UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CENTER FOR POPULAR DEMOCRACY ACTION and CITY OF NEWBURGH,

Plaintiffs,

v.

BUREAU OF THE CENSUS, STEVEN DILLINGHAM, UNITED STATES DEPARTMENT OF COMMERCE, and WILBUR ROSS,

Defendants.

Case No. 1:19-cv-10917-AKH

REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs request that this Court order a remedy for Defendants' refusal to spend funds already appropriated for vital census operations. This relief is more critical than ever. Plaintiffs have demonstrated that Defendant Bureau of the Census (the "Bureau") has slashed the number of enumerators hired and deployed, the number of field offices opened, and the extent of vital community outreach programs, despite a growing population and other new challenges. Defendants have undertaken these arbitrary and irrational actions in reliance on untested technologies and assumptions that contradict the evidence they had before them, all while holding more than $1 billion of appropriated funds in reserve. These decisions will lead inexorably to a substantial differential undercount of Hard-to-Count communities that Plaintiffs represent.

In their opposition, Defendants nowhere contend that the administrative record justifies their decisions. Instead, Defendants rely on new declarations, containing information not previously disclosed in the administrative record in this case. There, Defendants announce increases in funding for key programs. For example, from 2017 to 2019, the Bureau planned to deploy approximately 250 to 260,000 "core" enumerators to conduct its nationwide NRFU operations. ECF No. 1, Compl. ¶ 42. Accordingly to its recently filed declarations, the Bureau has now increased that figure to 320,000. ECF No. 46-1 ¶ 51. Likewise, in budget documents released last year, Defendants stated that they aimed to spend $480 million on advertising, ECF No. 49 ¶ 14, then slightly increased that figure to $500 million according to a January 2020 press release – and then, in response to Plaintiffs' motion weeks later, increased that amount to $585 million. ECF No. 46-5 ¶ 27. Defendants' authorization of major new expenditures follows months of decrying Plaintiffs' concerns as baseless, and their reliance on new declarations is tantamount to a concession of liability on Plaintiffs' Administrative Procedure Act ("APA") claims.

These eleventh-hour developments are laudable but insufficient. 2020 Census arrangements remain legally defective in critical ways. A February 2020 Government Accountability Office report, for instance, revealed that the Bureau has failed to meet its hiring goals. Although Defendants insist that this Court should trust in their capacity to hire additional enumerators in the late stages of census operations if response rates fall below their overly-optimistic expectations, the failings of the Bureau's hiring process confirm the flaws in its approach. As set forth below, Defendants' partnership programs and field office operations also remain arbitrarily and irrationally underfunded, and the agency's choices are not justified by the administrative record it produced to this Court, in violation of the APA and the Constitution.

Plaintiffs have established a likelihood of success on their claims. In order to avert a historic undercount of Hard-to-Count communities, Plaintiffs seek a preliminary injunction to remedy Defendants' plans to (1) hire and deploy 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—which Defendants do not contest tend to overestimate vacancy rates in African American neighborhoods—as part of the Non-Response Follow-Up (NRFU) process. In particular, Plaintiffs seek an order to increase partnership program staff and the number of deployed enumerators to no less than 2010 Census levels, adjusted for population growth, ECF No. 48 at 33, 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, adjusting for inflation and population growth. *Id.*[1]

[1]As stated in Plaintiffs' opposition to Defendants' motion to dismiss, given the new disclosures in Defendants' papers, Plaintiffs no longer rely on the replacement of In-Field Address Canvassing

In addition, Plaintiffs respectfully request that the Court enter an order requiring Defendants to disclose (a) on a weekly basis, the number of enumerators hired to date and the number and location of enumerator-hours deployed in the preceding week; (b) on a biweekly basis, the number of partnership staff hired to date; (c) the criteria Defendants have used to determine the outreach commitments expected of organizations deemed eligible to serve as partnership organizations for the 2020 Census and the resources made available to those partners; (d) the criteria or threshold circumstances that will trigger the deployment of additional enumerators; and (e) the basis on which they are deploying M-QAC teams and the sites to which they are being deployed. Plaintiffs additionally request Defendants to identify the final decision-makers corresponding to each of the aforementioned implementation decisions.

LEGAL STANDARD

For a preliminary injunction to issue, the moving party must establish "(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).*

Defendants cite *Trump v. Deutsche Bank AG*, 934 F.3d 627 (2d Cir. 2019) for the proposition that government action cannot be enjoined under the serious-questions standard. ECF No. 46 at 13. But their arguments mischaracterize that holding. After the portion of the opinion that Defendants cite, the Second Circuit notes that it has, in fact, affirmed preliminary injunctions against government action. *See Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1347 (2d

with In-Office Address Canvassing or the reduction in communications spending as evidence in support of their constitutional claim. *See* ECF No. 45 at 2 n.1.

Cir. 1992) (enjoining Immigration and Naturalization Service officials); *Mitchell v. Cuomo*, 748 F.2d 804, 806-08 (2d Cir. 1984) (enjoining state prison officials). Indeed, the Second Circuit has "affirmed decisions that issued or denied preliminary injunctions against government action using *both* standards." *Deutsche Bank*, 943 F.3d at 638 (citing *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 836 F.2d 760, 763 (2d Cir. 1988); *Patton v. Dole*, 806 F.2d 24, 28-30 (2d Cir. 1986); and *Patchogue Nursing Center v. Bowen*, 797 F.2d 1137, 1141-42 (2d Cir. 1986)) (emphasis added).

Critically, the Second Circuit has previously held that the less rigorous standard is appropriate in cases related to the taking of the census. *See Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) (granting injunction where there was a "fair ground for litigation"); *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995) (noting that *Carey* applied the "less rigorous" standard because it "involved methods adopted by the Census Bureau"). The Second Circuit has confirmed that the lower standard applies where, as here, "no party has an exclusive claim on the public interest." *Haitian Centers Council*, 969 F.2d at 1339; *see Carey*, 637 F.2d at 839 (noting that public interest in "obedience to the Constitution and to the requirement that Congress be fairly apportioned, based on accurate census figures"). And it uses the serious-questions standard where, as here, the challenged action was taken pursuant to a "policy formulated solely by the executive branch," *Deutsche Bank*, 943 F.3d at 638, and therefore not developed "through presumptively reasoned democratic processes," *id.*

Although Defendants argue that the higher standard should also apply in cases involving "mandatory injunctions," where the moving party seeks to change the status quo, the Second Circuit has explained that the distinction between mandatory and prohibitory injunctions is "more semantic[] than substantive." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d

Cir. 1995). Indeed, "in borderline cases injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms." *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 835 (1994). As Defendants themselves concede, Plaintiffs can frame their relief as "*prohibiting* the Census Bureau from reducing certain levels of staffing or expenditures from 2010 Census levels." ECF No. 46 at 14.

