including the 2010 Census that they use as an appropriate spending benchmark—have resulted in a differential undercount. Davis Decl. ¶ 18 ("In 2010, the County suffered the largest net census undercount of any large county in Maryland and one of the largest undercounts in the entire United States for any county of 100,000 or more residents."). But Plaintiffs would still have the Bureau rely on outdated technologies and expend resources required by those technologies—or at least to expend the funds that were required to house and transport millions of pages of paper to now conduct a primarily digital census. *See* Taylor Decl. ¶¶ 32–36. The 2020 Census is designed to harness advances in technology to perform the best count in census history. Entering Plaintiff's proposed injunction would chill future efforts to innovate, as it would justify the fear that any change in census design, however carefully planned over the course of a decade and well-founded in research, could be upended at the last minute and jeopardize the count as a whole.

C. Plaintiffs Will Not Experience Irreparable Harm

In contrast to the 2020 Census, *see* Taylor Decl. ¶¶ 17–20, 33–36, Plaintiffs will suffer no harm in the absence of that injunction. The Census Bureau will continually monitor self-response rates, enumerator productivity, and the remainder of the results to determine whether any additional resources are needed, either in any particular location or nationwide. Stempowski Decl. ¶ 57–59. If any initial assumption is found to be incorrect, or any amount of resources are shown to be underestimated, the Census Bureau will make efforts

to address that problem if and when it arises—that is the very purpose of its extensive planning and reserve for contingency funding. *Id.* ¶¶ 57–59; Taylor Decl. ¶¶ 17–19.

The Bureau's constant willingness to improve its plans and correct problems is demonstrated by its history to date, in which it has updated its plans repeatedly in response to its testing, research, and other public discussion. For two examples, the Court need look no further than two of the areas Plaintiffs have raised in this motion. First, since its final operational plan was published, the Bureau has developed a plan to spend around $110 million on mobile questionnaire assistance—more than *double* the amount Plaintiffs' request in this motion, mooting a portion of their requested relief entirely. Stempowski Decl. ¶ 41; ECF 169-1 at 6-7 ("request[ing] a preliminary injunction directing Defendants . . . "(3) to increase the number of . . . mobile assistance units . . . at levels commensurate to 2010 ($45.6 million)"). Second, the Bureau recently allocated additional spending to the communications campaign, bringing its total planned spending on "outreach and communications," Mot. at 2-3, to $103 million more than Plaintiffs' calculated in bringing their motion—the vast majority of the $128 million Plaintiffs ask for. Taylor Decl. ¶ 36. The Census Bureau is not averse to spending money when warranted, and will to do so as events develop. *See* Stempowski Decl. ¶¶ 57–59; Taylor Decl. ¶ 19.

Moreover, Plaintiffs' proposed injunction does not make sense on its face and will not remedy any undercount, so denying the motion will not put the Plaintiffs in any better position than granting it. Setting aside the now fully moot issue of mobile assistance centers, Plaintiffs seek $597 million to deploy in the field enumerators that have already been hired and $128 million to be spent on "outreach and communications." But Plaintiffs fundamentally misunderstand the cost—and effect—of deploying the additional enumerators. Deploying additional enumerators that have already been hired and trained *does not* increase cost or require additional expenditure, assuming a fixed amount of work. Because enumerators are paid by the hour, a work-load that takes 10 person-hours at a rate of $10/hour will always cost $100, whether two people do it or 10 people do it. The only difference is how long it will take and how much that cost is allocated to each individual (in the example above, five hours and $50 each in the first case and one hour and $10 each in the second).

The only reason to deploy more enumerators would be either (a) the enumerators end up behind schedule or (b) the workload is larger than anticipated. The Census Bureau will be monitoring the results in real time to determine whether these conditions do or do not occur. In either case, the Census Bureau is ready to resolve any issue that arises. Stempowski Decl. ¶ 57–59.

