IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

Plaintiffs,

v.

BUREAU OF THE CENSUS, et al.,

Defendants.

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

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

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INTRODUCTION

The relief Plaintiffs requested in their preliminary injunction motion—that this Court order a remedy for Defendants' drastic cuts in resources to the 2020 Census and refusal to expend appropriated funds—is more urgent than ever. For the past two years, Plaintiffs have raised alarms about Defendants' plans for the 2020 Census, including the reduction in enumerators, field offices, and community outreach despite a growing population and other new challenges. Defendants have made these severe cuts in reliance on untested technologies and while holding more than $1 billion of appropriated funds in reserve. As Plaintiffs have alleged throughout this case, these decisions will inevitably lead to a significant differential undercount of Hard-to-Count communities that Plaintiffs represent.

The Bureau has recently begun to recognize some of these shortcomings and to adjust some resources upward, as set forth in declarations submitted in opposition to Plaintiffs' motion that contain information not previously disclosed in this or other litigation nor shared with Congress or the public. From 2017 to 2019, for instance, the Bureau planned to deploy approximately 260,000 "core" enumerators to conduct its country-wide NRFU operations. ECF No. 168, Third Amended Complaint ("TAC") ¶ 111. Now, the Bureau has increased that figure to 320,000. ECF No. 170 at 13. Similarly, in budget documents disclosed in this case and to the public last year, Defendants stated their intention to spend $480 million on advertising, and only last month issued a press release slightly increasing that plan to $500 million. *Compare* ECF No. 169-3, Declaration of Dr. Mark Doms ("Doms Decl.") ¶ 14 *and* U.S. Census Bureau, *U.S. Census Bureau Unveils 2020 Census Ads* (Jan. 14, 2020), https://www.census.gov/newsroom/press-releases/2020/2020-census-ads-unveiling.html. Weeks later, in response to Plaintiffs' motion, the Bureau declared that it will spend $583 million on advertising. ECF No. 170-4, Declaration of Burton H. Reist ("Reist Decl.") ¶ 27.

Plaintiffs applaud the last-minute increases in these vital resources, but this is too little, too late. Preparations for the 2020 Census remain unconstitutionally deficient in critical ways, and Defendants' inadequate response to Plaintiffs' claims confirm the need for immediate judicial intervention. For example, as indicated in the February 2020 Report of the Government Accountability Office ("GAO"), the Bureau has been unable to meet its recently revised hiring goals. While Defendants ask this Court to trust their ability to hire additional enumerators in the late stages of census operations if response rates fall below their optimistic scenarios, the current hiring struggles evince the flaws of Defendants' approach.

As set forth in Plaintiffs' opening motion and herein, Plaintiffs have established a likelihood of success on their claims. In order to prevent a historic undercount of Hard-to-Count communities, Plaintiffs seek a preliminary injunction to remedy Defendants' plans to (1) hire an unreasonably small number of enumerators; (2) dramatically reduce the number of field offices, questionnaire assistance centers, and other forms of physical presence in Hard-to-Count communities; (3) significantly reduce the Bureau's partnership hiring; and (4) use unreliable administrative records as part of the Non-Response Follow-Up (NRFU) process.

The remedy sought for these violations is an order to increase the partnership programs and the number of deployed core enumerators to no less than 2010 Census levels, ECF No. 169 at 25, and to direct Defendants to expend already appropriated funds to operate the Questionnaire Assistance Centers program at equivalent effort and coverage to the 2010 Census, accounting for inflation and population growth. *Id.*[1] Additionally, Plaintiffs seek a Court order requiring Defendants to disclose a) the basis for the Bureau's targets for enumerator hiring and deployment,

[1] Given the new disclosures in Defendants' papers, Plaintiffs no longer rely on the replacement of In-Field Address Canvassing with In-Office Address Canvassing, TAC ¶ 37(d), or the reduction in communications spending, *id.* ¶ 37(a), as evidence in support of their constitutional claim.

as well as its progress on achieving those goals; b) the basis for its target number of partners and its progress meeting that goal; and c) the procedures by which it will allocate mobile QAC ("M-QAC") staff and any updates on the program's progress.

In their motions to dismiss and for summary judgment, Defendants once again strain to avoid judicial scrutiny. The motion to dismiss repeats many of the arguments that this Court already rejected in January 2019. ECF No. 64. Decades of census-related precedent and the Supreme Court's decision in *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) ("*New York*") confirm that Plaintiffs have standing, that Defendants' conduct is reviewable, and that the political question doctrine does not divest this Court of jurisdiction. Whether pursuant to the law of the case or simply governing precedent, this Court should reject Defendants' motion to dismiss.

Finally, this Court should reject or defer Defendants' motion for summary judgment. Plaintiffs have conducted no discovery on their recently reinstated Enumeration Clause claim, while Defendants rely on predictions about the likely success of their 2020 Census operations from witnesses who, with limited exceptions, have not been deposed in this case (or were not deposed on the current claims). As set forth in Plaintiffs' accompanying motion pursuant to Fed. R. Civ. P. 56(d), granting summary judgment on these new facts, prior to discovery, would be improper. In any event, in light of recent troubling facts regarding Defendants' preparations for the census, genuine disputes of material fact preclude entry of summary judgment. Defendants' premature motion should be denied.

BACKGROUND

In Defendants' opposition materials, they come forward with alleged facts—not previously made public or produced to Plaintiffs—to elide the concerns that Plaintiffs have raised throughout this case. But these facts are largely disputed and insufficient to resolve these pressing concerns. While Defendants accuse Plaintiffs of peddling in "unfounded speculation" concerning

deficiencies in the 2020 Census, ECF No. 170 at 8, the GAO this month reported that the partnership program is lagging behind on key targets, suggesting that the program is wholly under-resourced. ECF No. 172-1. The report also revealed that when it comes to hiring, the Bureau is "behind in meeting recruiting goals for upcoming operations." *Id.* at 4. These deficiencies in the census workforce, if unaddressed, will inevitably worsen the undercount. Further, the Bureau's Mobile Questionnaire Assistance Centers, which have never been tested, are unlikely to fill the gaps resulting from cuts in physical infrastructure, and the Bureau's heavy reliance on administrative records is clearly insufficient to determine whether households in Hard-to-Count communities are vacant or occupied. These cuts to the Bureau's programs are particularly worrisome given that the first-ever digital census presents its own set of problems, including "significant cybersecurity challenges," *id.* at 10.

In light of the substantial impact of these cuts, the Court should grant Plaintiffs' request for a preliminary injunction to provide targeted remedial action to reduce the foreseeable impact of Defendants' decisions. The Court should also allow discovery pursuant to Rule 56(d) on outstanding areas of factual dispute.

A. Critical Areas of the Census Remain Under-Resourced.

Defendants have drastically reduced key resources that they know are needed to reach Hard-to-Count populations. Defendants insist that evidence of reductions in particular staff and resources are the product of implementing new technology and operational methods that reduce costs and promote efficiencies. That reasoning is unpersuasive. Instead, these arbitrary and unnecessary cost restrictions will demonstrably threaten distributive accuracy in the census.

1. The Bureau Has Hired and Deployed Insufficient Enumerators.

For NRFU operations, the activities through which the Bureau follows up with those who do not initially self-respond to the census form, the Bureau will need more enumerators than it is

currently hiring given its unrealistic estimates for the census self-response rate and enumerator efficiency. Based on current hiring practices, the Bureau will not meet even its own insufficient hiring target. In 2010, the Bureau employed 516,709 enumerators after achieving a 63 percent self-response rate. *See* ECF No. 169-9, Declaration of Michael J. Wishnie ("Wishnie Decl."), Exhibit 11 at 222; Wishnie Decl., Exhibit 29 at 11. By contrast, for 2020, the Bureau now predicts it will need to hire 320,000 enumerators based on an estimated 60.5% self-response rate – a lower rate than in 2010 but still higher than was achieved in any previous 2020 test. *See* ECF No. 170-2 ("Stempowski Decl.") ¶ 51; ECF No. 172-1 at 6. The Bureau has only recently increased its target number of enumerators to a low-end goal of 320,000; Defendants' 30(b)(6) witness testified in July 2019 that the Bureau planned to deploy approximately 260,000 enumerators, and the Bureau's plans reflected that number through 2019. Wishnie Decl., Exhibit 12 at 117:1-117:15 ("Taylor Dep. Tr."). But the Bureau's recognition that it planned to deploy too few enumerators comes too late, and its revised enumerator target still falls short, underestimating hiring delays, overstating the effectiveness of new technologies, and relying on overly optimistic, unprecedented response rates.

