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

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

Plaintiffs,

v.

BUREAU OF THE CENSUS, *et al.*,

Defendants.

No. 19-cv-10917-AKH

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' PRELIMINARY INJUNCTION MOTION AND IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

In their preliminary injunction motion, Plaintiffs ask the Court to substitute its judgment for those of the career professionals who have been planning the 2020 Census for a decade and order the Census Bureau to waste nearly $800 million of taxpayer money on non-solutions for potential problems that are moot, that may never materialize, and that the Census Bureau has the resources, expertise, and contingency planning to actually solve if they do. Plaintiffs' requests are based on the unfounded assumption that the only acceptable way to carry out each census is to replicate the previous census, but with an ever-expanding allocation of resources to do precisely the same tasks. The Census Bureau, wielding its considerable discretion, has instead spent a decade carefully implementing numerous design changes that will improve the 2020 Census over previous censuses. Plaintiffs' claims ignore these improvements, rendering their requested relief nonsensical, counterproductive, and impossible to implement before the Census begins.

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. Moreover, beyond concentrating resources on harder-to-count areas, the 2020 Census design reserves 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.

As established by declarations from long-term Census Bureau employees, the 2020 Census reflects the Bureau's considered choice to adopt substantial and noteworthy departures from prior censuses. Indeed, precisely because the Census Bureau is continually refining its work, one of the three items of relief that Plaintiffs request (as well as one of the claims that they do *not* seek

injunctive relief on) is moot. Plaintiffs' proposed relief would require spending money on actions that would not improve the accuracy of the count, and thus would actually undermine the decade-long efforts of thousands to ensure the best possible count of this country's people. Further, this continued litigation distracts the professionals in charge of seeing that work successfully completed.

On the merits, Plaintiffs seek to do precisely what the Administrative Procedure Act ("APA") prohibits: substitute their judgment for that of the experts in charge of the Census, and, well after the eleventh hour, have the Court radically restructure and oversee the implementation of the 2020 Census. Such an effort is beyond the scope of the APA and, even if Plaintiffs' claims are evaluated on the merits, Plaintiffs cannot establish arbitrary or capricious agency action. Plaintiffs fare no better under the Enumeration Clause. 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.

Plaintiffs not only advance claims that are highly unlikely to succeed, but seek relief that would run profoundly contrary to the public interest and the balance of the equities. Granting injunctive relief that would throw the Census into turmoil mere weeks before the official Census start date (and well into the overall process). Doing so in order to avert the entirely speculative possibility of harm would be a severe misapplication of the preliminary injunction mechanism. That is particularly so where Plaintiffs, pointing to a document published more than a year ago, have belatedly launched a sweeping eleventh-hour attack on a complex operation years in the making.

Finally, certain of Plaintiffs' claims—at a minimum, those relating to the address canvassing phase—are also moot because they relate to completed phases of census operations or because the relief requested has already been provided for. The Court should accordingly dismiss these claims.

Accordingly, for the reasons set forth herein, the Court should deny Plaintiffs' motion for preliminary injunction, grant Defendants' prior motion to dismiss, and in the alternative grant Defendants' motion to dismiss as moot claims for which Plaintiffs do not seek injunctive relief or which have already been addressed by Defendants.

BACKGROUND

I. PROCEDURAL HISTORY

As the Government noted in its brief in support of its motion to dismiss (Dkt. No. 39) ("MTD Br."), Plaintiffs' claims are virtually identical to those brought by the same attorneys in parallel litigation in the District of Maryland. *See* MTD Br. 6. Plaintiffs have now followed the course set out in Maryland by filing a virtually identical motion for a preliminary injunction, *compare* Dkt. No. 40 ("P.I. Br.") *with Nat'l Ass'n for the Advancement of Colored People et al. v. Bureau of the Census et al.* ("*NAACP*"), Dkt. No. 169, No. 18 Civ. 891 (D. Md. Jan. 21, 2020), save that Plaintiffs here continue to pursue their APA claims, arguing a likelihood of success despite the fact that the District of Maryland and the Fourth Circuit have unanimously concluded that such claims are entirely without merit.

Plaintiffs' Complaint lays out five purportedly "arbitrary and irrational design choices":

> (a) plan to hire an unreasonably small number of enumerators; (b) drastic reduction in the number of Bureau field offices; (c) significant reduction in the Bureau's communications and partnership program, including the elimination of local, physical Questionnaire Assistance Centers; (d) decision to replace most In-Field Address Canvassing with In-Office Address Canvassing; and (e) decision to make only limited efforts to count inhabitants of units that appear vacant or nonexistent based on unreliable administrative records.

Dkt. No. 1 ("Compl.") at ¶ 36.

Plaintiffs now, however, request the compelled federal expenditure of nearly $800 million to obtain relief as to only the first three[1] of those "design choices," asking the Court to

> direct[] the Bureau to spend money already appropriated and currently held in accounts of Defendants to (1) increase outreach and communications to no less than 2010 Census levels as directed by Congress (expenditure of an additional $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 (expenditure of an additional $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 questionnaire assistance units within those communities at levels commensurate to 2010 (expenditure of an additional $45.6 million).

P.I. Br. at 33.

Plaintiffs no longer appear to request relief relating to the address canvassing program (design choice (d)) or the non-response follow up operations (design choice (e)). Yet because Plaintiffs' challenged actions "expressly are tied to one another," such that "[t]he sufficiency of the number of Enumerators inextricably is dependent on the other programs and decisions that the plaintiffs themselves identify," *Nat'l Ass'n for the Advancement of Colored People v. Bureau of the Census*, 945. F.3d 183, 191 (4th Cir. 2019) ("*NAACP III*"), the Government addresses comprehensively the 2020 Census design features identified (and mischaracterized) by Plaintiffs.