Finally, Defendants argue that Plaintiffs should have to meet the four-part test set out in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). But the Second Circuit has cabined the holding in *Winter*, noting that the case "concerned military operations affecting the national security . . . and two of the three cases cited to support the *Winter* formulation also concerned national security." *Deutsche Bank*, 943 F.3d at 640. As such, the Second Circuit held just last year that *Winter* did not preclude "our use of the two preliminary injunction standards that we ha[ve] used for five decades." *Id.* at 641.

The serious-questions standard is thus appropriate here. Ultimately, however, Plaintiffs can and do meet both standards for preliminary relief, establishing both sufficiently serious questions going to the merits and a likelihood of success on the merits.

BACKGROUND

I. Defendants Do Not Rely on the Administrative Record to Justify Their Recent Actions.

Judicial review of an agency decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" must be based on the "'whole record' compiled by the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "[T]he focal point of the review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138 (1973); *see LaFleur v. Whitman*, 300

F.3d 256, 267 (2d Cir. 2002) (APA review is limited to "to examining the administrative record to determine whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." (alteration in original)).

Consistent with this precedent, this Court ordered Defendants to produce "the administrative record underlying the five challenged agency actions." ECF 34 at 2. Defendants made this production, yet cite to the administrative record only *once* throughout their 42-page brief. Instead, Defendants rely on new affidavits—from outside the administrative record—to justify their arbitrary and capricious decisions. These litigation affidavits, however, are *post hoc* rationalizations of the Bureau's decisions, an inadequate and improper basis for review. *See Overton Park*, 401 U.S. 419-20 (reversing lower courts' review based on litigation affidavits and remanding for the district court to review the challenged decision "based on the full administrative record that was before the Secretary at the time he made his decision"); *Bechtel v. Admin. Review Bd., U.S. Dep't of Labor*, 710 F.3d 443, 450 (2d Cir. 2013) (holding letters that were not part of the administrative record could not be considered by the court in evaluating agency action under section 706).

Defendants' actions demonstrate that they do not have a basis in the administrative record to defend their decision, that they produced an incomplete record, or both. An incomplete record cannot justify the challenged actions. *See Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 143 (S.D.N.Y. 2019) ("The Administrative Procedure Act and the cases require that the complete administrative record be placed before a reviewing court." (citation omitted)). For the reasons argued herein, the Court should grant Plaintiffs' requested relief; but in any event, it should allow Plaintiffs to seek expedited discovery into the facts newly disclosed by Defendants

in the course of this motion. *See Camp*, 411 U.S. at 143; *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

II. Critical Census Operations Remain Arbitrarily and Unreasonably Under-Resourced.

Defendants have drastically reduced key resources necessary to reach Hard-to-Count populations in the 2020 Census. Although Defendants insist that reductions in staff and resources are simply the byproduct of implementing new technology and operational methods, that reasoning is unpersuasive given the serious deficiencies in both their plans and execution. Instead, these arbitrary and unnecessary cost restrictions create an imminent risk to distributive accuracy in the census, harming Hard-to-Count communities and violating the Bureau's constitutional and statutory obligations.

A. The Bureau Requires More Enumerators and Has Failed to Meet its Hiring Goals.

Enumerators play a critical role in ensuring that Hard-to-Count communities are accurately represented in the decennial census. Yet Defendants have pushed forward with their plans to slash the enumerator workforce for years. At the eleventh hour, and during the course of this litigation, they have now reversed some of these decisions and announced plans to hire more people—as if in response to Plaintiffs' warnings about the Bureau's drastic cuts to the enumerator workforce. But Defendants' efforts continue to be too little, too late. The Bureau still relies on unrealistic estimates for the census self-response rate and enumerator productivity to justify hiring fewer enumerators than it did in 2010 and fewer than are needed for the 2020 Census. And the technological and hiring challenges facing the Bureau make its plan to hire an insufficient number of enumerators and simply recruit more if needed down the line even more irrational.

The Bureau's assumptions regarding the self-response rate for the 2020 Census—and the corresponding number of enumerators needed—are patently unrealistic. In the 2010 Census, the self-response rate was 63 percent, and the Bureau employed 516,709 enumerators. *See* ECF No. 52, Declaration of Michael J. Wishnie in Support of Plaintiffs' Motion for Preliminary Injunction ("Wishnie Decl."), Exhibit 7 at 222 ("2010 NRFU Operations Assessment"); 2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Survey and Focus Groups: Key Findings for Creative Strategy (Oct. 31, 2018), https://www2.census.gov/cac/nac/meetings/2018-11/mcgeeney-evans-cbams.pdf; *see also* SDNYCENSUS_000607. By contrast, the Bureau expects a lower self-response rate for the 2020 Census—60.5 percent—and yet predicts that it will need to deploy only 320,000 enumerators. ECF No. 46-1, Stempowski Decl. ¶ 51; Supplemental Declaration of Michael J. Wishnie ("Wishnie Supp. Decl."), Exhibit 1 at 6 ("GAO Report"). The Bureau has only recently increased its target number of enumerators to a low-end goal of 320,000; as recently as July 2019, the Bureau represented that it planned to deploy approximately 260,000 enumerators, and the Bureau's plans reflected that number throughout the year. Wishnie Decl., Exhibit 8 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 targets—both the low end of 320,000 *and* even the high end of 500,000—still fall short, underestimating hiring delays, overstating the effectiveness of new technologies, and relying on overly optimistic, unprecedented response rates.

To make matters worse, the Bureau's own 60.5 percent estimate is too optimistic given that no previous test for the 2020 Census has achieved a self-response rate that high. Assistant Director 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" were borne out 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 community less diverse than those Plaintiffs represent, the self-response rate was just 56%. *See* Wishnie Decl., Exhibit 9 at 4 ("Fontenot Presentation"). This unexpected worst-case scenario is actually much closer to what the Bureau's testing predicts than what the Bureau is naïvely preparing for. In the 2018 End-to-End Test in Providence, the self-response rate was 56 percent. *Id.* For Black responders, the self-response rate was 39 percent, and for people of Hispanic origin, it was 43 percent. *Id.*[2] No test in the 2020 Census life cycle has *ever* produced a self-response rate as high as 60 percent. *See* Taylor Dep. Tr. at 131:2-10; *see also* SDNYCENSUS_005568. But at least one test has produced their "most extreme negative assumption" on the self-response rate. It is irrational and irresponsible for the Bureau to plan to deploy fewer enumerators in accordance with a self-response rate it knows it will not obtain in 2020.

