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15
 16 **IN THE UNITED STATES DISTRICT COURT**
 17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 18 **SAN JOSE DIVISION**

19 NATIONAL URBAN LEAGUE, *et al.*,

20 Plaintiff,

21 v.

22 WILBUR L. ROSS, JR., *et al.*,

23 Defendants.

24 Case No. 5:20-cv-05799-LHK

25 **DEFENDANTS' NOTICE OF MOTION TO**
 26 **DISMISS PLAINTIFFS' SECOND**
 27 **AMENDED COMPLAINT;**
 28 **MEMORANDUM IN SUPPORT**

Hearing Date: December 17, 2020

Time: 1:30 p.m.

Judge: Hon. Lucy H. Koh

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1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that Defendants, by and through their counsel, hereby move to
3 dismiss Plaintiffs’ Second Amended Complaint pursuant to Federal Rule of Civil Procedure
4 12(b)(1). Defendants respectfully request that this motion be heard on December 17, 2020, at 1:30
5 p.m., or at the Court’s next available date thereafter.

6 **INTRODUCTION**

7 In prior proceedings in this case, the Court issued preliminary relief to Plaintiffs and
8 enjoined Defendants from implementing their plan—the Replan—to complete the 2020 Census
9 within the statutory time period established by Congress. Defendants sought appellate relief, and
10 those efforts culminated in the Supreme Court’s decision to stay the preliminary injunction in full.
11 Shortly thereafter, the Census Bureau concluded its field operations and is now processing the data
12 it collected so that it can prepare the Secretary’s final report to the President. Those efforts should
13 not be disturbed yet again.

14 The claims Plaintiffs press in their Second Amended Complaint are no different from the
15 claims they pressed in seeking a preliminary injunction, and are based on the same flawed logic
16 that the Supreme Court rejected in granting a stay. This Court should therefore revisit its prior
17 assessment of Defendants’ jurisdictional defenses in this matter in light of the Supreme Court’s
18 stay. *See* ECF No. 96. Specifically, because the Supreme Court found that a judicially-imposed
19 impediment to the Bureau’s completion of the census was inappropriate, this Court has ample basis
20 to reevaluate the threshold jurisdictional defenses Defendants present below. Moreover, at least
21 one of the Ninth Circuit judges to have reviewed the preliminary injunction has thoroughly
22 embraced the non-justiciability of the dispute Plaintiffs present here. This analysis is correct.
23 Because the Court lacks subject matter jurisdiction over Plaintiffs’ claims, their Second Amended
24 Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1).¹

25 First, the manner and means of conducting the census is constitutionally committed to
26 Congress. Congress, in turn has delegated the duty of conducting the decennial census to the
27

28 ¹ Although Defendants further that Plaintiffs’ claims lack substantive merit, Defendants at
this time move to dismiss only under Rule 12(b)(1).

1 Bureau pursuant to 13 U.S.C. § 141, and neither the Constitution nor any other statute sets forth a
2 judicially discoverable or manageable standard for evaluating the Bureau’s complex operational
3 plans for a decennial census. Article III tribunals are simply not equipped to weigh and evaluate
4 the myriad decisions and complicated tradeoffs that define how a census is to be performed—in
5 the midst of a pandemic or otherwise. Plaintiffs’ attempt to remove from the province of the
6 Census Bureau’s expertise complex decisions about how to complete a census, and instead submit
7 them for judicial resolution is contrary to the constitutional design and should be dismissed.

8 Second, even if disputes about census operations were theoretically justiciable, Plaintiffs’
9 claims are not cognizable here, because they fail to establish standing. Specifically, because all of
10 Plaintiffs’ alleged harms arise from the statutory timeline under which the Bureau must complete
11 the census—a statutory timeline they do not challenge, and which the Ninth Circuit has explicitly
12 recognized as valid and binding on the agency—Plaintiffs fail to establish an injury that is traceable
13 to the Bureau’s actions, or redressable by a favorable ruling. Further, Plaintiffs’ injury is neither
14 concrete nor particularized, resting on speculation about the alleged *inaccuracy* of a count that far
15 exceeded anticipated completion metrics. And even assuming accuracy could somehow be
16 ascertained for a census that is not yet complete, Plaintiffs have not plausibly alleged that any
17 inaccuracy would produce a *differential* undercount, which is the only injury that could possibly
18 sustain Plaintiffs’ claim to standing.