II. CENSUS OPERATIONS

The 2020 Census has been exhaustively planned, and is well underway. The goal of the decennial census is to count each resident of the United States once, only once, and in the right place. Declaration of Deborah Stempowski ("Stempowski Decl.") ¶ 3(a). The Census is a huge and difficult undertaking—approximately 330 million people living over 3.8 million square miles

[1] With respect to the second "design choice," relating to Area Census Offices, Plaintiffs request the opening of additional field offices only as an alternative form of relief.

will be counted in just a few months—that takes a decade of planning. *Id.* ¶¶ 10, 67. The entire census operation is designed with the objective of achieving the goal of counting everyone, and this effort includes the specific aspects of the census design challenged in Plaintiffs' Complaint. *Id.* ¶¶ 4, 6. In the Bureau's attempts to achieve an accurate count, great efforts and the most resources are expended on those populations that are most difficult to count. *Id.* ¶ 9; Declaration of Benjamin Taylor ("Taylor Decl.") ¶¶ 18-19; Declaration of Patrick Cantwell ("Cantwell Decl.") ¶¶ 10, 34. 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: The Census Bureau is a recognized national leader in determining geographic area boundaries and addresses. Declaration of Deirdre Dalpiaz Bishop ("Bishop Decl.") ¶¶ 8-11. The Census Bureau's massive resources dedicated to geospatial information include most prominently the permanent Master Address File ("MAF"), which was developed beginning with the 2000 Census. *Id.* ¶¶ 22-23. In preparation for the 2020 Census, the Census Bureau has accepted over 100 million address records from government partners and used these to update the MAF from 2013 to 2019, including accepting 232,403 records from the City of New York for Kings County, NY, of which 100 percent matched to the MAF, and 133,467 records from Orange County, NY (including Newburgh), of which 99.98 percent matched to the MAF. *Id.* ¶ 28. The Census Bureau further implemented for the third decade the Local Update of Census Addresses Program, by which the Census Bureau accepted millions of additional addresses in 2018, including receiving 21,831 new and 13,503 corrected address records in Kings County, and 75 new and 3 corrected addresses in Newburgh. *Id.* ¶ 29. The Census Bureau also provided tribal,

state, and local governments the opportunity to submit addresses for new construction, beginning in March 2018 and continuing through Census Day, April 1, 2020; New York City and the State of New York have so far provided over 40,000 addresses within Kings County, while the City of Newburgh has declined to participate. *Id.* ¶ 30.

In addition to these operations, from 2015 to 2017, the Census Bureau conducted an in-office review of every census block in the nation (over 11 million blocks), comparing government and commercial satellite imagery from 2009 and the date of the review with housing unit counts from the MAF. *Id.* ¶ 34-35. Further review was then conducted from 2017 to 2019, which ultimately resulted in the identification of 12.1 percent of census blocks (encompassing 39,203,593 addresses) as requiring in-field review. *Id.* ¶¶ 36-37.

Building off of this intensive foundation, the Census Bureau launched the in-field address canvassing phase, visiting 35 percent of all census blocks in the nation (including 100 percent of those identified as requiring review) between August and October 2019. *Id.* ¶¶ 37-39. This process, now complete, 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 in March 2020, this exhaustively compiled 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. Based upon historical response rates, known levels of internet access and penetration, and demographics, residents predicted to have low online response rates will receive a full paper questionnaire on the first mailing, in addition to instructions for responding online or by phone. *Id.* ¶¶ 14-15. Follow-up mailing will ensue and 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 five 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. Enumerators are trained to assess whether the location is vacant or unoccupied and may also confirm with a "knowledgeable person"—*i.e.*, someone who knows about the address and the persons living there, such as a neighbor, rental agent, or building manager—as to whether an address is vacant or unoccupied. *Id.* ¶¶ 25-26. Even if both the postal records and the in-person inspection confirm the address is unoccupied, the Census Bureau will still send an additional mailing encouraging self-response. *Id.* ¶ 29. Critically, a single determination of a vacant or nonexistent housing unit will *not* suffice to remove the address from the Census Bureau's enumeration; confirmation from a knowledgeable source will be required, and if no such knowledgeable source can be found *then* administrative records may be consulted to confirm that an apparently vacant or nonexistent housing unit is, in fact, vacant or nonexistent. *Id.* ¶¶ 26-29.

If the Census Bureau determines 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, 64. 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, 23, 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. This process is similar to that used in the 2010 Census, but in some respects is *more* labor-intensive—for the 2010 Census three of the default six follow-up attempts could be by phone, whereas for the 2020 Census all six attempts must be in person. *Id.* ¶ 23.

Imputation: Finally, even if the Census Bureau has not obtained the count of an occupied address through the five initial mailings, multiple in-person visits, a final non-response follow-up mailing, or a proxy interview, 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.

Mobile Questionnaire Assistance: To further encourage responses, the Census Bureau has created an operation known as Mobile Questionnaire Assistance ("MQA"), for which it plans to spend $110 to $120 million. Stempowski Decl. ¶¶ 38, 41. In 2010, the Census Bureau operated physical Questionnaire Assistance Centers ("QACs") that functioned as distribution sites for "Be Counted" forms, which were Census questionnaires that could be submitted without a Census ID. *Id*. ¶ 35. The QAC staff were not authorized to accept completed forms; rather they could only hand out the form, provide assistance if needed, and direct the respondent to a mail box. *Id.* However, because the 2020 Census is not using paper Be Counted forms, the need for QACs has been obviated for the 2020 Census. *Id.* ¶ 36. Further, the QACs proved not to be a cost-effective method to achieve non-ID self-responses in the 2010 Census, given that they identified an average of only about 20 persons from each of the approximately 39,000 locations. *Id.* ¶ 37.

In contrast, the MQA operation takes advantage of the Census Bureau's new ability to take self-responses over the internet and in multiple languages. *Id.* ¶ 38. Over 4,000 staff hired across the country as Recruiting Assistants will be converted to working as MQA staff in March 2020,

and they will specifically target areas where respondents in hard-to-count or low response areas may be found. *Id.* In contrast to the QAC staff in 2010 (who could not even accept a response), the MQA staff will be highly mobile with the ability to visit multiple areas in a single day, thereby shifting Census's ability from merely attempting to motivate an eventual response to actually obtaining a secure, on-the-spot response. *Id.*

Enumerators: There are significant distinctions between the 2010 and 2020 Census operations that require a different approach to enumerator hiring. In 2010, enumerators relied heavily on the use of paper—questionnaires, maps, address listing pages, training materials, field manuals, time reports, and expense reports. Stempowski Decl. ¶ 46. Thus, large and numerous regional offices were needed to support the paper-based 2010 Census. *Id.*. Enumerators met with their supervisors daily to exchange completed time and expense forms, receive new assignments and materials, and 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 process includes use of 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 plans to hire and deploy somewhere between 320,000 and 500,000 enumerators for the 2020 Census. *Id.* ¶ 50; *see also* Taylor Decl. ¶¶ 32-34. This range of enumerators is specifically designed to be just that: a *range* of enumerators, which allows the Census Bureau to adjust its deployment of enumerators as necessary after Census Day. Stempowski Decl. ¶¶ 52-53. The Bureau needs this flexibility because 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. *Id.* ¶ 58; Taylor Decl. ¶ 14. Should any need to adjust the number of enumerators arise after Census Day, the Bureau will be prepared to do so. Indeed, the Census Bureau has already prepared for a variety of contingencies, both expected and unexpected, and through this planning, the 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.