Neither can new technology justify the Bureau's drastic reduction in the enumerator workforce. In fact, the likelihood of an even lower self-response rate is magnified by the serious IT challenges facing the Bureau: the agency is at risk of missing testing milestones for five IT operations, including one for the self-response system, directly undermining the Government's claims about technology enhancing enumerator productivity. *See* GAO Report at ii. In fact, in February, the Bureau decided to use its backup system to manage internet responses after discovering a scalability issue that was preventing enough users from accessing its primary system.

[2] Enumerator productivity in the 2018 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?.

Id. at 7–8. The Bureau also found several problems while testing the enumeration application it plans to use, including the need to "restart or reinstall the application for it to work correctly," obviously impeding productivity. *See* GAO Report at 9. Although technological innovation is important for improving census operations, Defendants' unfounded belief that technology will rectify the particular deficiencies in their plans is irrational here, where that technology is untested and could create problems instead of resolving them. The technological challenges identified by the GAO argue for more enumerators, not fewer.

If and when the Bureau eventually needs more enumerators, Defendants assert that they will "spend whatever funds are necessary on as many enumerators [as] are needed to complete non-response follow up ("NRFU") operations." ECF No. 46 at 22. This response cannot overcome Plaintiffs' evidence that Defendants' final plan for the hiring and deployment of enumerators is constitutionally and statutorily deficient. Further, it is contradicted by the findings of the GAO report issued last month highlighting the delays in hiring census workers. *See* GAO Report at i, 5–6 (noting that the Bureau was 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)") (indicating that the Bureau had missed interim hiring goals).

The Government should have known that hiring would be an issue after the Bureau failed to meet hiring targets in address canvassing tests. *See* Wishnie Supp. Decl. Exhibit 2 at 11. And it "continues to miss its interim recruiting goals as of February 3, 2020." GAO Report 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 later thus neglects its actual experience, and is not a sufficient rationale for its decision to hire fewer enumerators *now*. 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 suddenly increased goal unrealistic.

B. The Partnership Program Lags Behind Key Targets and Lacks Sufficient Resources.

Plaintiffs have consistently maintained that slashing the staffing for the partnership program in half will exacerbate the undercount of Hard-to-Count communities, especially in an environment where outreach challenges have become more severe. ECF No. 48, Pls. Mem. of Law in Supp. of P.I. ("Pls. Mem.") at 4-6. Defendants dismissed such drastic cuts as inconsequential, arguing that the eliminated "partnership assistants" performed clerical roles that could be replaced with technology and did not have a direct effect on the quality of the partnership program. ECF No. 46 at 12. But the Bureau's representations are simply not borne out by logic or the evidence in the public record.

To begin, Defendants 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 as conducting "paper and pencil administrative activities" with "little direct impact on the success of the partnership program." ECF No. 46 at 12; *see also* ECF No. 46-5, Reist Decl. at ¶¶ 23–25. In reality, partnership assistants did far more,

especially with respect to outreach to Hard-to-Count communities. They 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] 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* (Apr. 8, 2011), OIG-11-023-I at 6, https://www.oig.doc.gov/OIGPublications/OIG-11-023-I.pdf.

The substance and scope of these responsibilities not only exceeds the label of an "administrative" position but also undercuts Defendants' assertion that the role of the partnership assistants could adequately be replaced with technology. ECF No. 46 at 12. Technological advances would neither eliminate nor sufficiently replace much of the *non-clerical* work that partnership assistants performed. *But see* Stempowski Decl. ¶¶ 9, 33, 46–49, 51. Additionally, to the extent that the partnership assistants performed non-automatable administrative work, those responsibilities will not cease to exist just because the corresponding position no longer does. Those tasks will necessarily be adopted by partnership specialists, diluting the effectiveness of their outreach to Hard-to-Count communities.

Moreover, despite the Bureau's recent announcement that it has established 300,000 partnerships, deficiencies remain. U.S. Census Bureau Reaches Ambitious 2020 Census Community Partner Goal Ahead of Schedule, (Feb. 25, 2020), https://www.census.gov/newsroom/press-releases/2020/partner-goals.html. First, because of the Bureau's partnership staffing cuts, there will likely be insufficient staff resources to meaningfully support partner organizations. As it stands, every partnership staff member would, on average,

manage the relationships for 200 organizations each. This lopsided ratio indicates a structurally unsound program, ill-equipped to conduct sufficient outreach to Hard-to-Count communities.

The inadequacy of partnership staff resources is particularly acute in light of the Bureau's elimination of partnership assistants that helped facilitate and administer the outreach operation in 2010. Defendants have defended their decision to entirely eliminate the Partnership Assistant position by characterizing the role as largely "clerical," focused on "paper and pencil administrative activities," which they no longer need in this digital census. Reist Decl. ¶ 24. But this reversion back to reliance on paper forms means the clerical work that was covered by the 2,000 Partnership Assistants in the 2010 Census, ECF No. 49, Doms Decl. ¶ 11, will now be added to the responsibilities of the remaining overburdened partnership staff.

Second, the administrative record that the Bureau has provided does not offer any evidence of the qualifications and standards used to designate a participating entity as an official partnership organization, including whether such organizations have made outreach commitments to which the Bureau can hold them accountable. Without such evidence, the figure itself lacks substantive meaning – and may well include relationships that are "partnerships" in name only. For instance, partner organizations that lack physical proximity or meaningful connections to Hard-to-Count communities or lack resources to communicate with non-English speakers in areas where that is a prerequisite to outreach efforts will not ameliorate the differential undercount of these communities. The Bureau planned to establish 250,000 community partnerships by February 1, 2020, and as of just three weeks prior to its this deadline, it was short by more than 10,000 partnerships. GAO Report at 6.[3] Without more evidence to counter the under-funding problems

[3] In 2019, Defendants disclosed records stating that they would expend $480 million on advertising, another critical component of community outreach. Doms Decl. ¶ 14. Then, in mid-

Plaintiffs have identified, this recent history suggests that the mere number of partnerships cannot establish their strength or utility.

C. The Mobile Questionnaire Assistance Center Program Is Inadequate.

Plaintiffs challenged the efficacy of an untested, mobile-only QAC program with no fixed presence as arbitrary and unreasonable. Pls. Mem. at 8–9, 23–24. Defendants claim that Plaintiffs' concerns about the QAC program are moot because the Bureau is allocating between $110 million and $120 million for mobile questionnaire assistance centers.[4] *See* ECF No. 46 at 25. But Defendants' misconstrue Plaintiffs' claim and corresponding request for relief.