Plaintiffs' proposed injunction regarding outreach and communications fares no better. Plaintiffs' only substantive complaint regarding the design of the Communications and Partnership Program appears to be that they would prefer more staff be hired. *See* ECF No. 168 ¶¶ 39-53; ECF No. 169-1 at 5. Their putative concern rests on the false premise that all staff are fungible, and that a greater number of staff is necessarily better, regardless of the role that staff plays or whether there is any need for that role under the present census design. *See* Reist Decl. ¶¶ 23–26. But hiring unnecessary bodies would be poor stewardship of taxpayer dollars with no benefit to creating an accurate Census. Although the 2020 Census design does indeed require fewer "partnership staff" than the 2010 Census, that is because both experience and new technology made clear that the unskilled administrative role of "partnership assistant" used in the 2010 Census would not be useful in light of the 2020 Census's greater reliance on computing technology instead of paper. *See supra* Argument Section I.A. While that obsolete position has been eliminated, the size of the substantive professional staff doing the core substantive work of the program—"partnership specialists"—have nearly doubled, as Plaintiffs concede. Plaintiffs essentially ask this Court to order an extra $130 million expenditure on staff to sharpen pencils for people who now work on computers, even though there are now twice as many professionals using the computers for this program as there were professionals using pencils in 2010.

II. THIS CASE SHOULD BE DISMISSED, OR IN THE ALTERNATIVE, SUMMARY JUDGMENT SHOULD BE GRANTED FOR DEFENDANTS

A. This Case Presents a Nonjusticiable Political Question

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221,

230 (1986). The Enumeration Clause requires that an "actual Enumeration" of the population be conducted every 10 years and it vests Congress with authority to conduct that enumeration "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. As this Court previously recognized, "the Founders clearly intended Congress to have paramount authority in both the design and execution of the census, as well as its funding." *NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 418 (D. Md.), *aff'd in part, rev'd on other grounds,* 945 F.3d 183 (4th Cir. 2019). So Plaintiffs' census-design challenge is "constitutionally committed to a coordinate political department." *Id.* (alterations omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

There is also "a lack of judicially discoverable and manageable standards" in this area. *Id.* (quoting *Baker*, 369 U.S. at 217). It is clear that the *Wisconsin* reasonable-relationship standard applies where the decision at issue concerns "the population count itself—such as a postcensus decision not to use a particular method to adjust an undercount, and a decision to allocate overseas military personnel to their home States." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (citing *Wisconsin*, 517 U.S. at 4 and *Franklin v. Massachusetts*, 505 U.S. 788, 790–791 (1992)); *Utah v. Evans*, 536 U.S. 452, 464 (2002) (explaining that such determinations "rest[] upon the words 'actual Enumeration' as those words appear in the Constitution's Census Clause"). It is now also clear that ancillary decisions unrelated to the headcount—like the collection of demographic information through the census—should be judged by "Congress's broad authority over the census, as informed by long and consistent historical practice." *Dep't of Commerce*, 139 S. Ct. at 2566–67.

But there is no standard governing minute details of *future* census operations that are at the very core of the Congress's power (largely delegated to the Secretary) to "direct" the "Manner" by which the census is taken. U.S. Const. art. I, § 2, cl. 3. Where, as here, Plaintiffs challenge operations of a yet-to-be-conducted census, "[n]o districts have been drawn, no benefits cut, no actual harm yet suffered by the plaintiffs." *Tucker v. U.S. Dep't of Commerce*, 135 F.R.D. 175, 180 (N.D. Ill. 1991). So "[t]he question is which of the coordinate branches of government is best equipped to deal with plaintiffs' concern." *Id.* And the answer is Congress, as the Court would be venturing into the realm of cost/benefit analyses and policy judgments concerning every logistical decision in the 10-year lead up to the census, including whether the Census Bureau properly balanced

the cost, testing, training, effectiveness, timing, need, and accuracy of each operation with every other operation and the monies appropriated by Congress. *See* Defs.' First MTD at 22–25; Defs.' First MTD Reply at 9–14; Defs.' First MTD Suppl. Br. at 5–6.