First, the high predicted self-response rate leads the Bureau to underestimate the number of enumerators it will need. Ms. Stempowski states that "[u]nder the most extreme negative assumptions (e.g., pairing achieving only a 55% self-response rate with productivity of only 1.25 cases per hour), we could need almost 500,000 field staff." Stempowski Decl. ¶ 51. But these "extreme negative assumptions" are in fact what occurred in the Bureau's only full dress rehearsal, the 2018 End-to-End Test in Providence, Rhode Island. In that test, which occurred in a less diverse community than those Plaintiffs represent, the self-response rate was just 56%. *See* Wishnie Decl., Exhibit 13 at 4. For Black responders the self-response rate was 39% and for people of Hispanic

origin it was 43%. *Id.* at 4, 8.[2] No test in the 2020 Census life cycle has *ever* produced a self-response rate as high as 60%, Taylor Dep. Tr. at 131:2-10, and at least one test has produced their "most extreme negative assumption" on the self-response rate. Serious IT challenges could also reduce self-response and increase the need for enumerators. The Bureau is at risk of missing testing milestones for five IT operations, including one for the self-response system. *See* ECF No. 172-1 at ii. If online self-response systems flounder, this will further increase the need for enumerators.

If and when the Bureau eventually needs more enumerators, Defendants argue that "[t]he Census Bureau plans to spend whatever funds are necessary on as many enumerators [as] are needed to complete NRFU, and it has the resources to do so." ECF No. 170 at 12. This "just trust us" response is insufficient to overcome Plaintiffs' evidence that Defendants' final plan for the hiring and deployment of enumerators is constitutionally deficient. It is also contradicted by the findings of the GAO report issued this month highlighting the delays in hiring census workers. *See* ECF No. 172-1 at i, 5-6 (noting that the Bureau is falling short of its hiring goal by approximately 400,000 applicants, and that the Bureau is behind on hiring clerks, who assist with on-boarding enumerators and preparing them for the data-collection operation); *see also Full Committee Hearing With Census Bureau Director, Dr. Steven Dillingham: Hearing Before the H. Comm. on Oversight & Reform,* 116th Cong. (2020) https://republicans-oversight.house.gov/hearing/full-committee-hearing-with-census-bureau-director/ ("Census Hearing (2020)").

The Government knew that hiring would be an issue because it failed to meet hiring targets in address canvassing tests. GAO, *2020 Census: Actions Needed to Improve In-Field Address*

[2] Enumerator productivity in the End-to-End test was higher than in 2010. In the former, "[e]numerators completed 1.56 cases per hour worked," compared to a rate of 1.05 cases per hour worked in 2010. Albert E. Fontenot Jr., 2020 Census Update: Presentation to the National Advisory Committee, U.S. Census Bureau 3 (Nov. 1, 2018) https://www2.census.gov/cac/nac/meetings/2018-11/fontenot-2020-update.pdf?.

Canvassing Operation, GAO-18-414 at 11 (June 2018). And it "continues to miss its interim recruiting goals as of February 3, 2020." ECF No. 172-1 at i. As the GAO points out, the Bureau's failure to fix its hiring deficiencies jeopardizes its ability to complete the Bureau's "upcoming operations within its scheduled time frames, which could delay subsequent operations, add to costs, and adversely impact data quality." *Id.* at 5. The Government's contingency plan to simply hire more enumerators down the line thus neglects reality. Evidence that the Bureau has failed to meet its hiring targets even *before* most census operations begin confirms the deficiency of its plans. Plaintiffs' complaint predicted precisely the situation Defendants now face: their plan for enumerators targeted such a low number for so long that the foreseeable difficulties in hiring are rendering their belatedly increased goal unrealistic.

The Government also claims that new technology will improve enumerator productivity, ECF No. 170 at 5, but the technological challenges highlighted by the GAO contradict Defendants' evidence of expected enumerator efficiency. For instance, the Bureau itself found several problems while testing of the enumeration application it plans to use during NRFU operations. *See* ECF No. 172-1 at 9. These issues include the need to "restart or reinstall the application for it to work correctly," which will delay productivity. *Id*. The Government's optimism is unreasonable in light of the challenges identified in the actual implementation of this new technology.

Enumerators will be critical to this census, especially in light of its many challenges. The Bureau must provide more transparency on how and when it will decide to deploy additional enumerators in response to changes in the NRFU workload. Additionally, the Bureau must spend more on enumerators now to avoid struggling to fill major gaps in personnel later, especially given how delayed the recruitment process has been already. Finally, the Bureau has the ability to remedy

certain hiring challenges now, such as by clarifying in written materials that it will accept applications from non-citizens. It should do so while it still can.

2. The Partnership Program Is Under-Resourced.

Plaintiffs have consistently argued that slashing the staffing for the partnership program by half will exacerbate the undercount of Hard-to-Count communities. ECF No. 169, Pls. Mem. of Law in Supp. of P.I. ("Pls. Mem.") at 4-5. Defendants argue that such cuts are inconsequential as many staff members in the previous census performed purely clerical roles and have now been replaced. ECF No. 170 at 10-11. Defendants' description of the "unprecedented" "superior […] quality" of their planned partnership program, ECF No. 170 at 10, 12, is belied by the Bureau's failure to meet its own interim goals for community partnership formation. ECF No. 172-1 at 6. The Bureau planned to establish 250,000 community partnerships by February 1, 2020, yet as of February 4, 2020, it had fallen short of this goal by more than 10,000 partnerships. *Id.* Defendants' cuts to partnership staffing and their lags in creating partnerships will disproportionately impact Hard-to-Count communities by reducing the total number of partner organizations best placed to conduct outreach, at a time when the need for community outreach is particularly high and partners are expected to play a key role in, for example, reaching out to individuals with language barriers. *See* Doms Decl. ¶ 16; Wishnie Decl., Exhibit 2 at 9.

Defendants additionally mischaracterize the responsibilities of partnership assistants in a way that obscures the risk of eliminating an entire category of partnership staff. Defendants describe the responsibilities of partnership assistants during the 2010 Census as "simply managing the large volume of paper," ECF No. 170 at 9, and conducting "paper and pencil administrative activities." Reist Decl. ¶ 24. In reality, partnership assistants did far more. They also helped "to raise public awareness of the 2010 Census by staffing or attending activities at local events, festivals, fairs and meetings; helping Specialists conduct outreach with communities traditionally

hard to count; [and with] preparing presentations and promotional materials and distributing materials to partners and the public." Off. Inspector Gen., *2010 Census: Cooperation Between Partnership Staff and Local Census Office Managers Challenged by Communication and Coordination Problems* at 6 (Apr. 8, 2011), OIG-11-023-I. The substance and scope of these responsibilities not only exceeds the label of a "clerical job" but also undercuts Defendants' assertion that the role of the partnership assistant could be adequately replaced with technology. ECF No. 170 at 10. Technological advances would neither eliminate nor sufficiently replace much of the *non-clerical* work that partnership assistants performed. *But see* Stempowski Decl. ¶¶ 9, 46–49. Additionally, to the extent that the partnership assistants performed non-automatable administrative work, those responsibilities will not disappear simply because the corresponding position has been eliminated. Those tasks will have to be done by partnership specialists, rendering them less effective in conducting direct outreach to Hard-to-Count communities. The Bureau's assertions about its robust partnership program thus ring hollow in light of recently disclosed delays. A significant factual question remains as to how it intends to meet its hiring targets.[3]