19 Third, and for similar reasons, Plaintiffs’ claims contesting the accuracy of the census are
20 not ripe. If judicial inquiry into the accuracy of the census would ever be appropriate, it would not
21 be until the census is complete and the effects of any alleged inaccuracy on apportionment or
22 federal funding can be concretely ascertained. And because the apportionment results will be
23 known within months, there is no harm to Plaintiffs in awaiting those developments, particularly
24 when the Supreme Court (and the Ninth Circuit in this very case) has explained that post-
25 apportionment relief is available in census litigation.

26 Beyond these overall threshold defects, Plaintiffs’ claims under the Administrative
27 Procedure Act also cannot proceed to judicial review and should be dismissed under Rule 12(b)(1).
28 The APA permits review only of final agency action that is circumscribed and discrete; as other

1 courts have recognized, the Bureau’s general operational plans do not fit that framework.
2 Moreover, because no statute or regulation provides a meaningful judicial standard against which
3 the Bureau’s operational decisions can be evaluated, the operational components of the Replan are
4 committed to agency discretion by law and therefore beyond the scope of judicial review.

5 **BACKGROUND**

6 **I. LEGAL FRAMEWORK**

7 This Court is already familiar with the legal framework governing the Census from the
8 prior submissions and proceedings in this case. As a first principle, the Constitution’s Enumeration
9 Clause requires that an “actual Enumeration” of the population be conducted every ten years and
10 vests Congress with the authority to conduct that census “in such Manner as they shall by Law
11 direct.” U.S. Const. art. I, § 2, cl. 3. Under that constitutional authority, Congress enacted two
12 statutes governing completion of the census. First, through the Census Act, Congress charged the
13 Secretary of Commerce with the responsibility to conduct the decennial census “in such form and
14 content as he may determine.” 13 U.S.C. § 141(a). The Census Bureau assists the Secretary in the
15 performance of this responsibility. *See id.* §§ 2, 4. “[W]ithin 9 months after the census date,”
16 which is defined as April 1 of the census year, Congress required the Secretary to provide in a
17 report to the President the “tabulation of total population by States.” 13 U.S.C. § 141(b). Second,
18 after receiving the Secretary’s report, the President, using the “method of equal proportions,”
19 calculates “the number of Representatives to which each State would be entitled,” and transmits
20 the resulting information to Congress. 2 U.S.C. § 2a(a). For the 2020 Census, the President is
21 obligated to make this transmission “within one week” of “the first day . . . of the first regular
22 session of” the 117th Congress. *Id.*

23 **II. PROCEDURAL HISTORY**

24 Plaintiffs filed this action on August 18, 2020, and amended their Complaint on September
25 1, 2020. ECF Nos. 1, 61. Plaintiffs sought, and on September 24, 2020, obtained, a preliminary
26 injunction enjoining them from implementing two deadlines contained in the Replan: the
27 “September 30, 2020 deadline for the completion of data collection and December 31, 2020
28 deadline for reporting the tabulation of the total population to the President.” ECF No. 208 at 78.

1 On October 1, 2020, this Court clarified its prior preliminary injunction, and reinstated by court
2 order the deadlines from the Bureau’s COVID-19 Plan: “October 31, 2020 for the completion of
3 data collection and April 30, 2021 for reporting the tabulation of total population to the President.”
4 ECF No. 288 at 14.