Plaintiffs challenge serious deficiencies in the program's quality and effectiveness. Plaintiffs' request for increased expenditures is merely one component of the requested remedy. In particular, Plaintiffs ask the Court to order Defendants to 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 24 ("Completely untested, the Mobile Questionnaire Assistance program will have no fixed presence and instead will consist of staffers being deployed to areas the Bureau deems to be experiencing low self-response rates, like teenagers with clipboards canvassing for donations on a Manhattan street corner.") (internal citation omitted); *see also id.* at 2, 33 (seeking "fixed Questionnaire Assistance Centers" as well as increase in mobile assistance units). Critically, Plaintiff the City of Newburgh specifically requested a fixed QAC leading up to

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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 $585 million. Reist Decl. ¶ 27.

[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*, https://www.commerce.gov/sites/default/files/2020-02/fy2021_census_congressional_budget_justification.pdf.

the 2020 Census and has maintained this request as part of its requested relief since the initiation of this lawsuit. *See* Pls. Mem. at 23-24.

Defendants portray their M-QAC program as a considered approach to replace the fixed QAC program used in the 2010 Census. *See* ECF No. 46 at 8-9; Stempowski Decl. at ¶¶ 35, 38. But 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 22 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 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 is seriously flawed. 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* Wishnie Supp. Decl. Exhibit 4 at 2 (Dec. 2019 Letter from Sen. Reed to Census

[5] Only on February 21, 2020 did the Bureau release its "2020 Census: Mobile Questionnaire Assistance Operation Project Plan." *See* Wishnie Supp. Decl., Exhibit 3 ("MQA Operation Project Plan") There, the Bureau concedes "that the MQA operation was *proposed and planned late in the cycle*" and thus that "management believes a project plan with operational details will help ensure the success of this operation." *Id.* at 3.

Bureau). And the Bureau does not plan to hire new staff dedicated to the M-QAC program. *See* Wishnie Supp. Decl. Exhibit 5 at 1–2 ("Aug. 2019 Bureau Letter to Sen. Jack Reed"). The Bureau's staffing plan appears to consist of taking the 4,740 Recruiting Assistants hired in 2019 for census recruiting operations and transitioning them into M-QAC staff in mid-March 2020. *See id.*; ECF No. 46 at 8-9. This is a mere fraction of the more than 29,000 QAC staff employed during the 2010 Census, *see* Doms Decl. at ¶ 33, and implies that staff hired based on their experience and background in recruiting can be transformed overnight into M-QAC staff achieving different objectives and requiring different skills.

The Bureau states that it will "hire additional [M-QAC staff] in ACOs with a significant number of low response areas," but has not provided details on how it will do so with less than two weeks left before the mid-March launch of the M-QAC program. MQA Operation Project Plan at 6. Given the Bureau's representations about the M-QAC program, Defendants' claim that Plaintiffs labor under the "mistaken view that the number of ACOs has any bearing on 'physical outreach,'" ECF No. 46 at 25, is demonstrably false. If the hiring of additional M-QAC staff is tied to the existence of ACOs, then Defendants' decision to halve the number of ACOs *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 8–9. Because these 4,740 Recruiting-Assistants-turned-M-QAC-staff will, in many circumstances, work in groups or pairs, there will not even be enough teams to cover every county in the United States. *See* Aug. 2019 Bureau Letter to Sen. Jack Reed at 2.

Congress has repeatedly urged Defendants to establish fixed-location QACs. *See* Wishnie Supp. Decl. Exhibit 6 (Jul. 2019 Sen. Jack Reed Letter to Bureau). 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*." Aug. 2019 Bureau Letter to Sen. Jack Reed at 1 (emphasis added). Defendants' response relies on the assumption that the Bureau will *know* where assistance is most needed and where the non-responding households are located. This approach inverts and undermines the entire purpose of past QAC programs. 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. Since the Bureau definitionally cannot know if these populations are responding at appropriate levels because they are not in the MAF, they will be unable to deploy mobile response units effectively.

A mobile-only QAC plan does not address Congress's concerns or Plaintiffs' claim that Defendants' outreach efforts will disproportionately miss Hard-to-Count populations, such as homeless and transient individuals. Defendants emphasize that their mobile response initiative is an improvement from 2010 because it will allow respondents to fill out an internet rather than paper form. *See* ECF No. 46 at 8. However, a change in the format of the census forms that QACs provide does not justify the Bureau's decision to eliminate the fixed presence of QACs.

Defendants' decision to eliminate all fixed QACs does not bear a "reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin v. City of New York,* 517 U.S. 1, 20 (1996). This decision also lacks a "rational connection between the facts found and choices made," and the Bureau's explanations for cutting fixed QACs "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The decision violates the Enumeration Clause and the APA.

D. The Use of Administrative Records Will Lead to a Differential Undercount.

As part of a gambit to cut costs and reduce the NRFU workload, *see* SDNYCENSUS_024004, SDNYCENSUS_024013, Defendants plan to take the unprecedented step of relying on administrative records to determine whether households are vacant and to count certain households. The predictable effect of this decision will be to worsen the differential undercount of Hard-to-Count communities, especially African American and Hispanic communities, *see* Doms Decl. at ¶¶ 45–47, whom Plaintiffs disproportionately represent, *see* ECF No. 40-3 at ¶ 2, ECF No. 40-4 at ¶¶ 2, 5–6.

The manner in which Defendants will use these records is not in dispute. When a household does not respond to initial census mailings, an enumerator will visit the household in person. If, after a single visit, the enumerator suspects the home is vacant and cannot find a knowledgeable person, the Census Bureau will resort to administrative records to confirm. *Compare* Compl. at ¶¶ 134, 136, *with* ECF No. 46 at 27–28. Unlike in past censuses, Doms Decl. at ¶ 45, n. 56, if these records fail to reflect occupants, the Bureau will end its NRFU efforts for the household. ECF No. 46 at 28. Defendants acknowledge that this step all but ends the process of attempting to enumerate a particular address. *Id.* 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* Compl. at ¶ 138, *with* Stempowski Decl. ¶ 21–34.

Remarkably, Defendants nowhere contest the single most essential fact about administrative records: that they "generally tend to over-represent white … populations" and overestimate vacancy rates in "areas with a high concentration of Black households." Doms Decl. at ¶ 46. In response, Defendants make only the conclusory assertion that use of these records to reduce in-person NRFU is "reasonable" and not "arbitrary or capricious." ECF No. 46 at 28–29.