3. The Mobile Questionnaire Assistance Center Program Is Inadequate.

Plaintiffs challenged the efficacy of a QAC program that relies entirely on untested mobile activities with no fixed presence. Pls. Mem. at 8. Defendants claim that Plaintiffs' concerns about the QAC program are moot because the Bureau is allocating between $110 million and $120

[3] In 2019, Defendants produced records stating that they would expend $480 million on advertising, another critical component of community outreach. Doms Decl. ¶ 14. Then, in mid-January 2020, the Bureau issued a press release adjusting that figure to $500 million, available at U.S. Census Bureau, *U.S. Census Bureau Unveils 2020 Census Ads* (Jan. 14, 2020), https://www.census.gov/newsroom/press-releases/2020/2020-census-ads-unveiling.html. Weeks later, Defendants submitted a declaration in this case attesting that the advertising budget had suddenly risen to $583 million. Reist Decl. ¶ 27.

million for mobile questionnaire assistance centers.[4] *See* ECF No. 170 at 15. But Defendants' misconstrue Plaintiffs' concerns and requests for relief. Plaintiffs' claims regarding the QAC program are not limited to the Bureau's expenditure on the program; they also include serious deficiencies about the program's quality and effectiveness. Plaintiffs' request for increased expenditures is just one component of the remedies needed in this area. In particular, Defendants must establish fixed QAC locations, in addition to their mobile assistance units, to ensure an accurate enumeration of Hard-to-Count populations. *See* Pls. Mem. at 18 ("The mobile initiative proposed to replace QACs is insufficiently tested and cannot replace the nearly 40,000 physical sites used last census."); *id.* at 22 (asking for "fixed QACs" as well).

Defendants tout their M-QAC program as an innovative and improved approach to replace the fixed QAC locations used in the 2010 Census. *See* ECF No. 170 at 15; Stempowski Decl. ¶¶ 35, 38. In reality, Defendants had no plan to replace the physical QAC program until Congress expressly ordered them to do so in the Joint Explanatory Statement accompanying the Consolidated Appropriations Act, 2019. *See* Wishnie Decl., Exhibit 32 at 611 ("Additionally, the Bureau shall devote funding to expand targeted communications activities as well as to open local questionnaire assistance centers in hard-to-count communities."). Only then, in December 2019, did Defendants officially document its decision to add M-QACs, a mere three months before the start of the 2020 Census.[5] *See* Albert E. Fontenot, Jr., *Decision to Add Mobile*

[4] This $110-$120 million figure is not reflected in Defendants' FY21 Budget Justifications, which reports Defendants' actual spending thus far. *See* U.S. CENSUS BUREAU, *Budget Fiscal Year 2021, As Presented to Congress February 2020*, available at https://www.commerce.gov/sites/default/files/202002/fy2021_census_congressional_budget_justification.pdf.

[5] The Bureau has just released its "2020 Census: Mobile Questionnaire Assistance Operation Project Plan" a few days ago, on February 21, 2020. *See* U.S. Census Bureau, *Index of /programs-surveys/decennial/2020/program-management*, https://www2.census.gov/programs-surveys/decennial/2020/program-management/. In this project plan, the Bureau

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 ("The Census Bureau recently proposed the creation of this suboperation to create additional opportunities for the public to respond to the 2020 Census in key locations where we are experiencing low self-response rates.").

The M-QAC plan has been thrown together over the last few months, has never been tested, and includes many deficiencies. In response to continual prodding from Congress to provide more details, the Bureau provided only high-level descriptions of how it will staff and deploy the mobile response units. *See* Declaration of Jeremy M. Creelan ("Creelan Decl.") ¶ 22, Exhibit 1 at 2. The Bureau does not plan to hire new staff dedicated to the M-QAC program. *See id.* ¶ 23, Exhibit 2 at 1–2. As of the most recent publicly available information, the Bureau's plan appears to be to take the 4,740 Recruiting Assistants hired in 2019 for Census recruiting operations, and convert them to Mobile Response Initiative staff in mid-March of 2020. *See id.* This is a mere fraction of the more than 31,000 QAC staff members employed during the 2010 Census. *See* ECF No. 169-2, Declaration of D. Sunshine Hillygus ("Hillygus Decl.") ¶ 32 n.50. The Bureau states that it will "hire additional [MQAC staff] in ACOs with a significant number of low response areas," but has not provided details on how it will hire these additional staff members with only weeks to go before the mid-March launch of the MQAC program. *MQA Operation Project Plan* at 6. Furthermore, Defendants' ridiculing of Plaintiffs for believing that "the number of ACOs has any bearing on

contradicts Defendants' attempts to paint the M-QAC program as innovative and well-planned by conceding "[g]iven that the MQA operation was *proposed and planned late in the cycle,* management believes a project plan with operational details will help ensure the success of this operation." *See* U.S. Census Bureau, *2020 Census: Mobile Questionnaire Assistance Operation Project Plan,* ("*MQA Operation Project Plan*") https://www2.census.gov/programs-surveys/decennial/2020/program-management/ (emphasis added).

'physical outreach,'" ECF No. 170 at 15, is entirely unwarranted. If the hiring of additional MQAC staff is tied to the existence of ACOs, then Defendants' decision to eliminate Prince George's County's ACO *does* have a detrimental effect on Plaintiffs' Hard-to-Count communities and shows that Defendants' decision bears no relationship to census accuracy. *See* Pls. Mem. at 18.

Defendants emphasize that their mobile response initiative is an improvement from 2010 as it will allow respondents to fill out a digital rather than paper form. *See* ECF No. 170 at 14. This explanation does not justify the Bureau's decision to entirely cut fixed QAC locations. Indeed, the Bureau's current approach inverts and undermines the entire purpose of past QAC programs. Congress has urged Defendants to establish fixed-location QACs. *See* Creelan Decl., Exhibit 3 at 3. Yet the Bureau has ignored this request. In a letter to Congress outlining its M-QAC program, the Bureau wrote, "As households submit responses, real-time response rates will drive where M-QACs will be. Because this effort is not tied to specific physical locations, the M-QACs could be deployed dynamically *where they are most needed*." *Id.* at 1 (emphasis added). Defendants' response assumes that the Bureau will know where assistance is most needed and where the non-responding households are located. However, the whole point of having fixed, physical QACs is so that Hard-to-Count, transient, and homeless populations that the Bureau *does not know about* can come to the Bureau and fill out a form. It will thus be particularly difficult for Defendants to know where they are experiencing lower than expected response rates and then deploy mobile response units effectively.

A mobile-only QAC plan does not address Congress's or Plaintiffs' concerns that Defendants' outreach efforts will disproportionately miss Hard-to-Count populations, particularly homeless and transient individuals. Defendants' decision to eliminate fixed QACs does not bear a "reasonable relationship to the accomplishment of an actual enumeration of the population,"

violating the Enumeration Clause and its preference for distributive accuracy. *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996).

4. The Bureau's Use of Administrative Records Will Exacerbate the Differential Undercount of Plaintiffs and Their Communities.

Defendants misunderstand Plaintiffs' arguments regarding the Bureau's use of unreliable administrative records for the 2020 Census. *See* Hillygus Decl. ¶ 45. In their brief and declarations, Defendants explain how administrative records will be used in the NRFU and enumeration process. ECF No. 170 at 17–18; Stempowski Decl. at ¶¶ 21-32. But on this, Plaintiffs and Defendants agree. After a single enumerator visit, the Bureau has two options. If the enumerator deems the household vacant or nonexistent from the visit and cannot find a knowledgeable person to confirm that status, the Bureau will attempt to corroborate the status using administrative records. If such records indicate that the household is indeed vacant or nonexistent, the Bureau will exempt the household from the full NRFU process and never visit the household again. *Compare* TAC ¶ 138, *with* Stempowski Decl. ¶ 27. If the enumerator deems the household occupied from the visit, and no knowledgeable person is around to complete the enumeration, the Bureau will attempt to enumerate the household using administrative records. *Compare* TAC ¶ 140, *with* Stempowski Decl. ¶ 28.