5 Defendants appealed the Court’s rulings, and sought an expedited stay of the preliminary
6 injunction. ECF No. 210. On September 30, 2020, a divided panel of the Ninth Circuit denied an
7 administrative stay of the preliminary injunction. *Nat’l Urban League v. Ross*, 977 F.3d 698 (9th
8 Cir. 2020), ECF No. 277 (*NUL I*). Judge Bumatay dissented. He concluded not only that a stay
9 would be warranted, but that Plaintiffs’ action was not justiciable, noting that “courts are not
10 empowered to swoop in and rescue the elected branches from themselves.” *Id.* at 23.² On October
11 7, 2020, the Ninth Circuit granted a partial stay of the preliminary injunction. *Nat’l Urban League*
12 *v. Ross*, 977 F.3d 770 (9th Cir. 2020), ECF No. 320 (*NUL II*). Although the panel declined to
13 modify this Court’s directive that the Bureau continue field operations through October 31, 2020,
14 it stayed that part of the Court’s clarified preliminary injunction that would have required the
15 Secretary and the Bureau—following the COVID-19 Plan—to report the tabulation in April 2021,
16 *after* the statutory deadline December 31, 2020. *Id.* at 18-21. The panel observed that even if
17 “data processing cannot be completed by December 31 as a practical matter, that does not mean
18 that missing the putative statutory deadline should be required by a court. Serious separation of
19 powers concerns arise when a court seeks to override a congressional directive to an Executive
20 Branch agency.” *Id.* at 20-21.

21 On October 13, 2020, the Supreme Court granted Defendants’ application for a stay. *Ross*
22 *v. Nat’l Urban League*, --- S. Ct. ---, 2020 WIL 6041178 (Oct. 13, 2020) (*NUL III*). Unlike the
23 Ninth Circuit, and over a lone dissent from Justice Sotomayor, the Supreme Court stayed the
24 preliminary injunction in full pending disposition of the appeal in the Ninth Circuit. Plaintiffs filed
25 their Second Amended Complaint on October 27, 2020. ECF No. 352 (“SAC”).
26
27

28 ² Defendants’ citations to the Ninth Circuit opinions in this case are to the slip opinions on
the district court ECF docket.

1 **III. PLAINTIFFS' SECOND AMENDED COMPLAINT**

2 Plaintiffs assert three claims in their Second Amended Complaint, all unchanged from their
 3 prior Complaint. First, Plaintiffs assert that Defendants' implementation of the Replan and
 4 "decision to curtail crucial 2020 Census operations" violate the Enumeration Clause. SAC ¶ 465.
 5 Second, Plaintiffs assert that Defendants' decision to implement the Replan and comply with their
 6 statutory obligations is arbitrary and capricious in violation of the Administrative Procedure Act.
 7 *Id.* ¶¶ 474-75. Third and finally, Plaintiffs assert that Defendants' compliance with statutory
 8 requirements is "mere pretext" for racial and political discrimination in the conduct of the 2020
 9 Census. *Id.* ¶¶ 479-83.

10 **LEGAL STANDARD**

11 Pursuant to Federal Rule of Civil Procedure 12(b)(1), "the party invoking federal
 12 jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't*,
 13 523 U.S. 83, 104 (1998). This Court must determine whether it has subject matter jurisdiction
 14 before addressing the merits of the complaint, *see id.* at 93-95, and should "presume that [it]
 15 lack[s] jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*,
 16 501 U.S. 312, 316 (1991) (quotation omitted).

17 **ARGUMENT**

18 **I. THE POLITICAL QUESTION DOCTRINE BARS PLAINTIFFS' CLAIMS**

19 Plaintiffs' claims rest on their view that the Bureau's efforts to conduct the 2020 Census,
 20 including its efforts to fulfill the statutory deadlines that govern the census, will lead to an
 21 incomplete or inaccurate count. *See, e.g.*, SAC ¶¶ 1, 13, 464, 474, 481. But determining how best
 22 to conduct the census, including what operational components and timetables will ensure sufficient
 23 accuracy for the census, is an inherently political question committed to the other branches, and
 24 not appropriate for judicial review.