Area Census Offices: For the 2020 Census, the Bureau determined the requisite number and location of Area Census Offices ("ACOs") through a data-driven process based on the estimated number of enumerators needed for the 2020 Census. Stempowski Decl. ¶ 43. ACOs house the managers, staff, materials, and equipment (laptops, smartphones, tablets, etc.) needed to support the hundreds of thousands of Census Bureau employees conducting local census operations, including NRFU, group quarters, and other enumeration operations. *Id.* ¶ 45. ACOs are not open to the public—the public does not visit an ACO to be enumerated. *Id.* ¶ 44. Rather, regardless of the location of the nearest ACO, individuals will be counted either by self-responding (completing a form from any location of their choosing), through an in-person visit to their homes, through (in very rare cases) administrative records, or (in rarer cases) count imputation. *Id.* Thus, the amount of ACOs is not indicative of whether any person will or will not be counted. *Id.* ¶ 45.

ACOs are different than the Local Census Offices used for the 2010 Census. *Id.* ¶ 46. In 2010, the Bureau needed more offices with more space to support the paper-based 2010 Census. *Id.* 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.* ¶ 47. The Census Bureau's research and testing regarding technological advancements indicates that enumerators will be more productive and efficient than in the 2010 Census, which will likely mean fewer enumerators are required to complete the 2010 Census. *Id.* ¶¶ 48-49. It also means that enumerators do not need offices close enough to their residences to visit on a daily basis given that they will be relying primarily on their mobile devices to do their work. *Id.* ¶ 49.

Publicity and Partnerships: The Census Bureau has also been working to conduct an unprecedented Integrated Partnership and Communications campaign to communicate the importance of participating in the 2020 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. The Census Bureau has hired specialists years earlier than in the prior census; has more rigorously organized the partnership process; and has established over 8,000 Complete Count Committees,[2] including a New York state committee, 5 Complete Count Committees in Orange County, and a Complete Count Committee in Newburgh. Declaration of Burton Reist ("Reist Decl.") ¶¶ 19-22. Learning from the lessons of the 2010

[2] Complete Count Committees unite government and community leaders who then play a pivotal role in establishing, organizing, and integrating census partners at the state, local, and tribal levels. Reist Decl. ¶ 21.

Census, the National Partnership Program has nearly doubled the number of "partnership specialists"—professional staff whose responsibility is to reach out and form partnerships with local communities and organizations to encourage self-response. *Id.* ¶¶ 6(b), 20. The Census Bureau has meanwhile eliminated the "partnership assistant" position; these positions, which were created in part in order to provide jobs with unplanned-for stimulus funds allocated as part of the American Recovery and Reinvestment Act, were determined to have little direct impact on the success of the partnership program, and have been further rendered obsolete by the shift away from the paper and pencil administrative activities performed during the 2010 Census. *Id.* ¶¶ 23-25.

The Integrated Partnership and Communications program will also feature important innovations on the communications side. For example, the 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. *Id.* ¶ 10. The Census Bureau plans to spend roughly $583 million on the 2020 Census Integrated Communications Contract, or about $128 million *more* in constant 2020 dollars than was spent for the 2010 Census. *Id.* ¶ 27. Adjusting for both population growth and inflation, the communications program will spend roughly 18% more per person for the 2020 Census than for the 2010 Census. *Id.*

A perfect census count has never been achieved. The endeavor is too challenging and too complex. But the Census Bureau tries every ten years to do the best possible count, incorporating lessons from its previous efforts, taking into account new technological capabilities and available information, and adapting to the changes that have taken place over a decade. *See, e.g.*, Cantwell Decl. ¶ 34 ("Over the decades, many researchers at the Census Bureau, including 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. *See, e.g.*, Stempowksi Decl. ¶ 59.

LEGAL STANDARDS

When seeking to enjoin the actions of a private party and maintain the status quo, a preliminary injunction may be granted in the Second Circuit when "the movant [establishes] (1) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor, and (2) irreparable harm in the absence of the injunction." *Kelly v. Honeywell Int'l, Inc.*, 933 F.3d 173, 183-84 (2d Cir. 2019) (internal quotations omitted).

However, the Second Circuit has "repeatedly stated that the serious-questions standard cannot be used to preliminarily enjoin governmental action." *Trump v. Deutsche Bank AG*, 943 F.3d 627, 637 (2d Cir. 2019), *cert. granted*, 140 S. Ct. 660 (Dec. 13, 2019); *see also Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 n.4 (2d Cir. 2010) ("Where the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous 'serious questions' standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." (brackets omitted) (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995))).

Additionally, the Second Circuit has held that "a 'mandatory' preliminary injunction that 'alters the status quo by commanding some positive act,' as opposed to a 'prohibitory' injunction seeking only to maintain the status quo, 'should issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.'" *Citigroup*, 598 F.3d at 35 n.4 (brackets omitted) (quoting *Tom*

Doherty Assocs., Inc. v. Saban Entm't, Inc. 60 F.3d 27, 34 (2d Cir. 1995)). Or, phrased slightly differently, a plaintiff seeking a mandatory injunction must show a "clear or substantial likelihood of success on the merits." *NYCLU v. NYC Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012).

Accordingly, whether Plaintiffs frame their relief as *prohibiting* the Census Bureau from reducing certain levels of staffing or expenditures from 2010 Census levels, or *mandating* that the Census Bureau hire additional enumerators and expend additional resources, the "fair grounds for litigation" standard urged by Plaintiffs is inapplicable. *See* P.I. Br. at 14-15.[3] Plaintiffs must demonstrate both a clear likelihood of success on the merits and irreparable harm in the absence of the injunction.