This process will exacerbate the differential undercount for already hard-to-count communities. The Bureau asserts otherwise. Stempowski Decl. ¶ 33. But it offers *no* support for its claim other than a vague reference to "testing" in a declaration. *See id*. Plaintiffs, however, have already articulated three reasons why the Bureau's claims are unjustified, none of which are substantively rebutted by Defendants.

First, administrative records are highly inaccurate. As the Bureau's own testing demonstrates, and as presented in Assistant Director Stempowski's own presentation, 18 percent

of housing units identified as vacant through administrative records were found to be occupied on further inspection. Wishnie Decl., Exhibit 21 at 64. Thirty percent of housing units identified as *nonexistent* through such records were in fact occupied. *Id.* This high error rate alone raises serious questions about the Bureau's extensive use of administrative records in the NRFU process.

Second, administrative records are more likely to mistakenly deem Hard-to-Count housing units vacant. According to the Bureau's research, administrative records determine housing units to be vacant more often in predominantly Black neighborhoods. Hillygus Decl. ¶ 46.[6] These findings, combined with the known unreliability of administrative records, confirm that relying on administrative records will disproportionately increase the likelihood of a differential undercount. Hillygus Decl. ¶ 45. In the 2020 Census, Black housing units will be more likely to be incorrectly deemed vacant because of the inaccuracies in administrative records. *Id.* And once these units are deemed vacant, the Bureau will exempt them for the entire NRFU process, not even trying once more to visit these households in person and thus failing to enumerate them. Stempowski Decl. ¶ 27. Such reliance on incomplete and unrepresentative administrative records for enumeration, despite their obvious negative impacts on Hard-to-Count communities, violates the mandate of the Enumeration Clause and its preference for distributive accuracy. *Wisconsin*, 517 U.S. at 20.

Finally, administrative records especially underrepresent Hard-to-Count communities. While Defendants dispute Professor Hillygus's expert opinion that this will negatively impact Plaintiffs, ECF No. 170 at 17–18, the logic of her claims could not be more plain. Hard-to-Count communities are, by definition, less likely to self-respond to the census. If an enumerator determines that a household is occupied based on one visit during the NRFU process, the Bureau

[6] *See also* Robert Hummer, *Discussion of Use of Administrative Data and Modeling Efforts for NRFU During the 2020 Census*, Census Scientific Advisory Committee, 11 (Mar. 2017), https://www2.census.gov/cac/sac/meetings/2017-03/2017-hummer.pdf.

will then attempt to enumerate the household using administrative records. Stempowski Decl. ¶ 28. And because Hard-to-Count communities are underrepresented in these administrative records, it is more likely that "white and economically-advantaged populations" will be enumerated through administrative records, while Hard-to-Count communities will go through the traditional NRFU process, thereby exacerbating the differential undercount. *See* Hillygus Decl. ¶¶ 45–46.

5. The Number of Field Offices Is Insufficient.

For 2020, the Census Bureau plans to establish just 248 Area Census Offices (ACOs), half the number it had in 2010. Hillygus Decl. ¶ 24. The Bureau argues that its decision to open fewer field offices reflects its adoption of new technologies that make such offices less necessary. ECF No. 170 at 14–15. But the use of new technologies cannot entirely replace the functions that field offices serve. In particular, ACOs ensure the quality of the enumeration, as they are critical to the hiring, training, and supervising of enumerators. TAC ¶ 104; Hillygus Decl. ¶ 24. The Bureau acknowledges this fact, having stated repeatedly that it determined the number of ACOs for the 2020 Census by calibrating the number of offices to the projected NRFU workload. Hillygus Decl. ¶ 25; TAC ¶ 108.

Given the Bureau's acknowledgement that the number of ACOs is tied to expectations about the NRFU workload, one would have expected the number of ACOs to increase when the Bureau revised its estimated self-response rate downward. Not so. The number of ACOs has remained constant at 248, even as the Bureau has increased the number of enumerators it plans to hire—a metric itself based on the projected self-response rate—from 170,000 to 250,000, and now to somewhere between 320,000 to 500,000. TAC ¶¶ 109–11 (describing the constant number of field offices despite a jump from approximately 170,000 to 250,000 enumerators); ECF No. 170 at 5 (320,000 to 500,000 range).

With so many enumerators allocated to so few field offices, the supervisors—who work out of the offices—will be stretched thin, making it likely that enumerators will lack the proper training and management once the NRFU process begins. TAC ¶¶ 106–07. Yet the Bureau has maintained this plan despite concerns expressed by both the OIG and GAO about poor management. Hillygus Decl. ¶ 26. The claim that "whether there are 500,000 local offices…or zero local offices, the effect would be the same, and would be equally constitutional" thus cannot possibly be true. ECF No. 170 at 14-15.

The Bureau's initial decision to open 248 ACOs was based on its plans to deploy new technology. But since nothing about that technology has changed, that cannot be the explanation for why the number of ACOs has stayed constant at 248 despite an increase in the number of enumerators. Moreover, the Bureau's own testing contradicts its claim that the new technology will work as well as the Bureau predicts. *See* Wishnie Decl., Exhibit 14 at 9-10 (discussing flaws found in the End-to-End Test in the systems used by enumerators for NRFU). If the Bureau ends up needing to resort to paper forms—an entirely plausible scenario—it will not have the physical infrastructure in place to do so.

Finally, the lack of sufficient ACOs is exacerbated by the Bureau's overly optimistic assumptions regarding self-response rates and enumerator productivity. When these assumptions are not borne out, the decreased number of field offices will not be able to support the increased NRFU workload, thus exacerbating the differential undercount.

ARGUMENT

I. Plaintiffs' Motion for a Preliminary Injunction Should Be Granted.

Plaintiffs have established a likelihood of success on the merits in light of the constitutional deficiencies arising from cuts to the partnership program, enumerators, ACOs, and QACs, and the use of administrative records. Moreover, Plaintiffs will be irreparably harmed as

they will suffer a severe undercount in the 2020 Census and lose federal funds and representation in intrastate redistricting as a result. Finally, given the fundamental value of the decennial census to democracy, an injunction is in the public interest.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

Plaintiffs are likely to succeed on the merits of their claims regarding enumerators, partnerships, administrative records, questionnaire assistance centers, and field offices. As described in *supra* Background Section A.1–.5, Defendants' cuts and changes in these areas do not bear a "reasonable relationship to the accomplishment of an actual enumeration of the population," as required by the Enumeration Clause. *Wisconsin*, 517 U.S. at 20. Moreover, these cuts will undermine the Bureau's efforts to achieve the Constitution's "preference for distributive accuracy" in the census, *id.*, as they will disproportionately affect Hard-to-Count communities, who require greater outreach and in-person contact to complete the census forms.

The Bureau's cuts across multiple areas are unreasonable. First, the Bureau's decision to hire at least 100,000 fewer enumerators for 2020—despite calculating the 2020 self-response rate at least ten percentage points lower than in 2010—is unreasonable. *See* Wishnie Decl., Exhibit 29 at 11 (67% of householders in a pre-census survey were "extremely likely" or "very likely" to participate in 2020, compared to 86% surveyed for 2010). Such insufficient staffing will exacerbate the undercount of Hard-to-Count communities. Hillygus Decl. ¶ 30.[7] Second, the cuts to partnership program staff at a moment when the Bureau is already failing to meet its own targets

[7] Defendants claim that hiring additional enumerators would not require additional expenditures because they calculate the total work output of enumerators on an hourly basis as opposed to a work output calculation based on individual capacity. ECF No. 170 at 23. This mischaracterizes the nature of the work enumerators perform which entails physically dispersing to reach hard-to-count communities and is inherently correlated with individual manpower as opposed to an excessively reductive, hourly understanding of their work.

for community partners undermines distributive accuracy by paring back exactly the types of activities designed to reach Hard-to-Count communities. Similarly, the Bureau's decision to ignore a relationship it has historically relied on – that between the number of ACOs and the number of enumerators – and instead keep the number of ACOs constant will reduce the accuracy of the count as enumerators will be inadequately supervised. Fourth, the Bureau's adoption of an untested M-QAC program is also unreasonable as it ignores staffing difficulties and the challenges of reaching certain communities. Finally, the decision to rely heavily on administrative records to determine whether an address is vacant—despite clear evidence of the inaccuracy of those records—does not bear a reasonable relationship to an accurate count.