Those are determinations constitutionally entrusted to representatives of the people and executive officials confirmed by the same. They are up to the task: since the Bureau published its final operational plan, Congress appropriated (and the Bureau developed a plan to spend) around $110 million on mobile questionnaire assistance—more than *double* the amount Plaintiffs request in this motion. Stempowski Decl. ¶ 41. So court intervention is both unwise and unnecessary. Indeed, "you might as well turn [this case] over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417–18 (7th Cir. 1992). In this Court's own words, "the Court cannot undertake independent resolution" of Plaintiffs' case "without expressing lack of the respect due coordinate branches of government." *NAACP*, 399 F. Supp. 3d at 418 (alterations omitted) (quoting *Baker*, 369 U.S. at 217). This case is not justiciable and should be dismissed.

B. Plaintiffs Do Not Have Standing to Bring this Case

Standing "requires an injury in fact that is caused by the challenged conduct and is likely to be redressed by a favorable decision." *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 405 (4th Cir. 2019). As the parties invoking this Court's jurisdiction, Plaintiffs bear the burden of establishing these elements. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). They cannot.

1. Plaintiffs' speculative injuries are far from certainly impending.

"To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548. The purpose of the imminence requirement "is to ensure that the alleged injury is not too speculative for Article III purposes." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). So the "threatened injury must be *certainly impending* to constitute injury in fact, and allegations of *possible* future injury are not sufficient." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 207–08 (4th Cir. 2017) (alterations omitted)

(quoting *Clapper*, 568 U.S. at 409). A "highly attenuated chain of possibilities[] does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410.

Plaintiffs rely on just such a "highly attenuated chain of possibilities" to connect purportedly deficient census operations with their theoretical representational and funding injures. *See* TAC ¶¶ 167–69. In order for Prince George's County to experience an undercount, (1) its residents must not respond to any of six mailings by internet, mail, or phone, (2) they must not be counted by high-quality administrative records from other federal agencies, (3) they must not respond to six or more in-person visits by enumerators, (4) they must not be counted when enumerators gather information from proxies (like neighbors or landlords), and (5) they must not be counted by imputation, which is specifically designed as a final backstop to assure that all occupied housing units are counted. *Supra* Background Section II. And after all that, Prince George's County will not experience a *differential* undercount unless it is undercounted by *more* than other parts of Maryland (for Plaintiffs' intrastate redistricting "injury") or other parts of the country (for Plaintiffs' apportionment and federal funding "injuries"). In other words, undercounts elsewhere may render an undercount in Prince George's County (if any) immaterial. So Plaintiffs pile speculation on top of speculation six times over. *See, e.g.*, *Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (no standing because, even absent challenged census practice, "it might well be that . . . New York's representation would not be increased as [plaintiff] claims"); *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 570 (D.D.C. 1980) (denying standing because the plaintiffs "can do no more than speculate as to which states might gain and which might lose representation").

That is why, as this Court recognized, the idea of challenging census procedures *before* the census "flies in the face of decades of litigation that legions of plaintiffs have brought . . . *after* . . . the census had been conducted." *NAACP*, 382 F. Supp. 3d at 369 (D. Md. 2019) (collecting cases), *aff'd in part, rev'd in part* 945 F.3d 183 (4th Cir. 2019). Plaintiffs themselves recognize this uncertainty. *See, e.g.*, Hillygus Decl. ¶ 11 (hypothesizing that "*if* a differential undercount occurs in the 2020 Census and *if* current allocation formulas and funding levels remain similar over time, [ ] a differential undercount would cause" certain states to lose money (emphasis added)); *id.* ¶ 36 (noting that "reduced local presence creates a major risk for the 2020 count *if* self-

response rates decline below assumed and modeled levels . . .” (emphasis added)); *id.* ¶ 50 (explaining that “[t]he effects of these [operational] decisions are cumulative and often difficult to quantify precisely given available data”); Doms Decl. ¶ 24 (noting that “it is not possible to conclude” whether or not certain operational changes will improve efficiencies in Nonresponse Followup); *id.* ¶ 36 (conceding that “technology and outside databases could, in theory, produce a MAF more accurate than in-field operations”).