25 "The political question doctrine excludes from judicial review those controversies which
 26 revolve around policy choices and value determinations constitutionally committed for resolution
 27 to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am.*
 28 *Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The doctrine is "primarily a function of the separation

1 of powers,” *Baker v. Carr*, 369 U.S. 186, 210 (1962), and “is designed to restrain the Judiciary
2 from inappropriate interference in the business of the other branches of Government,” *United*
3 *States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). The Supreme Court has identified several
4 defining hallmarks of non-justiciable political questions. *Id.* Foremost among these are “[1] a
5 textually demonstrable constitutional commitment of the issue to a coordinate political department;
6 or [2] a lack of judicially discoverable and manageable standards for resolving” the dispute. *Vieth*
7 *v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (internal citation omitted); *see also Zivotofsky ex rel.*
8 *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)
9 (finding partisan gerrymandering not justiciable for lack of discernible and administrable standards
10 to apply). Although either hallmark alone renders a case nonjusticiable, *see Schneider v.*
11 *Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), Plaintiffs’ claims run headlong into both.

12 As a textual matter, the Enumeration Clause grants Congress the authority to conduct the
13 required “actual Enumeration” “in such Manner as they shall by Law direct.” U.S. Const. art. I,
14 § 2, cl. 3. This language is remarkable in its breadth, and Courts routinely recognize the
15 nonjusticiability of cases grounded in far less explicit constitutional language. *See, e.g., Made in*
16 *the USA Found. v. United States*, 242 F.3d 1300, 1313-14 (11th Cir. 2001) (explaining that the
17 Constitutional commitment of “foreign relations . . . to the executive and legislative” rests on
18 various textual provisions and established case law); *El-Shifa Pharm. Indus. Co. v. United States*,
19 378 F.3d 1346, 1367 (Fed. Cir. 2004) (holding that the Constitution, “in its text and by its structure,
20 commits to the President the power to make extraterritorial enemy property designations”); *Corrie*
21 *v. Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007) (“Whether to grant military or other aid to
22 a foreign nation is a political decision inherently entangled with the conduct of foreign relations.”);
23 *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005) (surveying cases applying the political
24 question doctrine in the foreign-relations context). But where, as here, the Constitution explicitly
25 commits an issue to Congress or the Executive, the political-question determination is
26 straightforward. *See, e.g., Gilligan v. Morgan*, 413 U.S. 1, 5-11 (1973) (noting Congress’s explicit
27 power to “organiz[e]. . . the Militia” in holding that a suit to restrain the Governor’s use of National
28 Guard troops presented a nonjusticiable political question).

1 As the Supreme Court has recognized, the text of the Enumeration Clause “vests Congress
2 with virtually unlimited discretion in conducting the decennial ‘actual Enumeration.’” *Wisconsin*
3 *v. City of New York*, 517 U.S. 1, 19 (1996); *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2567
4 (2019) (Congress has “broad authority over the census, as informed by long and consistent
5 historical practice”); *see also NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 418 (D. Md.
6 2019) (“[T]he Founders clearly intended Congress to have paramount authority in both the design
7 and execution of the census”), *aff’d in part, rev’d on other grounds*, 945 F.3d 183 (4th Cir. 2019).
8 Congress has historically exercised this authority in a variety of ways from the earliest days of our
9 Republic. *See, e.g.*, Census Act of 1790, 1 Stat. 101 (1790) (directing that the census would
10 commence on August 2, 1790 and end on May 2, 1791); An Act Supplementary to the Act Entitled
11 “An Act Providing for the Taking of the [S]eventh and [S]ubsequent Censuses,” 9 Stat. 445 (1850).
12 And while the Census Act now delegates many aspects of Congress’s “broad authority over the
13 census to the Secretary,” *Wisconsin*, 517 U.S. at 5, 19, Congress continues to exercise ultimate
14 control over the census by, among other things, setting the level of funding available and the date
15 by which the Secretary must report the results, so that it can reapportion House seats and provide
16 redistricting information to the States. *See, e.g.*, 13 U.S.C. § 141(b); 2 U.S.C. § 2a; *see also*
17 Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (appropriating \$3.5 billion
18 to the Census Bureau for use through 2021).