The administrative record in this case, which Defendants ignore, makes clear that written records fail to reflect Hard-to-Count communities and that Defendants cannot rebut this deficiency. In an internal report, the Bureau found that approximately ten percent of households marked vacant by administrative records had been determined to be actually occupied in the 2010 Census. SDNYCENSUS_024844. The report also found that in majority-Black neighborhoods, administrative records were disproportionately likely to indicate vacancy. SDNYCENSUS_024846. The report's author concluded that the "large amount" of this bias could lead to a "potential net undercoverage" of Black households in the 2020 Census. SDNYCENSUS_024851. And the balance of the administrative record reflects persistent concerns about the representation of children, who are more likely to be non-white than the general population, in official records. *See, e.g.*, SDNYCENSUS_024793 (noting "undercoverage of children in core AR sources), SDNYCENSUS_024849 (same), SDNYCENSUS_004625 (indicating that eighteen percent of addresses that appeared vacant and thirty percent of addresses that appeared no longer in existence in administrative records were in fact occupied). "[D]riven by time constraints," SDNYCENSUS_024519, and fully aware of yet insensitive to the "trade off between cost savings [and] accuracy," SDNYCENSUS_024018, Defendants ignored their own research and ignored these concerns.

Common sense leads to the conclusion that Plaintiffs' experts have already reached: the planned use of administrative records by the Bureau will "increase some of the undercount differentials in the 2020 Census." Doms Decl. at ¶ 46. This is not consistent with the "preference for distributive accuracy" inherent in "the constitutional purpose of the census." *Wisconsin*, 517 U.S. 20.

E. The Number of Field Offices Is Insufficient in Light of a Likely Greater Than Expected NRFU Workload.

The Bureau's plans for fewer offices in the 2020 Census do not accurately reflect either the increased NRFU workload that the Bureau will face or the range of roles that field office-based staff play. For 2020, the Bureau will open only half the number of Area Census Offices (ACOs) that it operated in 2010 (248 ACOs compared to 495 Local Census Offices). Doms Decl. ¶ 29. The Bureau argues that this choice arises from both the anticipation of high levels of self-response online and the new technologies that enumerators will use in the field. ECF No. 46 at 24. However, contrary to Defendants' assertions, these new procedures will not eliminate the need for more field offices. ACOs are not merely locations for "the pickup, return, and storage of paper," *id.*, but rather serve an important function in the hiring, training, and supervising of enumerators and other field staff—functions that are evident from the Bureau's own administrative record and which clearly improve the accuracy of the ultimate population count. Compl. ¶¶ 91–93; Doms Decl. ¶ 32.

Moreover, even if the offices did only play a central role in collecting and processing paper forms, that role would still be valuable in light of the Bureau's recent announcement that it plans to print enough paper forms for everyone in the country. *See* Hansi Lo Wang, *Despite Cybersecurity Risks And Last-Minute Changes, The 2020 Census Goes Online* (March 2, 2020), https://www.npr.org/2020/03/02/807913222/despite-cybersecurity-risks-and-last-minute-changes-the-2020-census-goes-online ("[A]midst heightened concerns about cybersecurity risks, disinformation campaigns and technical troubles … the bureau has increased its printing order to prepare enough paper forms for every home address in the country.").

As the Bureau has conceded, the number of offices that the Bureau must open for the 2020 Census is tied to the projected NRFU workload. ECF No. 40-6, Exhibit 11 at 1 ("Census staff selected the 'area of consideration' for each field office site based on certain criteria, including . . . equalizing the workload for the nonresponse followup (NRFU) operation."). Despite this

acknowledgement, the Bureau has not increased the number of ACOs it will open, even as estimates for likely self-response have fallen and the number of enumerators that the Bureau plans to hire has more than doubled—from approximately 170,000 to 250,000 to somewhere between 320,000 to 500,000. *See* Compl. ¶¶ 97–98 (noting an unchanged number of field offices despite the increase in the number of enumerators); ECF No. 46 at 9 (Bureau claims a new intent deploy between 320,000 to 500,000 enumerators). The number of offices has remained fixed even as Congress and outside stakeholders have urged that the Bureau increase the number of offices to more accurately reflect its likely workload. *See* SDNYCENSUS_006710 (noting Congressional request for the Bureau to investigate opening 300 field offices); SDNYCENSUS_025003–04 (comments asking the Bureau to "[i]ncrease the number of Area Census Offices in a way that is commensurate with projected increases in the NRFU workload in many hard-to-count communities."); *see also* Compl. ¶ 100 (describing concerns raised by Department of Commerce OIG about adequacy of the number of offices). The existing strain on ACO resources will be made even worse by the Bureau's unduly optimistic predictions about self-response rates and enumerator productivity. When these predictions falter, field offices will be even further stretched, worsening the differential undercount.

As the ratio of enumerators to ACO-based supervisors continues to climb upward, supervisors will have even more limited capacity, increasing the risk that enumerators will not receive adequate training and oversight. Moreover, ACO staff are now being called on to serve additional functions beyond those previously anticipated. In the just released plan for the M-QAC operation, the Bureau notes that ACO managers "will continue to manage overall ACO activites" [*sic*] including the addition of those that are "part of the MQA operation." Wishnie Suppl. Decl. Exhibit 3 (MQA Operation Project Plan) at 7. Moreover, ACOs will be required to accommodate

additional staff hired to take part in M-QAC activities. *Id.* These recent changes further highlight the vital role of ACOs and confirm that new responsibilities will stretch ACO management staff even more thinly. The suggestion that "the number of ACOs will not affect whether or not any individual is counted in any way" is absurd. ECF No. 46 at 24.

Finally, the use of new technology cannot explain the decision to open only 248 ACOs, Defendants' claims notwithstanding. The technology that the Bureau plans to use has not been altered even as the number of enumerators has steadily increased, demonstrating that more ACOs are still needed. If anything, the Bureau's own testing reveals that the new devices will be less effective than hoped. *See* Wishnie Decl., Exhibit 10 at 9–10 (discussing problems in IT system used by enumerators that were identified in the 2018 End-to-End Test). If further problems arise with the in-field devices, the online self-response system, or other minimally tested technologies and the Bureau must fall back on paper forms, it will simply lack the necessary physical infrastructure to conduct an actual enumeration.

ARGUMENT

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

Plaintiffs are likely to succeed on the merits of their claims—and at a minimum, raise sufficiently serious questions going to the merits—regarding enumerators, partnerships, questionnaire assistance centers, administrative records, and field offices. As described in the Background Section, *supra*, 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, and are arbitrary and capricious, in violation of 5 U.S.C. § 706(2).

A. The Bureau's Design Choices are Arbitrary and Capricious

In exercising its judgment, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. The judgment must be holistic and comprehensive. If the agency "fail[s] to consider an important aspect of the problem, [or] offer[s] an explanation for its decision that runs counter to the evidence before the agency," its decision is arbitrary and capricious and must be set aside. *Id.* Defendants misconstrue as a mere "difference of opinion" Plaintiffs' claims that the untested and risky approach adopted by the Bureau violates the APA's requirement of reasoned decision-making. ECF No. 46 at 17. Therein lies the problem: the APA demands more of Defendants than an opinion. Their decisions must evince a rational connection between the facts before the agency and the conclusions that reflect that careful consideration. In this case, they do not.