Moreover, as Plaintiffs seek to enjoin a program of significant national importance, they should be required to meet the four-factor test set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008): "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." *Id.* at 20. Although the Second Circuit has held that the *Winter* standard is not mandatory in private injunction cases, *see Citigroup*, 598 F.3d at 38, the Second Circuit has suggested that courts considering an injunction against the government should "consider not only whether [plaintiffs] have met the governing likelihood-of-success standard but also whether they

[3] Plaintiffs claim that *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), employed the "fair ground for litigation" standard. That claim egregiously misreads *Carey*, which rejected the argument that the plaintiffs had succeeded only in showing a "fair ground for litigation." *Id.* at 839. The Court explicitly found (and noted that the district court had found) that Plaintiffs had established a "likelihood of success on the merits." *Id.*; *see also id.* ("[A]s we have already noted, the merits of this case provide more than a 'fair ground for litigation.'"). In any event, even if *Carey had* employed the standard urged by Plaintiffs, it would have been long since superseded by the decades of controlling Supreme Court and Second Circuit law cited above.

have satisfied . . . a balance of hardships tipping decidedly in their favor, and the public interest favoring an injunction." *Trump*, 943 F.3d at 641.

Defendants further move to dismiss certain portions of the Complaint as moot. "When a case becomes moot, the federal courts lack subject matter jurisdiction over the action." *In re Kurtzman*, 194 F.3d 54, 58 (2d Cir. 1999) (internal quotation marks and brackets omitted). "As with other defects in subject matter jurisdiction, mootness may be raised at any stage of the litigation." *Id.* The burden is on the plaintiff to prove jurisdiction, and the court may resolve disputed jurisdictional facts by reference to evidence outside the pleadings. *See, e.g.*, *Dimodica v. U.S. Dep't of Justice*, No. 05 Civ. 2165 (GEL)(FM), 2006 WL 89947, at *2 (Jan. 11, 2006).

ARGUMENT

I. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED

A. Plaintiffs Are Unlikely to Succeed on the Merits

1. Plaintiffs Fail to State a Claim for Relief Under the APA

For the reasons set forth in Defendants' motion to dismiss, Plaintiffs fail to state a valid claim—let alone establish a likelihood of success—under the APA. First, Plaintiffs fail to challenge a discrete agency action, instead mounting an impermissible programmatic attack on the conduct of the 2020 Census. *See* MTD Br. 13-17. Second, Plaintiffs seek to compel agency action without identifying any non-discretionary act that is required by law. *See* MTD Br. 17-20. Third, Plaintiffs fail to challenge a final agency action that determines rights or obligations. *See* MTD Br. 20-21.

For each of these reasons, Plaintiffs' APA claims should be dismissed, and Plaintiffs certainly cannot establish a likelihood of success on (or even a serious question going to) the merits.[4]

2. The Design and Conduct of the 2020 Census Is Not Arbitrary or Capricious[5]

Even if Plaintiffs did state a cognizable claim under the APA, they would still have to demonstrate a likelihood that they will succeed in proving that Defendants' challenged actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *County of Westchester v. U.S. Dep't of Housing and Urban Dev.*, 802 F.3d 413, 430 (2d Cir. 2015) (per curiam) (internal quotation marks and footnotes omitted). "Under this deferential standard of review, [a court] may not substitute [its] judgment for that of the agency. The scope of review under this standard is narrow because a court must be reluctant to reverse results supported by a weight of considered and carefully articulated expert opinion." *Id.* at 430-31 (internal quotation marks and footnotes omitted).

Plaintiffs fail to make this 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 in which the Census Bureau has carefully planned to carry out the Census, with numerous tests, revisions, and improvements over the course of a decade, would not be adequate to meet their burden under the APA. And, Plaintiffs' criticisms are

[4] Because Plaintiffs have not challenged a "final agency action," the Court may rely on the attached declarations from long-time Census Bureau employees to find that Plaintiffs' claims are unlikely to succeed on the merits. *See* 5 U.S.C. § 706.

[5] The challenged actions discussed in this section are not arbitrary or capricious, and for the same reason they also bear "a reasonable relationship to the accomplishment of an actual enumeration of the population," and thus withstand Plaintiffs' constitutional challenge as well. *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). *See infra* Part 3.

not reasonable. At base, Plaintiffs' case is grounded in the contention 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 dubious premise, Plaintiffs assert, 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 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 that of 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 merit doing away with the 2020 Census design, which is "supported by a weight of considered and carefully articulated expert opinion" and has been developed over the course of a decade. *County of Westchester*, 802 F.3d at 431 (internal quotation marks omitted).

a. The Census Bureau Has Made the Reasoned Decision to Expand the Partnership Program by Relying on a Greatly Increased Number of High-Impact Professional Staff as Compared to the 2010 Census

Plaintiffs are not entitled to injunctive relief regarding the Census Bureau's spending on its partnership program because there is simply no basis to find that the Bureau's spending decisions lack a reasonable basis, or are arbitrary or capricious. As an initial matter, Plaintiffs' requested relief for nearly $128 million "to increase outreach and communications to no less than 2010 Census levels" is based on a faulty premise that the Bureau is spending approximately the same amount on advertising in 2020 as it did in 2010 adjusted for population growth and inflation, which

it simply is not. P.I. Br. at 5 (citing Doms Decl. ¶ 14). Plaintiffs' calculations are based on the understanding that the Bureau's current planned advertising spend is $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. Reist Decl. ¶¶ 27, 37; Taylor Decl. ¶ 36. Indeed, the amount spent on the advertising program for the 2020 Census represents an 18% increase in spending from 2010 adjusted for both inflation and population growth. Reist Decl. ¶ 27. And more money may be spent if necessary; specifically, the Census Bureau will increase outreach if certain populations or areas appear to be responding less than others, or less than anticipated. *See* Stempowski Decl. ¶ 59. Further, while the total spending on communications *and* partnerships may have decreased slightly when adjusted for population, the decrease is nowhere near the level assumed by the Plaintiffs' analysis and, as discussed below, is justified given the Bureau's reallocation of funding for partnership staff hiring.

Plaintiffs also argue the Bureau "cut . . . almost in half" the number of "partnership staff" since the 2010 Census. P.I. Br. at 5. However, their argument disregards the two 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. *Id.* ¶¶ 23-24. The Census Bureau determined that these positions would be even less worthwhile in 2020. *Id.* 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. *Id.* ¶ 24. That decision enabled the Census Bureau to nearly double the number of partnership specialists—the skilled professionals who do the substantive work central to the partnership program by actually forming and maintaining relationships with trusted partners. *Id.* ¶ 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.