19 Dissenting from the denial of an administrative stay of the preliminary injunction in this
20 very case, Judge Bumatay rightly observed that “[d]eciding whether the census meets a free-
21 floating concept of ‘accuracy’ is exactly the type of political question that courts are powerless to
22 adjudicate.” *NUL I* (dissent) at 11. The very exercise of commencing the inquiry into whether a
23 given census was sufficiently “accurate” would require this Court to undertake “‘an initial policy
24 determination of the kind clearly for nonjudicial discretion.’” *Id.* at 12 (quoting *Baker v. Carr*,
25 369 U.S. at 217). Yet Plaintiffs would have this Court not only second-guess the Bureau’s overall
26 policy for how to conduct the census, but also impose the Court’s own view of how innumerable
27 minutiae of the census should proceed. For example, Plaintiffs chide the Bureau for using what
28 they view as “low[er]-quality data” after a certain number of contact days for a particular

1 household in the Nonresponse Followup (NRFU) phase of data collection. *See* SAC ¶ 300. But
2 how is this Court to determine what amounts to sufficient data “quality,” let alone when the Bureau
3 should be allowed to rely on that data, and how the NRFU operation should be conducted in the
4 context of the Bureau’s overall, comprehensive plan for conducting an accurate census? There is
5 no standard, and the Judiciary is not equipped to make such policy decisions.

6 In prior cases involving the census, courts entertained challenges to discrete statistical
7 methodologies or data-collection decisions made by the Secretary. *See, e.g., New York*, 139 S. Ct.
8 2551 (evaluating re-instatement of citizenship question on census form); *Utah v. Evans*, 536 U.S.
9 452, 452 (2002) (holding that “hot-deck imputation”—a process which imputes characteristics of
10 households based upon the characteristics of neighbors—does not violate the Enumeration
11 Clause); *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (holding that
12 statistical sampling violates the Census Act and declining to reach the Enumeration Clause claim);
13 *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (holding that Secretary did not violate
14 Enumeration Clause by declining to correct a census undercount with data from a post-
15 enumeration survey); *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (confirming that allocating
16 federal employees serving overseas to their home States did not violate the Constitution). Each of
17 those cases involved a discrete policy choice that could be juxtaposed against an alternative—*e.g.*,
18 to omit a citizenship question, to forego imputation, to decline the use of a statistical adjustment.
19 *See NUL I* (dissent) at 14 (noting that prior cases “cases treating such challenges as justiciable
20 involved narrow and deferential review—not a freewheeling inquisition into the ‘accuracy’ of the
21 census”). And nearly all of those disputes could be resolved by examining whether the calculation
22 methodology at issue was a permissible person-by-person count (an “actual Enumeration”) or an
23 unlawful statistical estimate. *See, e.g., Utah*, 536 U.S. at 473 (“Utah’s constitutional claim rests
24 upon the words ‘actual Enumeration’ as those words appear in the Constitution’s Census Clause.”);
25 *House of Representatives*, 525 U.S. at 346–49 (Scalia, J., concurring in part) (“For reasons of text
26 and tradition . . . a strong case can be made that an apportionment census conducted with the use
27 of ‘sampling techniques’ is not the ‘actual Enumeration’ that the Constitution requires.”); *id.* at
28 362 (Stevens, J., dissenting) (concluding that an “actual Enumeration” does not preclude “the use

1 of sampling procedures to supplement data obtained through more traditional census methods”);
2 *Wisconsin*, 517 U.S. at 24 (examining the Secretary’s decision that an “‘actual Enumeration’
3 would best be achieved without the [] statistical adjustment of the census”). Plaintiffs’ challenges
4 are not similarly limited to discrete statistical methodologies or data-collection decisions made by
5 the Secretary.