Plaintiffs’ cursory allegations about their purported representational and funding injuries further demonstrate their inadequacy. For example, Plaintiffs note that “Defendants’ failure to conduct a constitutionally sufficient census . . . increases the risk of Maryland losing seats in Congress,” without any further elucidation concerning how Maryland’s census count will compare to the counts of the other 50 states needed to calculate Maryland’s number of representatives. TAC ¶ 169; *see Dep’t of Commerce v. Montana*, 503 U.S. 442, 455 (1992) (describing the method of equal proportions used for congressional apportionment). Plaintiffs also rest on conclusory allegations that “Defendants’ current failings threaten to result in a significantly higher undercount for Prince George’s County, leading to an even greater loss of funding” than prior censuses. TAC ¶ 167. But Plaintiffs make no mention of any specific federal funding programs, the funding formulas for those federal programs, how they incorporate census data, or how the count of Prince George’s County will compare to the counts of other states and localities relevant to any specific funding formulas. *See generally* TAC ¶ 14, 156–82; *see Nat’l Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 185 (D.C. Cir. 1996) (no standing because court could not determine “what effect any methodology for counting the homeless would have on the federal funding of any particular appellant,” since “if a more accurate count would have enlarged some communities’ shares, it likely would have reduced the shares of other communities”).[13] And even if they

[13] Individual Plaintiffs and Organizational Plaintiffs’ members have also not alleged sufficient facts indicating that they—as opposed to Prince George’s County—will suffer any concrete injury from a loss of funding or tied any hypothetical funding decreases to material changes in the particular public services they use. For example, Plaintiffs have alleged no facts indicating that their state and local governments will reduce spending on the particular roads and other programs that Plaintiffs themselves use, rather than replacing any lost federal funding with other sources, or reducing spending roads and programs not used by Plaintiffs. *See Defs. of Wildlife*, 504 U.S. at 571 (“[A]gencies generally supply only a fraction of the funding for a foreign project. . . . Respondents have produced nothing to indicate that the projects they have named will either be

had, Congress could change funding formulas at any time, making Plaintiffs' "injury" even more speculative. Plaintiffs' "legal conclusions couched as factual allegations" are plainly insufficient for standing. *Roberson v. Ginnie Mae*, 973 F. Supp. 2d 585, 589 (D. Md. 2013) (Grimm, J.) (citations omitted).

2. Plaintiffs' speculative injuries are not traceable to Defendants.

Plaintiffs also lack standing because they do not allege that their theoretical injuries will result directly from the Census Bureau's supposedly deficient census operations, but from a multi-step causal chain (as explained above), including the "the independent action of some third part[ies] not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976).

First, any speculative injury is traceable to Prince George's County residents who decide not to answer the census. Not only does the law require people to answer the census, 13 U.S.C. § 221(a), but, as explained above, the census operations at issue have been specifically designed to elicit census responses from every occupied household. That makes this case a far cry from the citizenship-question cases. "[I]n th[o]se circumstances," the Supreme Court found traceability because "third parties w[ould] likely react in predictable ways to [a] citizenship question [on the 2020 Census]" based on the "Census Bureau's theory" indicating "noncitizens' reluctance to answer a citizenship question." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). But here, there are no allegations—let alone a Census Bureau theory—that Prince George's County residents will be "reluctan[t]" to answer the census due to any of the census operations at issue. *Id.* To the contrary, the challenged census operations will be used *to enumerate* individuals, not to gather ancillary citizenship data. So if Prince George's County residents choose to not answer the census despite six mailings and multiple in-person visits, any (speculative) harm is traceable to their decision.