Further, Plaintiffs' suggestion that the reduction in partnership assistants might affect the response rate of minority communities has no basis in fact. Rather, the decrease in partnership staffing since the 2010 Census is a direct result of eliminating the obsolete partnership assistant position, which, even during the 2010 Census, did not contribute significantly to the partnership contact rate. Reist Decl. ¶ 36. Any assumption that that each dollar spent on partnership programs has an equal impact in the number of partnerships is untrue for the same reason: a dollar spent on a partnership specialist is worth far more in terms of developing contacts and partnerships than a dollar spent on a partnership assistant. *Id.* Unlike partnership specialists, who make direct contact with partners, partnership assistants typically did not, and the Census Bureau reasonably concluded that the elimination of this position was unlikely to have any effect on the overall effectiveness of the partnership program. *Id.* As noted above, the 2020 Census will nearly double the number of professional partnership specialists as compared to the 2010 Census, which the Census Bureau anticipates will directly increase the number and quality of partnerships and should have a positive impact on the enumeration of hard to count and minority populations. *Id.* ¶ 20.[6]

[6] Plaintiffs' expert 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. ¶ 12. 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

Moreover, Plaintiffs' focus on partnership ignores the beneficial impact of the 2020 communications program. Not only is the Bureau's communications program spending more than in 2010, it will also be significantly more effective given the various innovations and direct targeting used in 2020. *See id.* ¶¶ 9-10. Specifically, the Bureau's media campaigns focus on various minority population groups, and 2020 is the first census to make a significant investment in digital advertising, spending time and resources targeting online sites including Facebook, Instagram, paid search engines, display ads, and programmatic advertising. *Id.* ¶ 10. The push to have a greater digital presence will allow the Census Bureau to reach a mobile audience, tailor messages, micro-target, and shift campaign ads and messages as needed. *Id.* Should a specific area of the country generate lower than expected responses, the Census Bureau can increase advertising outreach to that area. *Id.* Micro-targeting to specific regions allows the Census Bureau to tailor its messaging, including directing appropriate messages to hard-to-reach communities and those who distrust government, both of which have been traditionally undercounted. *Id.* Additionally, if the Census Bureau call centers detect a sizable number of calls or comments surrounding a specific concern, digital advertising will allow the Bureau to respond more directly. *Id.* The Bureau is also mounting a more robust traditional media campaign compared to prior censuses, and has hired an advertising firm to provide expertise on reaching out to various population groups regarding their responses, including the Black/African American, Hispanic/Latino, Asian, American Indian and Alaska Native, and Native Hawaiian and Other Pacific Islander populations. *Id.* ¶¶ 11-12.

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in which the Census Bureau made many of the decisions he now criticizes. Doms Decl. ¶ 6; *see also* 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 should not be credited.

Despite Plaintiffs' contentions, the partnership program is only part of the Integrated Partnership and Communications ("IPC") program, which is the part of the census operations designed to increase participation of hard-to-count communities. Plaintiffs' argument wholly ignores the other half of the IPC program, the Integrated Communications Contract. This is a $583 million program, and it is expected to reach 99.9% of 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. In short, the Census Bureau's communications program is not only larger than ever before in terms of the actual amount spent and staffing devoted to outreach, as Plaintiffs concede, *see* Doms Decl. ¶ 14, it is also far more sophisticated than in past censuses. Reist Decl. ¶ 38. There is simply no reasonable basis to assume that changes to the communications program since the 2010 Census will result in any increase in a differential undercount, or any reason to suggest that the Bureau's decisions are arbitrary or capricious.

Nor, contrary to Plaintiffs' contentions, has the Census Bureau declined to spend a particular amount on the partnership program despite being "directed by Congress" to do so. P.I. Br. at 2, 11. When Congress appropriated a lump sum to the Bureau, it explicitly declined to direct any amount for advertising and outreach; indeed, the 2019 appropriations act states that "from amounts provided herein, funds *may* be used for promotion, outreach, and marketing activities," without mandating that any amount be so spent. Wishnie Decl. Ex. 21 (emphasis added). This is in marked contrast to the way funds are allocated in the same provision to the Department Office of Inspector General, allocating a specific amount of funds to that office for the specific purpose of investigating and auditing the Census Bureau. *See id.* Indeed, even the statement cited by Plaintiffs fails to support their claim: a single statement by a committee chairperson (as relied on by Plaintiffs) does not represent an "express Congressional instruction" to spend a certain amount

on outreach. P.I. Br. at 6. 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 suggests no specific amount of funds for that purpose. Wishnie Decl. Ex. 3 at 10962. The Bureau's plans heed that suggestion and reflect a level of effort on outreach and communications that is significantly greater for the 2020 Census than for the 2010 Census. *See* Reist Decl. ¶¶ 10, 19-22, 27-34, 36, 38.

Indeed, the ICP program is both expanded in scale and superior in quality to the 2010 Census. *See id.* Plaintiffs do not attack the 2010 Census's equivalent program as arbitrary or capricious, and appear to request that it be replicated, so their claim should fail for that reason alone. Moreover, Defendants' expenditure of over three quarters of a billion dollars on the ICP program to create over 1,000 different advertisements in 13 languages, expected to reach 99.9% of the country, and to hire 1,500 partnership specialists to establish and manage 300,000 partnerships, all in order to encourage self-response to the census, can hardly be seen as arbitrary or capricious. *See* Reist Decl. ¶¶ 12, 17, 20, 28; *see* Doms Decl. ¶¶ 13-14.

b. 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 non-response follow up ("NRFU") operations, 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 number of enumerators—would result in wasteful and unnecessary expenditure, 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. P.I. Br. at 7. 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. 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. *Id.* ¶¶ 51-53.

Plaintiffs' misunderstanding of the Census's Bureau's plans for enumerators seems to be based 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." Compl. ¶ 98. This term refers to the number of enumerators that Defendants 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 does not limit or control the number of enumerators that the Census Bureau intends to hire or deploy; it is just a prediction of how many enumerators the Census Bureau expects to use in completing its work, assuming the middle of its range of assumptions is realized. *See* Wishnie Decl. Ex. 8 at 117.