6 Plaintiffs’ challenge to the census’s alleged inaccuracy would entail the Court reviewing
7 the careful and complex balancing of numerous considerations such as cost, testing, training,
8 effectiveness, timing, and informational need. But these tradeoffs are quintessentially “policy
9 choices and value determinations constitutionally committed for resolution to the halls of Congress
10 [and] the confines of the Executive Branch.” *Japan Whaling*, 478 U.S. at 230. A litigant could
11 *always* posit, as Plaintiffs do here, that some alleged deficiency can be cured with more time, staff,
12 money, or by a better design. But such hypotheticals do not provide any vehicle by which a court
13 (as opposed to Congress, or an agency to which Congress has delegated authority) can evaluate
14 the myriad of policy choices and tradeoffs that Congress has made to establish a deadline and the
15 Bureau has made in designing a census to meet that deadline. Nor does it illuminate any
16 constitutional floor or standard which a Court could deem to be violated. *Cf. Tucker v. U.S. Dep’t*
17 *of Commerce*, 958 F.2d 1411, 1418 (7th Cir. 1992) (Plaintiffs seeking statistical adjustment “are
18 asking [courts] to take sides in a dispute among statisticians, demographers, and census officials
19 concerning the desirability of making a statistical adjustment to the census headcount”). As a
20 result, there is no rule or standard that a Court could apply to determine when census operations
21 are too limited, too curtailed, or otherwise deficient. Indeed, “you might as well turn [this case]
22 over to a panel of statisticians and political scientists and let them make the decision, for all that a
23 court could do to add to its rationality or fairness.” *Id.* at 1417-18.

24 Plaintiffs seem to suggest that the Court may decide this case because the Enumeration
25 Clause demands accuracy at all costs. But the Supreme Court has never embraced such a theory.
26 Because no census is ever perfect—and every census can, presumably, be made better with more
27 time or resources—any choice of how to deploy finite resources could be viewed as undermining
28 the ineffable constitutional standard of accuracy Plaintiffs advance, just as setting *any* deadline

1 could be deemed improper under Plaintiffs’ erroneous view of the law. *See, e.g., Wisconsin*, 517
2 U.S. at 6; *see also Karcher v. Daggett*, 462 U.S. 725, 732 (1983). Yet Congress has long delegated
3 to the Bureau how to make resource allocation decisions, just as Congress has long set deadlines
4 by which a census should be completed, and Defendants are unaware of any case finding those
5 deadlines improper. The Court should “decline [Plaintiffs’] invitation to measure the
6 constitutionality” of a census plan “by a standard that would seem to render every census since
7 1790 unconstitutional.” *New York*, 139 S. Ct. at 2567.

8 Given the explicit textual commitment of the means of conducting the census to Congress
9 and the lack of any discernible standards, this Court should not wade into the territory of evaluating
10 the propriety of the Replan or its various components, or of measuring the Replan against some
11 unknowable minimum of constitutional “accuracy” which Plaintiffs allege to exist. “Determining
12 what level of accuracy is sufficient is simply not something that the judicial branch is equipped to
13 do.” *NUL I* (dissent) at 16. Plaintiffs’ claims present issues barred by the political question
14 doctrine, and their Second Amended Complaint should be dismissed.

15 **II. PLAINTIFFS LACK STANDING**

16 Even if disputes about the timing of census operations were theoretically justiciable,
17 Plaintiffs would still not be entitled to any remedy here, because they have failed to establish
18 standing. The “irreducible constitutional minimum” of standing under Article III has three
19 elements: (1) a concrete and particularized injury-in-fact, either actual or imminent; (2) a causal
20 connection between the injury and defendants’ challenged conduct, such that the injury is
21 “fairly . . . trace[able] to the challenged action of the defendant”; and (3) a likelihood that the injury
22 suffered will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-
23 61 (1992). Plaintiffs bear the burden of establishing each of these elements, *id.*, and the Court
24 “may review evidence beyond the complaint” to determine whether Plaintiffs have carried that
25 burden. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The standing inquiry
26 is “especially rigorous when reaching the merits of the dispute would force [the court] to decide
27 whether an action taken by one of the other two branches of the Federal Government was
28 unconstitutional.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v.*

1 *Byrd*, 521 U.S. 811, 819-20 (1997)). Faced with that heavy burden, Plaintiffs in their Second
2 Amended Complaint fail to meet any of the required elements.