First, the Bureau's cuts to enumerators are arbitrary and capricious. Defendants argue that cuts to enumerators are justified because "the NRFU workload . . . will [not] be known until the self-response operation is well underway." ECF No. 46 at 23. But as Defendants concede, the planned number of enumerators must be built on "informed projections" so that the Bureau is not blindsided by low response races and insufficient preparatory hiring. *Id*. But that is exactly the position Defendants are in because they have ignored the very data on which such projections ought to be based.

The Bureau's own studies show that self-response rates are likely to be twenty percentage points lower in 2020 than in 2010. *See* SDNY_006015, SDNY_006021, increasing expected NRFU workload. Further, in the only End-to-End Test the Bureau conducted in preparation for the 2020 Census, the Bureau reported an even lower self-response rate than its anticipated self-response rate of 60.5% for the 2020 Census, *compare* Fontenot Presentation at 4, *with* Wishnie

Decl., Exhibit 6 at 50, with an even lower response rate among Black and Hispanic communities. Fontenot Presentation at 4, 5, 8, 9; Doms Decl. at ¶ 22. Again, the data before the Bureau simply cannot justify its decision to hire fewer enumerators and hold money in reserve until these dire predictions become reality. That sort of dilatory preparation is exactly the behavior proscribed by *State Farm*.

It is well within the Bureau's power to remedy these deficiencies. First, 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. Second, 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. Finally, 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. This Court should order the Bureau to do so while it still can.

Second, the Bureau's cuts to partnership staff are arbitrary and capricious. Defendants insist that cuts to partnership staff are justified because partnership assistants were merely "administrative staff" doing an "obsolete clerical job." ECF No. 46 at 18–19. But as discussed *supra*, the public record and reports of the Office of Inspector General belie these statements. Amorphous "technology" is simply not an adequate replacement for manpower on the ground to conduct outreach and engage the public.

Third, Defendants' decision to cut in-person questionnaire assistance centers is arbitrary and capricious. While in 2010 such sites added 760,748 additional people to the count (the equivalent of an entire congressional district), *see* SDNYCENSUS_004765, the Bureau will provide only Mobile Questionnaire Assistance in 2020. *See* SDNYCENSUS_006609. These M-QACs—entirely untested and ill-equipped to substitute for the function of physical QACs at fixed

locations with readily available staff on-site—are not up to the job for which they are designed. Defendants contest none of this and instead merely offer a footnote suggesting Plaintiffs have not explained why physical QACs would be superior. *See* ECF No. 46 at 25 n.7. To rely on M-QACs without adequate testing or sufficient staff and in the face of clear evidence that their predecessors were vital to the last census is arbitrary and capricious.

Fourth, the Bureau's shift to administrative records for enumeration is also arbitrary and capricious. Defendants' position that administrative records are but one element of the process by which a household is deemed vacant does not answer the fundamental problem highlighted by Plaintiffs. Administrative records are disproportionately likely to indicate vacancy in already Hard-to-Count communities, SDNYCENSUS_024846, and to do so incorrectly; in the Bureau's own testing, 18 percent of addresses indicated vacant and 30 percent of addresses indicated non-existent by administrative records were in fact occupied. SDNYCENSUS_004625. Using administrative records with such a high demonstrated error rate, combined with its disproportionate impact on Hard-to-Count communities, is arbitrary and capricious. Layering on other forms of validation does not cure the flaws of administrative records because, where other forms of validation fail, this one is as likely to confirm the error as to correct it.

Finally, the Bureau's dramatic reductions in field offices are arbitrary and capricious. Defendants argue that Area Census Offices (ACOs) are "immaterial" to whether any individual is counted. ECF No. 46 at 24. Because the 2020 Census will be conducted using technology like iPhones rather than conducted exclusively on paper, they claim that there is less need for ACOs. But here, too, the Bureau has ignored the data in front of it, forging ahead with an untested methodology that uses "technology" as a synonym for "effectiveness." As discussed *supra*, the appropriate number of ACOs is expressly tied to the self-response rate and enumerator

productivity, both of which the Bureau has substantially overestimated. It is arbitrary and capricious for the Bureau to reverse-engineer a rationale for its number of ACOs in the 2020 Census, maintaining the exact same number of ACOs as the planned number of enumerators that these offices must accommodate has more than doubled.

B. The Bureau's Actions Do No Bear A Reasonable Relationship to The Conduct of An Actual Enumeration.

Plaintiffs are also likely to succeed on the merits of their claims under the Enumeration Clause and have certainly established sufficiently serious questions as to the merits. As outlined above, Defendants' drastic cuts to the number of enumerators, partnership staff, and field offices, as well as their overreliance on administrative records and an untested M-QAC program, do not bear a "reasonable relationship to the accomplishment of an actual enumeration of the population," as the Enumeration Clause requires. *Wisconsin*, 517 U.S. at 20. Contrary to Defendants' arguments, ECF No. 46 at 32, the Bureau and Congress do "not have unbridled discretion" in the conduct of the census *Utah v. Evans*, 536 U.S. 452, 495 (2002) (Thomas, J., concurring). There is "a strong constitutional interest in accuracy," *Utah v. Evans*, 536 U.S. at 455–56, and that includes a "preference for distributive accuracy." *Wisconsin*, 517 U.S. at 20. The census must be designed to promote distributive accuracy as best as possible—an aim that plans for the 2020 Census, which disproportionately affect Hard-to-Count communities, fail to meet. None of the five challenged decisions discussed above satisfies the "reasonable relationship" test as each will undermine the distributive accuracy of the census by reducing the Bureau's tools to effectively count certain Hard-to-Count communities.

The Bureau's choices are unreasonable for several reasons and as detailed above. First, the Bureau's decision to slash the number of enumerators that it plans to hire will result in an undercount as it needs more, not fewer, field staff when self-response rates are projected to be far

lower than in 2010. *See* SDNY_ 006015, 006021 (67% of householders who completed the Census Barriers, Attitudes and Motivators Study for 2020 were "extremely likely" or "very likely" to fill out a census form, while the comparable statistic for 2010 was 86%). Second, the Bureau has unreasonably reduced its partnership staff. The 2020 Census is occurring against the backdrop of increased distrust of government and concerns among traditionally Hard-to-Count communities, making increased outreach from local partners more necessary than ever. *See* Doms Decl. ¶ 23. Third, the Bureau has ignored the importance of ACO-based managers in supervising field staff and providing other resources during the enumeration. Maintaining a fixed number of ACOs despite increasing the number of enumerators does not bear a reasonable relationship to an actual enumeration. Fourth, in choosing to adopt an untested M-QAC program that provides no fixed, physical presence, the Bureau fails to consider the differential impact that its decision will have on certain transient communities. Finally, the choice to use administrative records to assess whether or not a home is vacant and/or to enumerate a household if no one is home fails to adequately consider the inaccuracies in these records and the risk that those inaccuracies will exacerbate the differential undercount.