When Plaintiffs show, as they have here, that "a census undercount is inevitable, that the undercount is particularly large among minority populations . . . and that Census Bureau procedures were inadequate," they "have demonstrated a likelihood of success on the merits." *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980).

B. Plaintiffs' Will Experience Irreparable Harm.

In the absence of an injunction, Plaintiffs' communities are likely to suffer a greater differential undercount than in past censuses. The design for the 2020 Census risks increasing the differential undercount of Black communities by at least two percentage points—the largest the undercount has been in recent decades. *See* Hillygus Decl. ¶ 2.[8] Such an undercount would cause

[8] In challenging Professor Hillygus's analysis, Defendants neglect her contextual input about how the Bureau's design choices will collectively lead to a negative effect on African Americans' self-response rate. Instead, Defendants effectively claim that staff redistribution within their partnership program (a single component of an otherwise multifaceted operation) would wholly eliminate "*any* [emphasis added] negative effect on African Americans' self-response rate to the census" resulting from changes to the 2010 census. ECF No. 170 at 10.

Plaintiffs to lose federal funding and political representation, exactly the types of harms the Supreme Court has recognized in previous census cases. *New York*, 139 S. Ct. at 2565.

Defendants mistakenly assert that "[P]laintiffs will suffer no harm." ECF No. 170 at 22. The Bureau's decisions make it more likely that individuals will be excluded from the census at each stage: first, if the Bureau misidentifies their residences as vacant; then, if they do not receive outreach materials; and finally, if enumerators do not contact them at all. Although the Bureau claims that it "will continually monitor" response rates and productivity to assess "whether any additional resources are needed," *id.*, it has offered no explanation of when or on what basis it will deploy additional resources, nor what it will do if it lacks the necessary human resources to do so. *See* ECF No. 172-1 at 4-5 (documenting repeated failures to meet hiring targets). Given the Bureau's repeated failure to meet self-imposed deadlines for hiring staff and establishing community partnerships, *see id.* at 4–7, it is far from clear that the Bureau is, in fact, "ready to resolve any issue that arises." ECF No. 170 at 24.

The deficiencies likely to result from the 2020 Census will harm Plaintiffs for the next ten years. The Supreme Court has recognized as harms exactly the injuries that Plaintiffs will suffer here: the "diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources" that all arise from "an inaccurate population count." *New York*, 139 S. Ct. at 2565. In particular, Maryland relies on census data in its intrastate redistricting process. M.D. Const. art. III, § 5. Although Defendants argue that Maryland need not use such data, ECF No. 170 at 29–30, at this stage it is unrealistic to expect the state to do otherwise. The lasting harms Plaintiffs will suffer "cannot be fully rectified by the final judgment after trial," *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d

197, 216 (4th Cir. 2019) (internal citations omitted). Without preliminary relief, they risk being "irreparably harmed by deprivation of their right to a fair apportionment." *Carey*, 637 F.2d at 837.

C. An Injunction Is in the Public Interest and the Balance of Equities Tips in Plaintiffs' Favor.

Contrary to Defendants' arguments, ECF No. 170 at 21-22, a preliminary injunction in this case would be "in the public interest," and the "the balance of equities tips in [Plaintiffs'] favor." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017). The Enumeration Clause is of "paramount importance in our constitutional scheme," *NAACP v. Bureau of the Census*, 945 F.3d 183, 186 (4th Cir. 2019), as the decennial census forms the basis for allocating over a trillion dollars of federal funding and for determining political power at both the state and local levels. When the government shirks its responsibilities under the Enumeration Clause, an injunction directing the Bureau to take steps to ensure an accurate count serves the public interest. As the Second Circuit explained, the "public interest . . . requires obedience . . . to the requirement that Congress be fairly apportioned, based on accurate census figures" and is served when the "federal government distribute[s] its funds… on the basis of accurate census data." *Carey*, 637 F.2d at 839.

Ever since Plaintiffs brought this suit nearly two years ago, they have sought to reach the same goal that Defendants claim to seek: to ensure that the decennial census "count[s] each resident of the United States once, only once, and in the right place." ECF No. 170 at 3. But Defendants will not meet that goal under their current plan, which will result in a differential undercount of Hard-to-Count individuals, African Americans, and other communities of color. The injunction Plaintiffs seek will ensure that the work of an accurate enumeration is done correctly and that the Bureau achieves its stated goal of an accurate enumeration.

Further, actions taken now to address deficiencies in the 2020 Census will not deplete the Bureau's contingency reserves. The Bureau has more than enough funding to spend some money

now and still have plenty remaining to respond to issues that may arise later in the process. The Bureau itself has acknowledged its abundant reserves, stating that it would still have *two-thirds* of its contingency funds left over even if it had to hire more enumerators for a worst-case scenario in which the self-response rate fell to 50% and enumerators operated at 2010 productivity levels. ECF No. 170-1, Declaration of Benjamin K. Taylor, ¶¶ 30-32. Rather than waiting for such a scenario to arise, the Bureau must take steps to prevent it occurring in the first place. *See, e.g.*, House Oversight Committee, Preparing to Count (statement of Rep. Jamie Raskin at 3:33) ("In light of the damage done, I think the Bureau should increase outreach to hard to count communities instead of sitting on a billion dollars in appropriated funds . . . I fail to see a compelling reason for the delay."). When the Second Circuit granted a preliminary injunction in a similar case during the census process, it did not consider similar expenditures to be a hurdle to granting relief, noting that "the fact that some funds may have to be expended to hire additional personnel seems hardly a substantial problem" compared to the overall spending on the census. *Carey*, 637 F.2d at 837.

Finally, Plaintiffs of course do not presume "that the census can never innovate or take advantage of new technologies." ECF No. 170 at 22. But when the Bureau adopts new technologies that even its own limited testing reveals to be flawed, it cannot simply assume that the technologies will work better in the future and demand blind trust from African-American and other Hard-to-Count communities for whom a decade of political power and federal funding is at stake. *See* Wishnie Decl., Exhibit 14 at 9–10 (2018 GAO report discussing problems in the End-to-End Test with devices used by enumerators for NRFU); ECF No. 172-1 at 9 (discussing flaws in the enumeration application); *id.* at 10-12 (noting Census unprepared for cyber-threats). Especially now, when the Bureau has suddenly shifted to its barely-tested backup internet-response system, the Bureau must ensure that it also has tried-and-true mechanisms in place—such as physical

QACs and a greater number of enumerators—to conduct an accurate count. Otherwise, Defendants will place the costs of their cuts to resources and reliance on under-tested technologies squarely onto the shoulders of those least able to bear them.

***

It is not too late to ensure that communities of color are equally counted in the 2020 Census. This Court should order a remedy to the constitutional deficiencies identified by Plaintiffs. "[C]itizens who challenge a census undercount on the basis, inter alia, that improper enumeration will result in loss of funds . . . have established . . . a substantial probability that court intervention will remedy the plaintiffs' injury," and an injunction should be granted. *Carey*, 637 F.2d at 838.