3 **A. Plaintiffs’ Alleged Injuries are Not Redressable by a Court Order**

4 Plaintiffs must establish redressability by demonstrating “that some personal benefit will
5 result from a remedy *that the court is prepared to give*.” 13A Charles Alan Wright et al., *Federal*
6 *Practice & Procedure* § 3531.6 (3d ed. Apr. 2018 update) (emphasis added). That is, a plaintiff
7 must show that “the court has the power to right or to prevent the claimed injury.” *Gonzalez v.*
8 *Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.). Where a plaintiff requests
9 prospective relief in the form of an injunction, the plaintiff must show that “prospective relief will
10 remove the harm” and the plaintiff “personally would benefit in a tangible way from the court’s
11 intervention.” *Warth v. Seldin*, 422 U.S. 490, 505, 508 (1975). If the court cannot order relief that
12 would remedy the plaintiff’s alleged injury, redressability—and thus Article III standing—are
13 lacking. *See McConnell v. FEC*, 540 U.S. 93, 229 (2003) (no redressability because court “has no
14 power to adjudicate a challenge to the [allegedly unconstitutional] FECA limits in this litigation”),
15 *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

16 Plaintiffs here have not mounted a challenge to either 13 U.S.C. § 141 or 2 U.S.C. § 2a,
17 the statutory deadlines Congress has established governing completion of the census and the
18 apportionment of Representatives. *See generally* SAC ¶¶ 460-90. And wisely so. The “virtually
19 unlimited discretion” that the Constitution vests in Congress to “conduct[] the decennial” census,
20 *Wisconsin*, 517 U.S. at 19, includes the power to set deadlines for bringing that project to a close.
21 Indeed, setting such a deadline is part and parcel of establishing the “Manner” of conducting the
22 census, which the Constitution grants Congress the power to “direct.” U.S. Const. art. I, § 2, cl. 3.
23 Yet the relief Plaintiffs seek—violation of those deadlines by court-ordered reinstatement of the
24 COVID-19 Plan, *see* SAC ¶¶ 487-88—is not redress the Court can provide, as the Supreme Court’s
25 decision in this case makes clear.

26 Granting relief that compels the Bureau to miss Congress’s deadline “would be an affront
27 to our tradition of legislative supremacy and constitutionally separated powers.” *Id.*; *see also*
28 *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002). It would be an

1 “unprecedented expansion of the judicial power” to grant Plaintiffs’ requested relief, because “a
2 district court has no authority to order an Executive agency to disobey a Congressional statute.”
3 *NUL I* (dissent) at 17-18. Indeed, there have been three occasions where a district court has ordered
4 the Census Bureau to disregard Congress’s statutory deadline, and all three of those decisions were
5 stayed by the Supreme Court.

6 It happened in this case, when the Supreme Court stayed this Court’s preliminary
7 injunction, and thereby rejected the notion that Congress’s deadlines can be overridden by judicial
8 fiat. Moreover, the Ninth Circuit, reviewing this Court’s order enjoining the Bureau from meeting
9 its obligation under 13 U.S.C. § 141(b), recognized that “[s]erious separation of powers concerns
10 arise when a court seeks to override a congressional directive to an Executive Branch agency.”
11 *NUL II* at 20-21. And it happened twice before. In *Carey v. Klutznick*, 637 F.2d 834, 837-38 (2d
12 Cir. 1980), the Second Circuit affirmed a district court order—later made permanent—that
13 required the Census Bureau to take actions “to compensate for [a] disproportionate undercount”
14 and declared § 141(b)’s December 31 deadline “directory and not mandatory.” 508 F. Supp. 420,
15 433 (S.D.N.Y. 1980). Within days, the Supreme Court reinstated the statutory deadline. Just as it
16 did in this case, the Supreme Court stayed the district court’s order that precluded the Bureau “from
17 certifying to the President the population totals for New York and the state-by-state census
18 tabulations, on December 31, 1980, as mandated by 13 U.S.C. § 141(b).” *Klutznick v. Carey*, 449
19 U.S. 1068, 1068 (1980). In *Klutznick v. Young*, No. A-533 (Dec. 24, 1980), the Supreme Court
20 did the same, rejecting the district court’s conclusion that the statute could be disregarded in light
21 of competing considerations. These decisions illustrate that the deadlines Congress has established
22 to govern completion of the census and transmission of the results to Congress cannot be
23 overridden by a judicial remedy.