Additionally, *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980) remains applicable law in this case. Per the Supreme Court's decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), "diminishment of political representation" remains a serious harm, *id.* at 2565, and to avoid that harm, the census must be designed to provide as accurate a count as possible. Even if Defendants' argument regarding the relationship between the "one person, one vote" standard and *Carey* were correct, it would not bear on Plaintiffs' arguments regarding the ways that an inaccurate census will result in *the loss of federal funding* to the communities Plaintiffs represent. Thus, Plaintiffs "have demonstrated a likelihood of success on the merits" when they make clear

"that Census Bureau procedures were inadequate" and "a census undercount is inevitable." *Carey*, 637 F.2d at 839.

C. Plaintiffs' Claims on Questionnaire Assistance Centers Are Not Moot.

A claim is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Catanzano v. Wing*, 277 F.3d 99, 107 (2d Cir. 2001). The critical question is whether there exists "a sufficient prospect that the decision will have an impact on the parties." *Id.* Defendants' allege that Plaintiffs' claims regarding QACs are moot because Plaintiffs requested relief including expenditures on both fixed QACs "and/or mobile questionnaire assistance units," and Defendants are already spending $110 to $120 million on mobile QACs. ECF No. 46 at 40–41.

But, as described above, Defendants ignore entirely the evidence Plaintiffs present demonstrating that mobile QACs are less effective than fixed QACs, especially when it comes to the Hard-to-Count communities. In 2010, 65 percent of people who used a QAC reported that they found it by seeing it in person, *see* SDNYCENSUS_004765 at xiv, adding 760,748 additional people to the count, *see id.* at xvi. Mobile QACs are far less likely to serve this purpose precisely because they have no fixed location where would-be census participants can easily locate them and fill out their questionnaires. That Plaintiffs are also in favor of additional mobile QACs *on top of physical locations* does nothing to change Plaintiffs' ongoing interest in ensuring the Bureau establishes physical QACs.

Moreover, Plaintiffs have an ongoing interest in the Bureau's establishment of fixed QACs because the new M-QACs are entirely untested. Defendants began putting together a plan for M-QACs only in December 2019, a mere three months before the start of the 2020 Census. *See* 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. The M-QAC plan has been thrown together over the last few months and has never been tested. This stands in contrast to the known effectiveness of physical QACs. That Plaintiffs are amenable to both forms of QAC together does not moot their challenge to the use of M-QACs alone. There remain substantial avenues by which this Court could order relief that would impact the parties.

II. Plaintiffs Will Experience Irreparable Harm.

Plaintiffs will suffer irreparable harm from a differential undercount if the Bureau's current plans are allowed to go forward with no judicial intervention. ECF No. 40-1 at 31. These harms—loss of federal funds, diversion of resources, and diminishment of political representation—are all "concrete and imminent" injuries that the Supreme Court has recognized in previous census cases. *See, e.g.*, *New York*. 139 S. Ct. at 2565. Notwithstanding Defendants' attempt to trivialize the harms caused by their actions, they strike at the heart of our republic. *See NAACP v. Bureau of the Census*, 945 F.3d 183, 194 (4th Cir. 2019) (Gregory, C.J., concurring).

Defendants advance a number of distracting arguments to deflect from the seriousness and urgency of Plaintiffs' harms. Defendants claim that the government's ongoing willingness to "improve its plans and correct problems" means that Plaintiffs will not suffer irreparable harm. ECF No. 46 at 35. That is an odd argument. First, the government has not shown a genuine willingness to "correct problems." For example, Defendants cite to their creation of the Mobile Questionnaire Assistance Center (M-QAC) program. But the Bureau did not create this program of its own volition. It only did so after Congress *directed* the Bureau to established fixed QACs, which the Bureau did not even do. *See supra* 15–16. Second, Defendants fail to rationalize why this Court should trust its vague promise to "improve its plans and correct problems" in the future.

Although the Bureau claims that it "will continually monitor" response rates and productivity to assess "whether any additional resources are needed," ECF No. 46 at 35, 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* Wishnie Suppl. Decl. Exhibit 1 (GAO Report) at 5–6 (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 5–7, it is far from clear that the Bureau is, in fact, "ready to resolve any issue that arises." ECF No. 46 at 36. Moreover, the Bureau's vague promises to do better *tomorrow* should have no bearing on the Court's analysis *today* of whether Plaintiffs are at imminent risk of irreparable harm. The Court should evaluate Plaintiffs' harm in light of the real facts before it, not the Bureau's imagined future remedies.

Similarly, Defendants fundamentally misunderstand the rationale underlying Plaintiffs' requested relief. On enumerators, the Bureau is correct to say that "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." *Id.* But as amply established by Plaintiffs above, Defendants' assumptions regarding both prongs are manifestly unrealistic, given the established issues with enumerator technology and the Bureau's irrationally optimistic assumptions regarding the self-response rate.

Defendants' arguments regarding partnership staff are similarly infirm. They accuse Plaintiffs of peddling a "false premise that all staff are fungible," rationalizing the elimination of the "partnership assistant" position on the fully clerical nature of the job. ECF No. 46 at 37. But the government's own data contradicts this assertion. *See* Off. Inspector Gen., *2010 Census: Cooperation Between Partnership Staff and Local Census Office Managers Challenged by*

Communication and Coordination Problems at (Apr. 8, 2011), OIG-11-023-I at 6, https://www.oig.doc.gov/OIGPublications/OIG-11-023-I.pdf. Further, the Bureau has obscured details about the quality of their partners and whether they have enough partnership staff to support them. More spending on enumerators, partnership staff, and the communications program (which Defendants have already done) would ameliorate many of the harms facing Plaintiffs and Hard-to-Count communities. But with these current deficient design choices, Plaintiffs risk being "irreparably harmed by deprivation of their right to a fair apportionment." *Carey*, 637 F.2d at 837.