Critically, this number of "core enumerators" exists only for planning purposes, and it is based solely on informed projections. Using this number to mandate hiring ignores the Census Bureau's contingency planning, which is based on a range of potential outcomes and allows the Bureau to hire and deploy whatever number of enumerators the workload ultimately calls for. Stempowski Decl. ¶¶ 51-53; Taylor Decl. ¶ 19. There can be no basis to suggest that that the

Census Bureau's plan—reserving funds for and planning to hire whatever number of enumerators the job calls for—is arbitrary or capricious. Instead, Plaintiffs' request that the Court order a specific expenditure and mandate a specific number of enumerators now, regardless of the scope and location of the workload, is unnecessary and would waste resources. Taylor Decl. ¶ 34.

c. The Number and Location of Field Offices Is Immaterial 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, P.I. Br. at 23, 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. *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 is not. As discussed, 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. 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 were 500,000 local offices (with each enumerator's house being an "office") or one national office, the

effect would be the same, and would be equally permissible under the APA or the Enumeration Clause. 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's mistaken assumption that the Census Bureau 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 (including potentially by allocation of mobile questionnaire assistance units). P.I. Br. at 23; Doms Decl. ¶ 33. But the Census Bureau has already allocated between $110 million and $120 million for its mobile questionnaire assistance operation.[7] Stempowski Decl. ¶ 41; Taylor Decl. ¶ 33. This decision to provide more than double the resources for mobile questionnaire assistance than Plaintiffs request effectively moots this aspect of their request (*see infra* at 40).

d. 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. Plaintiffs do not seek to redo the address canvassing phase. As explained *infra* at 39, because Plaintiffs effectively seek an advisory opinion that the address canvassing phase *was* defective, their claim is moot.

[7] Plaintiffs also criticize Defendants' decision to eliminate brick-and-mortar questionnaire assistance centers, which, as discussed above, were a legacy of a census based on paper forms and which on average resulted in just 20 additional people counted per center. 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 questionnaire assistance program.

But Plaintiffs' concerns about the address canvassing effort are in any event 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 censuses, with the Census Bureau now harnessing exponential improvements in geospatial technology[8] 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. *Id.* ¶ 32; *see generally 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. *Id.* ¶¶ 32-36. Wherever there was *any* question about either the data quality or any change to the block, the Census Bureau performed in-field verification. *Id.* ¶ 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 precisely the sort of "result[] supported by a weight of considered and carefully articulated expert opinion" for which courts should be leery of "substitut[ing their] judgment for that of the agency." *County of Westchester*, 802 F.3d at 430-31 (internal quotation

[8] 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).

marks and footnotes omitted). Plaintiffs' small number of minor criticisms, P.I. Br. at 24-25—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, *id.* at 25, 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. ¶ 51. 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.*

Plaintiffs further rely on Dr. Doms to suggest that minority households tend to be in areas requiring more in-field verification. P.I. Br. at 25 (citing Doms Decl. ¶ 44). But Dr. Doms's arguments and the underlying data on which he 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.

e. 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 "arbitrarily" relied on to determine whether a housing unit is unoccupied is flatly wrong. P.I. Br. at 25. 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 total mailings or submit a response via the mobile assistance operation. *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 (*i.e.*, 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 other administrative records. *Id.* ¶ 27. Only if there is concurrence between the undeliverable list, the enumerator, *and* other administrative records will an address be treated as vacant or unoccupied. *Id.* This is an eminently 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.[9] *Id.* ¶ 29.

Plaintiffs attack this "reliance" on administrative records without appearing to understand what it consists of. And by contrast to the careful, multilayered process assembled over years by the Census Bureau, Plaintiffs rely on the entirely speculative and unsupported assertion by Dr. Doms that the use of administrative records "*could* increase the likelihood that occupied Non-White households get mistakenly classified as vacant," Doms Decl. ¶ 46 (emphasis added), which he declines even to attempt to quantify, *id.* ¶ 49(g). *See generally* Cantwell Decl. ¶ 7 (explaining that Dr. Doms's quantitative conclusions are largely lifted from the analysis by Dr. Hillygus in the Maryland litigation); Cantwell Decl. (explaining flaws in Dr. Hillygus's analysis).

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 decision to rely upon one visit

[9] 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.

to a vacant lot, *plus* the postal service undeliverable list, *plus* other administrative records, is not arbitrary or capricious.

f. 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 baseless contention that the Census Bureau has "refused" to spend appropriated funds, P.I. Br. at 27-28. 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). This requires retaining 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 unforeseen events could lead to unexpected outcomes. 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 predict perfectly. Either way, the Census Bureau has allocated a substantial sum that it intends to use to address 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' expert has 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"); *accord Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."). It is indisputable that the appropriations Plaintiffs point to are precisely that sort of unreviewable lump sum appropriation. *Compare* Wishnie Decl. Ex. 31 ("*Provided*, that from amounts provided herein, funds **may** be used for promotion, outreach, and marketing purposes[.]" (bolding and underline added)) *with id.* ("*Provided further*, That within the amounts appropriated, $3,556,000 **shall** be transferred to the "Office of Inspector General" account[.]" (bolding and underline added)).

Plaintiffs suggest that, notwithstanding this lump sum appropriation, various statements of individual representatives should be interpreted as constituting "Congressional commands." P.I. Br. at 27-28. This argument runs contrary to "a fundamental principle of appropriations law":

> [W]here "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on" the agency.

Lincoln, 508 U.S. at 192 (quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975)).

Plaintiffs' cited cases, Pl. Br. at 28,[10] pertain to entirely dissimilar situations where an agency has improperly conditioned grants to certain recipients based on proscribed factors, or has refused to spend funds on a congressionally mandated objective, and are thus inapposite. Here (1) there is a lump sum appropriation with *no* factors prescribed by Congress as to how the Census Bureau is to go about conducting the Census, *see* Wishnie Decl. Ex. 31, and (2) Defendants have *not* refused to spend appropriated funds, but have merely allocated a portion of it to contingency funding pursuant to their statutory discretion. The Census Bureau's decision to do so is neither arbitrary nor capricious.