II. Defendants' Motion to Dismiss Should Be Denied.

For the third time in this case, Defendants attempt to avoid judicial scrutiny entirely by moving to dismiss Plaintiffs' Complaint at the pleading stage pursuant to Rules 12(b)(1) and 12(b)(6). But this time, Defendants largely rely on the same arguments recycled from their first motion, in which they similarly sought dismissal of this case on political question, standing, and Rule 12(b)(6) grounds. In its January 29, 2019 opinion, this Court squarely rejected those arguments, making clear it did so as to all of Plaintiffs' Enumeration Clause claims, even those that the Court then dismissed, because "they may be reinstated." ECF No. 64 at 37 n.16. Now that Plaintiffs' Enumeration Clause claims have been reinstated, Defendants cannot raise the same arguments. And to the extent Defendants raise any new arguments, such as relying upon this August 2019 Court's decision as to Plaintiffs' "underfunding claim" alone, they are inapplicable and should be rejected. Defendants' Motion to Dismiss should be denied.

A. Plaintiff's Claims Remain Justiciable.

Defendants make the same unavailing arguments regarding nonjusticiability and the political question doctrine as they did in their first motion to dismiss. There, as here, they argued that Congress's authority to conduct the census "in such a Manner" as it directs is committed to the political branches by the Constitution. *Compare* ECF No. 43-1 at 18-22, *with* ECF No. 170 at 24-25. They further argued, as they do here, that this Court has no judicially manageable standards by which to determine whether the 2020 Census is being properly conducted. *Compare* ECF No. 43-1 at 22-25, *with* ECF No. 170 at 25-26. But this Court rejected those arguments, holding that "the political question doctrine does not preclude [this Court's] review of Plaintiffs' Enumeration Clause claim." ECF No. 64 at 53. The Court held that the "Enumeration Clause does not textually commit exclusive, non-reviewable control over the census to Congress," and rejected Defendants' purported distinction, again drawn here, between an "actual Enumeration" and the "manner" of conducting the census. *Id.* (citation omitted).[9]

Defendants thus blatantly disregard the law of the case. *See United States v. Bennerman*, 785 F. App'x 958, 962 (4th Cir. 2019) ("The law of the case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") (quoting *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017)). The law of the case doctrine prevents parties from attempting to re-air arguments previously considered and rejected in the hopes that a second airing may yield a different result. A court will

[9] The Court also specifically rejected Defendants' reliance on *Tucker v. U.S. Dep't of Commerce*, 135 F.R.D. 175, 180 (N.D. Ill. 1991), which Defendants repeat here, ECF No. 170 at 25, because "on appeal, the Seventh Circuit expressed its doubts about the political question doctrine and its applicability," and "conclud[ed] that, regardless, 'the accuracy of the decennial census is not a political question.'" ECF No. 64 at 53 n.22 (quoting *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1415 (7th Cir. 1992) (Posner, J.)).

upset its earlier decisions only in rare situations, such as where "new evidence becomes available, the controlling law changes, or the prior decision was clearly wrong." *Id.* at 963. None of those circumstances is present here. Defendants do not identify an intervening change in controlling authority or assert that the Court's prior decision was "clearly erroneous" or a "manifest injustice." *Graves v. Lioi*, 930 F.3d 307, 341 (4th Cir. 2019) (citation omitted). Nor do their purported plans to expend more funds constitute new evidence rendering Defendants' conduct unreviewable. On the contrary, it remains "well within the competence of the judiciary" to discern whether Defendants' decisions bear a "reasonable relationship" to the goal of an accurate enumeration. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458-59 (1992); *Wisconsin*, 517 U.S. at 20.

Even if the law of the case doctrine does not foreclose Defendants' arguments, this Court should reject them for the same reasons it did on first consideration. Decades of census-related litigation have established that review of Defendants' conduct is not barred by the political question doctrine. *See, e.g.*, *Tucker*, 958 F.2d at 1415 ("The accuracy of the decennial census is not" a political question); *Carey*, 637 F.2d at 838 (finding that a challenge to the adequacy of address registers and field enumerators for the 1980 Census was not a political question); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 95 (D.D.C. 1998) (three-judge court) (holding that the census is not textually committed to Congress and recognizing that "[c]ourts routinely adjudicate these matters"), *aff'd*, 525 U.S. 316 (1999).

Further, there are judicially manageable standards by which this Court may evaluate the decisions Plaintiffs are challenging. In arguing that the *Wisconsin* "reasonable-relationship" standard applies to decisions concerning "the population count itself" but not to the "operations of a yet-to-be-conducted census," Defendants distort the Supreme Court's holding in *New York* in two ways. ECF No. 170 at 25. First, as this Court has noted, the Supreme Court in *New York* "did

not hold the [*Wisconsin* reasonable-relationship] standard *only* applied under the circumstances in which the Court had previously applied it." *NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 413 n.3 (D. Md.), *aff'd in part, rev'd on other grounds*, 945 F.3d 183 (4th Cir. 2019) (emphasis in original). Second, Defendants' distinction between "the count itself" and "future census operations" is false: the census is a multi-step process, and decisions about funding and staffing made before Census Day affect the Bureau's ability to conduct an actual enumeration. The decisions Plaintiffs challenge in this case are more closely related to "the population count itself" than to decisions about what kinds of demographic information to collect in the course of taking the census, *see id.*, and the "reasonable relationship" standard applies regardless.

Despite the abundance of case law establishing the justiciability of challenges to the census, Defendants rely on this Court's August 2019 opinion in arguing that "Plaintiffs' census-design challenge is 'constitutionally committed to a coordinate political department.'" ECF No. 170 at 25 (quoting *NAACP*, 399 F. Supp. 3d at 418). However, that decision was limited to Plaintiffs' now-dismissed underfunding claims. *NAACP*, 399 F. Supp. 3d at 419 ("[A]ddressing Plaintiffs' underfunding claim as it now stands would take the Court into the area reserved for Congress and the Executive Branch."). Moreover, as Chief Judge Gregory noted with respect to Enumeration Clause claims generally, "The question—whether Congress, by agency of the Executive Branch's Bureau of the Census, has violated the Enumeration Clause of the Constitution because it has demonstrated that it will unlikely make a meaningful and faithful enumeration of all persons in the upcoming 2020 Census—*is not a political one*. If this constitutional question were beyond the reach of judicial review, the People would have no ordered redress of Legislative and Executive Branch actions or inactions that thwart their essential constitutional right." *NAACP*, 945 F.3d at

194 (emphasis added). Defendants' request to dismiss this suit on grounds of nonjusticiability should be rejected.

B. Plaintiffs Have Standing to Bring Census-Related Claims.

To establish standing, Plaintiffs must allege facts that demonstrate that: (1) they have suffered an injury in fact; (2) that is fairly traceable to the challenged action of the Defendants; and (3) is redressable by a favorable judicial decision. *New York*, 139 S. Ct. at 2565 (citing *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008)). As with their justiciability challenge, Defendants raise substantially similar standing arguments as they did in their first motion to dismiss, including that (1) Plaintiffs' injuries are too "attenuated" and "speculative" to establish an injury in fact, *compare* ECF No. 43-1 at 8-12, *with* ECF No. 170 at 26-29; (2) Plaintiffs' injuries are not traceable to Defendants due to the actions of third parties, *compare* ECF No. 43-1 at 13-15, *with* ECF No. 170 at 29-31; and (3) Plaintiffs' injuries are not redressable by this Court, *compare* ECF No. 43-1 at 15-16, *with* ECF No. 170 at 31.

In the Court's January 2019 opinion, it rejected each of these same arguments, and concluded that Plaintiffs had sufficiently alleged standing for their Enumeration Clause claims. *See* ECF No. 64 at 41 (holding that Plaintiffs' injuries of "reduced funding and representation" were "neither highly attenuated nor merely hypothetical"); *id.* at 46 (holding that Plaintiffs "have plausibly alleged that a disproportionate undercount would be fairly traceable to Defendants' plans for conducting the 2020 Census, including understaffing and underfunding" (citation omitted)); *id.* at 50 ("[I]f . . . Plaintiffs' challenges to the methods and means selected by the Secretary to conduct the census are reinstated, the Court will be able to offer further declaratory or injunctive relief.").