Contrary to Defendants' claims, there was no delay in this litigation that weighs against the grant of a preliminary injunction. ECF No. 46 at 37. In fact, Plaintiffs filed suit as quickly as they could as events regarding the census unfolded after the Bureau's publication of the Final Operational Plan. In June 2019, the Supreme Court affirmed the justiciability of census cases in *New York* and ruled in favor of the plaintiffs on APA grounds. In the summer, the M-QAC program was proposed and later funded. The Newburgh City Council voted to join the lawsuit in October 2019, and Plaintiffs filed suit the next month. ECF No. 1. Given the arduous administrative process required for a city and a membership-based advocacy organization to initiate a lawsuit and the rapidly changing developments throughout 2019, there was no meaningful delay in Plaintiffs' suit.

Defendants seek to have it both ways. Here, they complain that Plaintiffs come to Court too late. ECF No. 46 at 37. But in their brief just a month ago, Defendants argued that Plaintiffs' have come to Court too early, because there alleged injuries are "speculative" and Defendants' action have not *yet* "resulted in an undercount that must now be ameliorated," ECF No. 39 at 11. Unless Plaintiffs could not have brought suit at any time to challenge the Bureau's actions—an idea which decades of Supreme Court and Second Circuit precedent reject —the Court should not acquiesce to Defendants' self-contradictory arguments regarding the timing of this suit.

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

Both the public interest and balance of the hardships tip decidedly in Plaintiffs' favor. Defendants advance several flawed arguments in an attempt to convince this Court of two propositions: that judicial intervention in favor of an accurate enumeration is not in the public interest, and that the balance of equities tips toward the federal government rather than the minority communities that are at risk of severe harm. Yet precedent is clear. 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. And the Constitution's Enumeration Clause is of "paramount importance in our constitutional scheme," *NAACP v. Bureau of the Census*, 945 F.3d at 186, 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.

Defendants make an unconvincing argument that judicial intervention "at this late date" would force the Census Bureau to "misspend nearly $800 million," thus harming the public interest. ECF No. 46 at 33. But the Bureau can still spend money on these programs to positive effect given that it is *still* currently engaged in many of these activities. The Bureau is actively hiring staff for the enumerator and partnership programs and is expanding its communications program, per its own representations. The increases sought by Plaintiffs will alleviate the undercount and benefit the public interest in an actual enumeration. Further, the Second Circuit has affirmed a district court's order to provide relief regarding a deficient census at an even later stage (i.e., when the initial census count was already complete). The Court should provide injunctive relief when "citizens 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." *Carey*, 637 F.2d at 838.

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. 46-2, Taylor Decl. ¶¶ 30–32. Rather than waiting for such a scenario to arise, the Bureau must take steps to prevent it occurring in the first place. When the Second Circuit affirmed a preliminary injunction in a similar case during the census process, it did not consider 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.

Neither would judicial intervention would be an "immense waste of taxpayer dollars." ECF No. 46 at 34. Congress allocated funds to the Census Bureau for a specific purpose: to reach Hard-to-Count communities. *See, e.g.*, ECF No. 40-6, Exhibit 1 ("2020 Appropriations House Report") at 14. Members of Congress have expressed concern over the Bureau's holding $1.3 billion in reserves, which puts the Census "at risk during the most critical year of its operation." *Id.; see also Beyond the Citizenship Question: Repairing the Damage and Preparing to Count 'We the People' in 2020* (statement of Rep. Jamie Raskin, House Oversight Committee), https://oversight.house.gov/legislation/hearings/beyond-the-citizenship-question-repairing-the-damage-and-preparing-to-count-we (at 3:33) (Bureau "should increase outreach to hard to count

communities instead of sitting on a billion dollars in appropriated funds"). It is not the domain of the Bureau to decide which programs are a "waste" when Congress has instructed it to spend it in a specific manner. *See, e.g.*, *In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (noting that executive agencies "[do] not have unilateral authority to refuse to spend [appropriated] funds").[6] These monies were allocated for outreach and enumerative purposes, not as a rainy day fund.

Finally, the Bureau may of course innovate, ECF No. 46 at 34, but when it 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 Hard-to-Count communities for whom a decade of political power and federal funding is at stake. *See* Wishnie Decl., Exhibit 2 at 9–10 (2018 GAO report discussing problems in the End-to-End Test with devices used by enumerators for NRFU); *id.* Exhibit 1 (2020 GAO Report) at 9 (discussing flaws in the enumeration application); *id.* at 10–11 (noting Bureau is 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 well-tested 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.

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

[6] The Second Circuit's recent decision in *New York v. Dep't of Justice*, No. 19-267(L), 2020 WL 911417, at *1 (2d Cir. Feb. 26, 2020) does not change this well-established principle, because it dealt with the executive branch's ability to condition grants on state compliance with law, and not the ability of the executive branch to refuse to spend appropriated funds altogether.

programs to no less than 2010 Census levels adjusted for population, 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 adjusted for population; and (3) increase the Bureau's presence within Hard-to-Count communities by increasing the number of fixed Questionnaire Assistance Centers, as a complement to the Bureau's planned mobile assistance program within those communities, at levels commensurate to 2010.

In addition, Plaintiffs respectfully request that the Court enter an order requiring Defendants to disclose (a) on a weekly basis, the number of enumerators hired to date and the number and location of enumerator-hours deployed in the preceding week; (b) on a biweekly basis, the number of partnership staff hired to date; (c) by April 1, 2020, the criteria Defendants have used to determine the outreach commitments expected of organizations deemed eligible to serve as partnership organizations for the 2020 Census and the resources made available to those partners; (d) by April 1, 2020, the criteria or threshold circumstances that will trigger the deployment of additional enumerators above Defendants' current low-end target of 320,000; and (e) by May 1, 2020, the basis on which they are deploying M-QAC teams and the sites to which they are being deployed. Plaintiffs additionally request the Court direct Defendants to identify the final decision-makers corresponding to each of the aforementioned implementation decisions.

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Respectfully submitted,

By: /s/Michael J. Wishnie

Rachel Brown, Law Student Intern
Lisa Chen, Law Student Intern
Daniel Ki, Law Student Intern
Nikita Lalwani, Law Student Intern
Wishcha (Geng) Ngarmboonanant, Law Student Intern
Sommer Omar, Law Student Intern*
Laura Pietrantoni, Law Student Intern
Matthew Quallen, Law Student Intern*
Joshua Zoffer, Law Student Intern
Renee Burbank
Michael J. Wishnie (MW1958)
Rule of Law Clinic
Yale Law School†
127 Wall Street
New Haven, CT 06511
Tel: (203) 436-4780
michael.wishnie@ylsclinics.org

Jeremy M. Creelan
Susan J. Kohlmann
Seth H. Agata
Jacob D. Alderdice
Jenner & Block LLP
919 Third Avenue
New York, NY 10022-3908
Tel: (212) 891-1600
jcreelan@jenner.com

* Motion for Leave to File Law Student Appearances forthcoming.

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