[10] Citing *State of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 238 (S.D.N.Y. 2018) (rejecting conditioning of grant money in contravention of "plain meaning of the statutory language" (internal quotation marks omitted)); *In re Aiken County*, 725 F.3d 255, 257, 261 n.1 (D.C. Cir. 2013) (striking down NRC's complete refusal to consider application for nuclear waste storage at Yucca Mountain and stating that executive cannot unilaterally "spend less than the full amount appropriate by Congress *for a particular project or program*" while noting authority of agencies "to implement [policy] within statutory boundaries" (emphasis added)); *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (rejecting conditioning of congressional appropriations in contravention of legislative intent); *Guadamuz v. Ash*, 368 F. Supp. 1233, 1244 (D.D.C. 1973) (rejecting unilateral termination of entire congressionally mandated program).

3. Plaintiffs Are Unlikely to Succeed on Their Enumeration Clause Claims

For the same reasons set forth above as to why the Census Bureau's challenged decision-making is not arbitrary or capricious, Plaintiffs fail to demonstrate a likelihood of success on their Enumeration Clause claims. 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."[11] *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 . . . ."). In other words, the Constitution does not require a specific manner of conducting the census, a specific number of employees for conducting the census, or that a specific number of dollars be spent on any census operation. At most, all that is required under the Constitution is that the Census Bureau attempt to count the population rather than estimate it statistically, and do so reasonably.

Plaintiffs rely on *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), to suggest that a more exacting standard of scrutiny might apply. P.I. Br. at 17. But, as Defendants pointed out in their motion to dismiss, the Second Circuit in *Carey* erroneously relied upon the one person, one vote

[11] As Defendants noted in their motion to dismiss, it is not clear that there is *any* law to apply in adjudicating Enumeration Clause disputes such as this one. *See* MTD Br. at 23 n.9. But for purposes of this preliminary injunction motion, Defendants assume that the *Wisconsin* standard applies.

line of cases in suggesting a standard for evaluating the Enumeration Clause claims. *See* MTD Br. at 24 (noting *Carey*'s reliance on *Reynolds v. Sims*, 377 U.S. 533, 537 (1964), and *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)). The Supreme Court has since decisively rejected application of that standard to the Enumeration Clause, articulating instead the far more permissive *Wisconsin* standard of "a reasonable relationship to the accomplishment of an actual enumeration." *Id.* (citing *Wisconsin*, 517 U.S. at 16-19).

As discussed *supra*, Plaintiffs' various criticisms *at most* amount to stating that they would prefer that the Census Bureau operated the 2020 Census more like the 2010 Census, and allocated resources accordingly. That critique—which itself is based upon fundamental misunderstanding of census operations and design—does not remotely suffice to demonstrate that the Census Bureau's extensive address canvassing, partnership and communications programs, use of enumerators, deployment of mobile questionnaire assistance, or non-response follow up operations do not bear a reasonable relationship to the accomplishment of an actual enumeration.

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 by the deadline that has been imposed by law. Interfering with the Census's design at this late date and forcing the Census Bureau to misspend 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 potential specific, actualized concerns to be addressed in a tailored manner when those concerns arise. *See* Taylor Decl. ¶ 17-20; 33-36.

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 unnecessary amounts of 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 Bureau 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 the appropriate spending benchmark—have resulted in a differential undercount. *See* Declaration of Alexandra Church ¶ 18 ("In the 2010 Census, Orange County was the fifth-most undercounted county in New York State. Newburgh's census response rate—57 percent—was one of the lowest in Orange County."). But Plaintiffs would still have the Bureau rely on outdated technologies and

expend resources required by those technologies—or at least 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 Plaintiffs' 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 harm that would be dealt to the 2020 Census if Plaintiffs prevail, *see* Taylor Decl. ¶¶ 17-20, 33-36, Plaintiffs will suffer no irreparable harm in the absence of an 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 need for resources is shown to have been 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 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 public feedback and discussion. For two examples, the Court need look no further than two of the areas Plaintiffs have addressed 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 for questionnaire assistance, effectively mooting a portion of their requested relief (*see infra* at 40). Second, the Bureau recently

allocated additional spending to the communications campaign, bringing its total planned spending on "outreach and communications," P.I. Br. at 33, to $103 million more than Plaintiffs calculated in bringing their motion—the vast majority of the $128 million Plaintiffs ask for. Taylor Decl. ¶ 36. These developments corroborate the Census Bureau's explanation that it is not averse to spending money when warranted, and will 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, and thus granting the motion will not put Plaintiffs in any better position than denying it. Setting aside the moot issue of questionnaire assistance centers, Plaintiffs seek $597 million to deploy in-the-field enumerators who will already be hired. But Plaintiffs fundamentally misunderstand the cost—and effect—of deploying additional enumerators. Deploying additional enumerators who will already be 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 workload 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) that the enumerators have an unexpectedly low productivity rate or (b) that the workload is larger than anticipated. Stempowski Decl. ¶ 51. The Census Bureau will be monitoring the results in real time to determine whether these conditions do or do not occur. *Id.* ¶¶ 51-52. In either case, the Census Bureau is ready to resolve any issue that arises and allocate workloads and resources accordingly. *Id.* ¶¶ 58-59.

Plaintiffs' proposed injunction seeking expenditures of $128 million for outreach and communications fares no better. Plaintiffs' only substantive complaint regarding the design of the Integrated Communications and Partnership Program appears to be that they would prefer more staff be hired. *See* P.I. Br. at 5; Compl. ¶¶ 102-111. Their request 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. *Id.* ¶ 25. 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* at 17. While that obsolete position has been eliminated, the size of the substantive professional staff doing the core substantive work of the program—partnership specialists—has nearly doubled. Reist Decl. ¶ 20. To rectify this nonexistent problem, Plaintiffs ask the Court to order $128 million in additional "outreach and communications," seemingly not recognizing that the Census Bureau already intends to spend over $100 million more on communications than Plaintiffs assume. Reist Decl. ¶¶ 27, 37; Taylor Decl. ¶ 36. Contrary to Plaintiffs' assertions, any decline in partnership program effectiveness (which is highly unlikely) *will* be counteracted by a sizeable increase in communications spending and efficacy. *See* Doms Decl. ¶ 14 (using incorrect data to describe communications program as "barely tread[ing] water").