Even if this Court does not apply the law of the case doctrine, the Court should still reject Defendants' arguments. The Supreme Court's unanimous decision last term in *New York* that

Plaintiffs have standing for census-related injuries confirms that the Court's initial standing analysis was correct. Accordingly, Defendants' motion should be denied.

1. There Is a Substantial Risk That Plaintiffs' Injuries Will Occur.

Plaintiffs have sufficiently alleged actual and imminent harm to overcome Defendants' motion to dismiss. An "injury in fact" is any invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). For a plaintiff to have standing, it is sufficient if "there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). Plaintiffs have alleged sufficient actual and imminent injuries—the loss of federal funding, vote dilution, malapportionment, and diversion of organizational resources—resulting from Defendants' deprivation of the key resources for counting Hard-to-Count communities. *See, e.g.*, TAC ¶¶ 156–82.

Again, Defendants exaggerate the "chain of possibilities" in Plaintiffs' allegations in order to label them as merely speculative. ECF No. 170 at 27. Like the plaintiffs in *New York*, Plaintiffs have plausibly alleged a substantial risk of injury and an impending injury: (1) Defendants' severe deficiencies in their plans and preparations for the 2020 Census will lead to a significant differential undercount of Hard-to-Count communities; and (2) Plaintiffs, as members or representatives of those communities, will be harmed by that differential undercount. As in *New York*, there is evidence that "[African American] households have historically responded to the census at lower rates than other groups," and Plaintiffs plausibly allege that the Bureau's decisions will exacerbate those low response rates. 139 S. Ct. at 2566.

Defendants selectively cite Plaintiffs' expert declarations for the proposition that there are various uncertainties in the results of the Bureau's preparations for the 2020 Census, ECF No. 170 at 27. For example, Defendants note Professor Hillygus's statement that "*if* a differential

undercount occurs in the 2020 Census," it would cause Plaintiffs to lose money. *Id.* But according to both Professor Hillygus's estimates and Plaintiffs' allegations, this is precisely what *will* happen.[10] Plaintiffs have plausibly alleged that Defendants' failures will lead to a deeply injurious undercount.

2. Plaintiffs' Injuries are Traceable to Defendants.

Defendants again make the argument that any injuries suffered by Plaintiffs result from a "multi-step causal chain," ECF No. 170 at 29, the same argument advanced in the first Motion to Dismiss, ECF No. 43-1 at 13, and denied by this Court. Notably, Defendants fail to mention that in 2019, the Supreme Court categorically rejected this very argument, and held that the plaintiff's census-related injuries were traceable to Defendants' decisions—in that case, the decision to institute a citizenship question. *New York*, 139 S. Ct. at 2565–66. As in *New York*, Plaintiffs have alleged injuries, such as the loss of federal funding and political representation, which are directly traceable to Defendants' drastic decreases in the necessary resources for reaching Hard-to-Count populations. Accordingly, Plaintiffs easily satisfy this prong of standing. As noted above, Plaintiffs' alleged chain of causation contains two steps: Defendants have flagrantly failed to prepare for the 2020 Census and thus will undercount Hard-to-Count communities; and those communities, including Plaintiffs, will be harmed.

Defendants argues that the injury is the result of Prince George's County residents who decide not to answer the census. ECF No. 170 at 29. That the intervening conduct of third parties may also contribute to Plaintiffs' injuries is not sufficient to defeat standing, so long as the Plaintiffs' alleged injuries remain fairly traceable to actions by Defendants. *See Lexmark Int'l, Inc.*

[10] Defendants also cite to this Court's holding that Plaintiffs could not "challenge census procedures before the Census." ECF No. 170 at 27. But this was the primary holding that the Fourth Circuit reversed. *NAACP*, 945 F.3d at 192.

v. Static Control Components, Inc., 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing . . . . "). In *Attias v. Carefirst, Inc.*, the D.C. Circuit found standing despite intervening illegal acts by third parties because, as here, the alleged harm flowed from the defendants' negligence. 865 F.3d 620 (D.C. Cir. 2017). The traceability requirement "does not require that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs' injuries; it requires only that those injuries be 'fairly traceable' to the defendant." *Id.* at 629.

Defendants also argue that Maryland's decision to rely on census figures for redistricting breaks the causal chain. ECF No. 170 at 29–30. The Supreme Court has foreclosed this argument, finding standing in a challenge to the census where states "require use of federal decennial census population numbers for their state legislative redistricting." *Dep't of Commerce*, 525 U.S. at 333. Finally, Defendants argue that Plaintiffs have not adequately alleged what specific federal funds Plaintiffs may lose as a result of an undercount. ECF No. 170 at 30. This argument is irrelevant. It is established that the population count derived from the census is used to allocate federal funds to states and local governments. *New York*, 139 S. Ct. at 2561. Alleging a loss of such funds is a sufficiently concrete and imminent injury to satisfy Article III. *Id.* at 2565. No more specific allegation is necessary.

3. Plaintiffs' Injuries Are Redressable by the Court.

Plaintiffs' alleged harms are also redressable. The redressability inquiry focuses on whether the *injury* that a plaintiff alleges is likely to be redressed through a favorable decision arising from the litigation. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 286–87 (2008). The relief need not be total, and plaintiffs need only show that relief would address their injuries "to some extent." *Massachusetts v. EPA.*, 549 U.S. 497, 526 (2007) (finding redressability

satisfied where "risk of catastrophic harm" could be "reduced to some extent if petitioners received the relief they seek").

Defendants rely primarily on this Court's holding that it could not offer redress as to Plaintiffs' "underfunding claim," ECF No. 170 at 31, and continue to ignore this Court's prior holding as to the claims at hand. ECF No. 64 at 50. Here, Plaintiffs allege a wide and deep range of severe deficiencies in Defendants' plans and preparations for the 2020 Census, which together will cause Plaintiffs' injury. Defendants do not and cannot argue that it is beyond the power of this Court to grant any remedy that would reduce Plaintiffs' injuries to some extent, including an order remedying the Bureau's staffing deficiencies or for the Bureau to expand its partnership program. At this stage, it is sufficiently likely that there are remedies through which the injury can be "reduced to some extent." *Mass. v. EPA*, 549 U.S. at 526.

4. The NAACP has Organizational Standing.

Plaintiff the NAACP, a nationwide organization devoted to promoting political, educational, social, and economic equality, has organizational standing to sue on behalf of its members, and standing due to its diversion of resources as a result of Defendants' deficient census plans. *See* TAC ¶¶ 4, 176, 179. Defendants offer no reason for this Court to conclude that the NAACP has no standing in this case.[11]

This diversion of resources is sufficient to constitute an injury. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Defendants rely on *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012) for the proposition that a diversion of resources based on an organization's own budgetary choices is insufficient to create standing. However, *Lane* is inapposite. In *Lane*, the organization's

[11] Defendants argue that the NAACP does not have standing "unless the organization identifies a particular affected member," but then admit that Plaintiffs Robert Ross and Elizabeth Johnson are identified as members. ECF No. 170 at 31–32.

mission was to educate the public about restrictions on gun rights, *id.* at 671, so an expense incurred from educating the public about a new gun restriction was not actionable, *id.* at 675. In this case, expending resources to combat an unconstitutional lack of preparation for the 2020 Census on the part of the Bureau is not merely a budgetary choice. The NAACP is an official partner of the 2020 Census and its mission is not to fill the gaps left in preparation by the Bureau, but, as Defendants acknowledge, to "ensure the political … equality of all citizens," including by promoting the Black community's participation in the 2020 Census. ECF No. 170 at 32-33. It is not the role of the NAACP, as a partner or otherwise, to carry the weight of preparing for the 2020 Census. Because the Bureau has failed to prepare adequately itself, the NAACP must expend additional resources to bridge the gap. *Casa De Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760, 773 (D. Md. 2019) (finding a diversion of resources to be a sufficient injury—in line with *Havens* and unlike that in *Lane*—when the reallocation was a result of the government's change of policy that was "dramatically more threatening to its members"). That the NAACP and its branch office have had to expend funds that could have been used in order to further the NAACP mission in other ways is sufficient injury to confer standing.