Second, even assuming a differential undercount for Prince George's County, any intrastate vote dilution would be fairly traceable to Maryland's independent decision to use Census Bureau decennial census

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suspended, or do less harm to listed species, if that fraction is eliminated. . . . [I]t is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.").

data—as opposed to an alternative source of population data—in post-2020 intrastate redistricting. No stricture of the *federal government* requires states to use Census Bureau data in intrastate redistricting. *See Burns v. Richardson*, 384 U.S. 73, 91 (1966) ("[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured."); *City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) ("Nothing in the constitution . . . compels the states . . . to use only the unadjusted census figures."). Indeed, Maryland has chosen not to do so in some instances. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 n.3 (2016); Md. Code Ann., State Gov't § 2-2A-01; Md. Code Ann., Local Gov't § 1-1307. If Maryland chooses to draw its post-2020 legislative districts using some other source of population data—like their own population data, population data from a private entity, or even Census Bureau population data other than from the decennial census—Plaintiffs' intrastate voting power would be unaffected by any theoretical differential undercount.

Any intrastate vote dilution would also be fairly traceable to Maryland's independent decision to redraw the post-2020 state legislative districts in which Plaintiffs reside as a result of any differential undercount. States may constitutionally deviate from equal populations across state legislative districts by up to 10% to accommodate districting decisions reflecting the states' history and legitimate political values. *See Brown v. Thompson*, 462 U.S. 835, 838–40, 842–44 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977); *White v. Regester*, 412 U.S. 755, 761 (1973); *Abate v. Mundt*, 403 U.S. 182, 185 (1971). So even assuming a differential undercount in Prince George's County, if Maryland does not change how state legislative districts are drawn after 2020, or redraws districts to account for any differential undercount, Plaintiffs' intrastate voting power would be unaffected by any differential undercount.

Third, again assuming a differential undercount for Prince George's County, Plaintiffs have not come close to adequately alleging any loss of funds traceable to the Census Bureau. *See* TAC ¶ 167. As noted above, Plaintiffs do not allege the loss of monies from any specific federal funding programs, the funding formulas for those federal programs, or how they incorporate census data. That is important for traceability purposes

because many federal funding regimes provide full or partial discretion to states and localities in disbursing federal funds, making any purported funding injury traceable to other actors.

Plaintiffs have not adequately alleged that any abstract census-related injury is traceable to the challenged census operations rather than Prince George's County residents that do not answer the census or Maryland's redistricting and funding choices. It may be true that "the causation element of standing is satisfied where the plaintiff suffers an injury that is produced by the determinative or coercive effect of the defendants' conduct upon the action of someone else." *Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 479 (D. Md. 2019) (Grimm, J.) (alterations and citations omitted). But the Census Bureau has done everything in its power to "coerce" census responses from every occupied housing unit and make an accurate count the "determinative" outcome.

3. Plaintiffs' speculative injuries are not redressable by the Court.

This Court previously rejected Plaintiffs' request for "the Court to tell the Bureau when and how to spend [ ] funds and, in effect, take supervisory control over the execution of the 2020 Census." *NAACP*, 399 F. Supp. 3d at 416. As the Court explained, "[t]hat is not a remedy that a court has the authority, expertise, or time to provide." *Id.*; *see NAACP v. Bureau of the Census*, 945 F.3d 183, 191 (4th Cir. 2019) (recognizing that "the various 'design choices' being challenged expressly are tied to one another," so "'[s]etting aside' one or more of these 'choices' necessarily would impact the efficacy of the others, and inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations"). The Court was correct in its holding and should apply the same reasoning to dismiss Plaintiffs' TAC (or grant summary judgement for Defendants). *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[R]espondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.").