Finally, Plaintiffs' long delay in bringing this litigation should weigh heavily against the grant of a preliminary injunction. Plaintiffs identify the relevant operational plan as version 4.0, which was published in December 2018. *See* SDNYCENSUS_000577. Plaintiffs' counsel filed

a complaint in the District of Maryland on April 1, 2019, that previewed—nearly verbatim—the complaint in this litigation. Yet Plaintiffs did not file the instant Complaint until November 26, 2019. *See generally* MTD Br. at 6. As the Second Circuit has held, such a delay "may, standing alone, preclude the granting of preliminary injunctive relief, because the failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) (internal quotations marks, citations, and ellipsis omitted) (reversing grant of preliminary injunction due to nine-month delay in commencing lawsuit); *see also Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 13 F. Supp. 2d 417, 419 (S.D.N.Y. 1998) ("Courts have not imposed rigid deadlines by which a request for preliminary injunctive relief must be made: In some circumstances, even a relatively brief delay may be too long." (citing *Citibank, N.A. v. Citytrust*, 756 F.3d 273, 276-77 (2d Cir. 1985) (ten-week delay precluded preliminary relief))); *Silverman v. Local 3*, 634 F. Supp. 671, 673 (S.D.N.Y. 1986) (three-month delay "seriously, indeed fatally, undermines the Board's position that an injunction is necessary to protect against harm to the public"). If the purported defects with the Census are as critically important and time sensitive as Plaintiffs make them out to be, it is difficult to understand why Plaintiffs waited so long bring this suit.

In sum, Plaintiffs ask the Court to order massively disruptive relief, at the eleventh hour, in order to fix problems that do not exist or have already been budgeted to be addressed as they actually arise. This is not the type of irreparable harm preliminary injunctions are designed to redress.

II. PLAINTIFFS' CLAIMS RELATING TO ADDRESS CANVASSING AND QUESTIONNAIRE ASSISTANCE SHOULD BE DISMISSED AS MOOT

"The mootness doctrine, which is mandated by the 'case or controversy' requirement in Article III of the United States Constitution, requires that federal courts may not adjudicate matters that no longer present an actual dispute between parties. Thus, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome, a case is moot and the federal court is divested of jurisdiction over it." *Catanzano v. Wing*, 277 F.3d 99, 107 (2d Cir. 2001) (internal quotation marks and citations omitted). Mootness can occur in a variety of circumstances, but "[t]he central question nonetheless is constant—whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." Wright & Miller, 13C Fed. Prac. & Proc. Juris. § 3533. Based on the limited scope of Plaintiffs' requested injunctive relief, it has become clear that two of their claims are moot.

A. Plaintiffs' Address Canvassing Claim Is Moot

One way in which mootness can occur is when a challenged action has already taken place and cannot effectively be retaken. *Cf.* Wright & Miller § 3533.3.1 ("Mootness may rest on an explicit or implicit determination that the remedies that might have some actual effect come at too high a cost. Thus relief may be denied because of the apparent costs even though it would be possible to require that an election be set aside and held again . . . ." (citing *Watkins v. Mabus*, 502 U.S. 954 (1991)).

As discussed in the Bishop and Stempowski Declarations, the extensive address canvassing operations leading up to the 2020 Census have been effectively completed, and could not reasonably be redone. Bishop Decl. ¶ 41; Stempowski Decl. ¶ 11. Plaintiffs appear to recognize this fact, as they do not seek any injunctive relief relating to address canvassing. *See* P.I. Br. at

33. Plaintiffs' apparent abandonment of their relief may present a further reason to deem this claim moot. *See Maher v. Hyde*, 272 F.3d 83, 87 (1st Cir. 2001) (where plaintiff has withdrawn claim relating to one of two properties at issue, the appeal relating to that property "is necessarily moot"). In the absence of any live controversy over the address canvassing phase, "[a] federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States*, 319 U.S. 41, 42 (1943). Because the Court could do little more than render an advisory opinion on the adequacy of the already-completed address canvassing operations, Plaintiffs' claims relating to address canvassing should be dismissed as moot.

B. Plaintiffs' Claim Relating to Increasing the Bureau's Presence Within Hard-to-Count Communities Is Moot

A case may also become moot where the Defendant has taken steps that accomplish the relief sought (*e.g.*, ceased the allegedly illegal conduct), there is no reasonable expectation that the alleged violation will recur, and interim relief or events have completely eradicated the effects of the alleged violation. *See Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). Here, Plaintiffs seek in part "immediate injunctive relief directing the Bureau to spend money already appropriated and currently held in accounts of Defendants to . . . (3) increase the Bureau's presence within Hard-to-Count communities by increasing the number of fixed Questionnaire Assistance Centers, field offices, *and/or mobile questionnaire assistance units* within those communities at levels commensurate to 2010 (expenditure of an additional $45.6 million)." P.I. Br. at 33 (emphasis added). While Plaintiffs suggest (without evidence) that mobile questionnaire assistance is less effective than fixed QACs, their request for relief specifically states that the expenditure of $45.6 million on "mobile questionnaire assistance units" would satisfy their claim for relief. *Id.* As noted, the Census Bureau has already put forward a detailed plan to spend $110 million to $120

million on mobile questionnaire assistance. Stempowski Decl. ¶¶ 38, 41; *see generally* 2020 Census Program Memorandum Series: 2019.28 (Decision to add Mobile Questionnaire Assistance as a Suboperation of Internet Self Response Operation) (Dec. 16, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2019_28.pdf. This commitment moots Plaintiffs' demand for an order compelling the expenditure of $45.6 million for these activities.

Plaintiffs' request for an additional $45.6 million on such operations was based on the assumption that the present allocation was *zero* dollars. *See* Doms Decl. ¶ 15 (identifying proposed 2020 spending as $0, as compared to adjusted 2010 spending of $45.6 million). However, the relief sought—expenditure of a total of $45.6 million in physical outreach—has already been budgeted more than twice over. Thus, as Plaintiffs cannot identify any reasonable grounds to believe that the relief they seek will not in fact be provided, this claim for relief should be dismissed as moot.

CONCLUSION

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

Dated: February 21, 2020
New York, New York

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Lucas Issacharoff, an Assistant United States Attorney for the Southern District of New York, hereby certify that on February 21, 2020, I caused a copy of the foregoing Memorandum of Law in Opposition to Plaintiffs' Preliminary Injunction Motion and In Support of Defendants' Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction to be served by ECF upon all counsel of record.

Dated: February 21, 2020
New York, New York

By: /s/ Lucas Issacharoff

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