C. Plaintiffs Have Sufficiently Alleged an Enumeration Clause Violation.

As in their first motion to dismiss, Defendants argue that the latitude granted to the Bureau under governing Enumeration Clause precedent forecloses Plaintiffs' claim pursuant to the Enumeration Clause. ECF No. 170 at 34; ECF No. 43-1 at 25–29. This Court held otherwise, finding that Plaintiffs had "alleged sufficiently that proceeding as Defendants are with the 2020 Census will unreasonably compromise the distributive accuracy of the census, thereby stating a claim for violation of the Enumeration Clause." ECF No. 64 at 54–55 (citations and internal quotation marks omitted). There is no reason for a different result here; if anything, the circumstances are more severe, as Defendants are closer to the 2020 Census and are still

proceeding in a manner that "will exacerbate the undercount Prince George's County historically experiences." *Id.* at 54. Accordingly, the law of the case requires that Defendants' arguments for dismissal on the pleadings be rejected.

Even if this Court were to evaluate again whether Plaintiffs have sufficiently alleged a violation of the Enumeration Clause, it should reach the same result. Defendants' motion focuses on their newly offered evidence in place of Plaintiffs' allegations; for the reasons explained below, Defendants' summary judgment motion is improper at this stage and should be denied. To the extent Defendants' make any 12(b)(6) arguments at all, it is to appeal to the "extraordinarily deferential standard of review under the Enumeration Clause." ECF No. 170 at 34. Although the Secretary has broad discretion over conducting the census, such discretion is not unbounded. *See Wisconsin*, 517 U.S. at 19. It is essential that such claims be reviewed, as a "violation of the Enumeration Clause's mandate" cannot be hidden "behind the fig leaf of deference to administrative procedure." *NAACP*, 945 F.3d at 194 (Gregory, C.J., concurring); *see also Utah v. Evans*, 536 U.S. 452, 495 (2002) (Thomas, J., concurring in part and dissenting in part) ("[W]hile Congress may dictate the manner in which the census is conducted, it does not have unbridled discretion."). The Supreme Court's decision in *New York* that Plaintiffs' allegations regarding "decisions about what kinds of demographic information to collect" should not be reviewed under the Enumeration Clause, 139 S. Ct. at 2566, is inapplicable to this case, and does not change longstanding precedent ensuring review of Defendants' census-related conduct. Plaintiffs have adequately alleged that Defendants' drastic cuts to the resources needed to reach Hard-to-Count populations will significantly undermine the "distributive accuracy" of the 2020 Census. *Wisconsin*, 517 U.S. at 20. Defendants' motion should be denied.

III. Defendants' Premature Summary Judgment Motion Should Be Denied.

On January 10, 2020, Plaintiffs re-pleaded the Enumeration Clause claims that this Court had dismissed in its January 2019 opinion, following the Fourth Circuit's reversal of that decision. *See* TAC. Defendants filed their present motion for summary judgment seeking dismissal of those claims only one month later, without Plaintiffs having conducted discovery on those claims, and relying exclusively on factual assertions supported by wholly new declarations that were not previously produced in this case, ECF No. 170 at 33–35, and that were inconsistent with previous discovery in this case and disclosures to Congress and the public. *See, e.g., supra* note 3. As this Court has held, "summary judgment is inappropriate 'where the parties have not had an opportunity for reasonable discovery.'" *Perry v. Warden*, 2017 WL 2829512, *5-6 (D. Md. June 28, 2017) (denying summary judgment motion). Defendants do not cite a single case in which summary judgment has been granted at this pre-discovery stage. For the reasons set forth in Plaintiffs' accompanying motion pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, Defendants' motion should be denied as premature, or deferred pending Plaintiffs' taking of discovery related to Defendants' factual assertions. *See, e.g., Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 281 (4th Cir. 2013) (reversing district court's granting of summary judgment where the plaintiffs did not take discovery on their claims).

Moreover, this Court should deny Defendants' motion outright, because there are genuine disputes of material fact as to whether Defendants are proceeding in a manner that bears a "reasonable relationship" to achieving "distributive accuracy" in the 2020 Census. *Wisconsin*, 517 U.S. at 20. As set forth in the Background Section, *supra*, there are many indications that their cuts in the necessary resources for outreach to Hard-to-Count communities will lead to a significant

differential undercount. Moreover, questions remain as to whether Defendants can even meet their own internal goals for hiring and community outreach. *See* Background Section, *supra*.

Nearly all of Defendants' primary contentions are in dispute.[12] Defendants argue that the 2020 Census "is not reliant on paper for tracking information, which reduces the need for physical office space and clerical support." ECF No. 170 at 33. But in light of Defendants' failure to adequately test their new technologies, to what extent they have successfully "reduce[d] the need" for physical infrastructure, without significant harm to Hard-to-Count communities, is disputed. Defendants argue that the "Bureau will deploy 2020 enumerators in a strategic and targeted way," *id.* at 34, but the Bureau has only recently begun raising the number of enumerators it is attempting to hire, and is struggling to meet even its still-too-low target. Defendants argue that "the 2020 Census involves expanded outreach," *id.*, but Defendants have reduced their overall partnership staff and are lagging behind their goals in establishing partnerships with communities. *See supra* Background Section A.2. Defendants argue that their plans are "supported by extensive research and testing," ECF No. 170 at 34, but they do not dispute Plaintiffs' allegations that they cancelled key field tests in the years leading up to the 2020 Census. TAC ¶¶ 32, 89. Plaintiffs are not relying on "unsupported speculation," but the concrete facts available to them at this stage.

As Plaintiffs argue above, they have established a likelihood of success on their claims that the Bureau's current plans for the 2020 Census do not bear a "reasonable relationship" to the constitutional goals of the census, including achieving "distributive accuracy." *Wisconsin*, 517 U.S. at 20; *Carey*, 637 F.2d at 839. But at minimum, there are genuine factual disputes regarding whether this is the case, making summary judgment inappropriate. *See, e.g.*, *Client Network Servs.*,

[12] As noted above, Plaintiffs no longer rely on their allegations pertaining to Defendants' use of In-Office Address Canvassing or advertising spending. All of Defendants' other contentions are disputed.

Inc. v. Smith, 2017 WL 3968471, *19 (D. Md. Sept. 8, 2017) (denying motion for summary judgment where "factual disputes exist"). Accordingly, Defendants' motion should be denied.

CONCLUSION

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

In order to ensure transparency regarding Defendants' hiring and deployment of enumerators and partnerships, Plaintiffs further request that the Court issue an Order requiring Defendants (a) to report to the Court by March 16, 2020, on whether Defendants have met their internal goals for establishing partnerships for the 2020 Census, as identified in the February 2020 GAO Report; (b) to identify by March 20, 2020, the criteria or threshold circumstances that will trigger the deployment of additional enumerators above Defendants' current low-end target of 320,000; (c) to report to the Court and Plaintiffs if, at any point during census operations, Defendants' criteria for requiring additional enumerators are met, within 10 days of meeting that criteria, on the number, location, and timing of the deployment of these additional enumerators; and (d) to identify by May 1, 2020, the basis on which they are deploying M-QAC teams and the sites to which they are being deployed.

Dated: February 25, 2020

Respectfully submitted,

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* Petitions for Law Student Appearance Forthcoming.

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

CERTIFICATE OF SERVICE

I, Jacob D. Alderdice, an attorney for Plaintiffs, certify that copies of the foregoing Memorandum of Law In Further Support of Plaintiffs' Motion for a Preliminary Injunction and In Opposition to Defendants' Motions to Dismiss and for Summary Judgment, and the accompanying Plaintiffs' Memorandum of Law In Support of Their Motion Pursuant to Federal Rule of Civil Procedure 56(d) and Declaration of Jeremy M. Creelan and exhibits were served this 25th day of February, 2020 upon the all counsel of record by ECF.

/s/Jacob D. Alderdice
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