4. NAACP and its branch office cannot sue on behalf of unidentified members.

An organization does not have Article III standing to sue on behalf of its members unless the organization identifies a particular affected member, not merely a "statistical probability that some of [its] members

are threatened with concrete injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). A general reference to unidentified members is insufficient for organizational standing. *Id.* ("[T]he Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm."); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.23 (1982); *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) (upholding dismissal for lack of standing at the pleading stage because the plaintiff "failed to identify a single *specific member* injured by the [conduct at issue]"); *Casa De Maryland, Inc. v. Trump*, 2019 WL 5190689, at *5 (D. Md. Oct. 14, 2019) (Grimm, J.). Because NAACP and its branch office name only Robert Ross and Elizabeth Johnson as members, they cannot support standing by relying on their allegations that some member, somewhere in the United States, will be hypothetically injured after the census. *See, e.g.*, TAC ¶ 173; *id.* ¶ 175.

5. NAACP and its branch office cannot sue on their own behalves.

Organizational standing is conferred where the defendants' misconduct causes injury to the organization by frustrating the organizational mission, thus requiring the organization to divert resources in response. *PETA v. Tri-State Zoological Park of W. Maryland, Inc.*, 2019 WL 7185560, at *17 (D. Md. Dec. 26, 2019); *Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) ("An organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission."). Prince George's County Maryland Branch NAACP does not allege any diversion of resources whatsoever, and therefore fails this inquiry at the outset. *See generally* TAC ¶¶ 156–82. NAACP, on the other hand, alleges that it "has devoted additional staff time to its efforts to encourage participation in the 2020 Census, has begun providing Census-related trainings to its membership units across the country, and has established new Census-related partnerships with outside organizations." TAC ¶ 176. But NAACP nowhere alleges how these activities have "impede[d] its efforts to carry out its mission." *Lane*, 703 F.3d at 674. That is probably because census-related activities are at the core of NAACP's

mission to, in its own words, "ensure the political, educational, social, and economic equality of all citizens."[14] In fact, "NAACP has been a trusted partner in the last three censuses." Reist Decl. ¶ 18 n.2. NAACP therefore lacks standing because any diversion of resources is not the result of "any actions taken by [Defendants], but rather from the organization's own budgetary choices." *Lane*, 703 F.3d at 675 (citations omitted).

Even if NAACP's census-related activities somehow impeded its mission, it would still lack standing because any purported harm from the census is entirely speculative. *See* Section II.B.1, *supra*. So NAACP "cannot manufacture standing merely by inflicting harm on [itself] based on [its] fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416; *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 285 (3d Cir. 2014) (explaining that an organization cannot "simply choos[e] to spend money fixing a problem that otherwise would not affect the organization at all"). "If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Maryland v. United States*, 360 F. Supp. 3d 288, 308 (D. Md. 2019) (citation omitted).

C. Plaintiffs Do Not Plausibly Allege, or Create Any Material Factual Dispute Concerning, an Enumeration Clause Violation

For the reasons set forth in Argument Section I.A., Plaintiffs fail to plausibly allege, or create a genuine issue of material fact in support of, their claims. As Defendants' declarations make clear, each of the challenged 2020 Census operations have been designed with great effort and far exceed the minimal requirement (if any) that they "bear only a reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin*, 517 U.S. at 20. The undisputed facts show that the 2020 Census is materially different in design from the 2010 census such that comparable levels of funding and staffing are not required. In particular, the undisputed facts show that: (1) the 2020 census is not reliant on paper for tracking information, which reduces the need for physical office space and clerical support (Stempowski Decl. ¶¶ 46–49; Reist Decl. ¶¶ 23–25); (2) superior in-office data have produced the most accurate dataset ever of U.S. addresses (Bishop Decl.

[14] NAACP, *What is the Mission of the NAACP?*, https://www.naacp.org/about-us/. Indeed, NAACP's own website touts its efforts to "promote and ensure the full participation of the Black community in the 2020 Census." *See* NAACP, *2020 Census*, https://www.naacp.org/campaigns/2020-census/.

¶¶ 24–42); (3) the Bureau will deploy 2020 enumerators in a strategic and targeted way, to maximize the chances of an accurate count for hard-to-count populations (Stempowski Decl. ¶¶ 18, 21–33; Taylor Decl. ¶¶ 18–19); (4) the 2020 Census involves expanded outreach, including to hard-to-count communities, as compared to any previous census (Reist Decl. ¶¶ 7–12, 20–22, 27–28, 32–34); (5) plans for the 2020 Census were supported by extensive research and testing (Stempowski Decl. ¶¶ 54–56; Reist Decl. ¶¶ 29–30; Cantwell Decl. ¶ 24); and (6) Defendants' reservation of funding to address risks and contingencies is consistent with congressional intent and appropriately avoids unnecessary spending (Stempowski Decl. ¶¶ 57–59; Taylor Decl. ¶ 13). All Plaintiffs offer in opposition is the repeated invocation of the 2010 census design and expenditures, which cannot constitute genuine disputes of material fact in light of the changes for the 2020 census. *See Mathews v. Johns Hopkins Health System, Corp.*, 2019 WL 3804129, at *6 (D. Md. 2019) (defendants entitled to summary judgment on plaintiff's discrimination claim where plaintiff " attempts to compare apples to oranges, [so] this argument too must fail."); *Zimmerman v. Vectronix*, 2017 WL 6459680, at *3 (E.D. Va. 2017) ("where such a comparison cannot be made because of apples-to-oranges sales figures, this is an irreconcilable debate and ultimately immaterial to the question at the summary judgment stage—has the plaintiff carried his burden of production with respect to establishing the prima facie case? Mr. Zimmerman has not.").

And even if Plaintiffs attempt to find some area of factual dispute, any such dispute is not material given the extraordinarily deferential standard of review under the Enumeration Clause (assuming the *Wisconsin* standard even applies). Plaintiffs' experts offer only unsupported speculation about the effect of census operations based on unreasonable assumptions, critical omissions, and mischaracterization of details necessary to properly understand the plans at issue. "[A] party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences." *See Bennett v. Charles Cty. Pub. Sch.*, 2006 WL 4738662, at *2 (D. Md. May 23, 2006) (citing *Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330–31 (4th Cir. 1998), *aff'd*, 223 F. App'x 203 (4th Cir. 2007); *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). And such speculation is forcefully rebutted by the declarations of the long-term Census employees cited herein. Reist Decl. ¶¶ 35–38; Stempowski Decl. ¶¶ 60–65; Bishop Decl. ¶¶ 50–54; Taylor Decl. ¶¶ 21–32; Cantwell Decl. ¶¶ 9–32.

The Court should enter summary judgment for Defendants. "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989). This applies doubly where, as here, "an agency is called upon to make complex predictions within its area of special expertise." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 205 (4th Cir. 2009). In such circumstances, "a reviewing court must be at its most deferential" and "the novelty of a [ ] measure alone cannot be the basis of our decision to discredit it." *Id.* There is no genuine issue of material fact here.

CONCLUSION

This case is a study in misguided litigation. Plaintiffs purported to want more funding for the 2020 Census, so they sued instead of lobbying Congress. Then Plaintiffs purported to want design changes, so they sued instead of expressing concerns to the Census Bureau. Now, despite professed concerns about the census, they wish to commandeer nearly $800 million of Census Bureau's budget to transform the way the 2020 Census will be conducted just weeks before census invitations are mailed to nearly 150 million residences.

The Census Bureau has spent over 10 years researching, testing, evaluating, refining, and planning in an effort to count everyone once, only once, and in the right place. Operations are already underway. For the reasons set forth above, the Court should reject Plaintiffs' eleventh-hour attempt to upend the Census Bureau's most critical undertaking. Plaintiffs' preliminary-injunction motion should be denied, and Defendants' motion to dismiss or in the alternative motion for summary judgment should be granted, permitting the Census Bureau to go about its critical work once and for all.

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Respectfully submitted,

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