24 For all their criticism of the Replan, Plaintiffs have never once offered an alternative
25 proposal for how the Bureau should conduct a better census while also complying with its statutory
26 obligations. They offered no such plan at the outset of the case, and they offer none now. That
27 failure alone forecloses standing. See *Nat’l Law Ctr. on Homelessness & Poverty v. Kantor*, 91
28 F.3d 178, 183 (D.C. Cir. 1996) (alleged enumeration injury not redressable where plaintiffs “do

1 not even ask that [] alternative methodologies . . . be employed in a recount” and the court has no
2 basis to find “that a commission of as-yet unnamed persons, using as-yet unidentified
3 methodologies, will devise a better [] count that will redound to appellants’ benefit”). Rather than
4 grapple with Congress’s deadlines, Plaintiffs pretend that those obligations simply do not exist,
5 urging instead that the Bureau flout Congress’s requirements and “[t]ak[e] the modest additional
6 time necessary to ensure an accurate census.” SAC ¶ 326. As the Ninth Circuit and Supreme
7 Court recognized when they stayed this Court’s invalidation of the deadline, what Plaintiffs seek
8 is not an option.

9 **B. Plaintiffs’ Alleged Injuries are Not Traceable to Defendants’ Actions**

10 For similar reasons, Plaintiffs fail to establish the requisite “causal connection between”
11 their alleged injury and the Replan they challenge. *Def. of Wildlife*, 504 U.S. at 560. To establish
12 such a connection, Plaintiffs must show more than that their populations may be undercounted
13 under the plan the Bureau has developed. They must establish that their populations will be
14 “improperly undercounted by [a particular] methodology *as compared to a feasible, alternative*
15 *methodology*,” *Kantor*, 91 F.3d at 183 (emphasis in original)—and further, that the difference
16 resulting from the two methodologies would be sufficiently large to produce some kind of harm,
17 *id.* at 185-86. *See also Franklin*, 505 U.S. at 802 (plurality) (challengers to the allocation of
18 overseas employees among states had “neither alleged nor shown . . . that [they] would have had
19 an additional Representative if the allocation had been done using some other source of ‘more
20 accurate’ data” and accordingly did not have standing “to challenge the accuracy of the data used
21 in making that allocation”). Plaintiffs have not done so.

22 As noted above, while Plaintiffs surmise that the census will result in an undercount of
23 people in their communities, they have identified *no* other feasible method by which the
24 Government could meet the deadlines of 13 U.S.C. § 141 and 2 U.S.C. § 2a—much less one that
25 can produce a supposedly more-accurate result. Absent such an alternative, Plaintiffs cannot
26 meaningfully contend that any alleged undercount of their communities is, in fact, caused by the
27 Bureau’s plan, rather than by some independent factor, such as the COVID-19 pandemic, the
28 statutory deadlines, or both.

1 In fact, all of Plaintiffs’ efforts to extol an alternative plan that *disregards* the statutory
2 deadlines only emphasize that their alleged injuries derive, first and foremost, from *Congress’s*
3 decision not to modify the timetable, rather than from the Bureau’s adoption of the Replan. That
4 is fatal to their standing. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)
5 (Federal courts have jurisdiction only if the plaintiff’s injury “fairly can be traced to the challenged
6 [conduct] of the defendant, and [does] not ... result[] from the independent action of some third
7 party not before the court.”). So long as the applicable deadlines remain unchanged, the Bureau
8 cannot lawfully reinstate the COVID-19 Plan—which contemplates completing the census well
9 after those deadlines will have come and gone—as Plaintiffs request. *See SAC ¶¶ 487-88*. Since
10 the congressional timetable is the source of their alleged injuries, Plaintiffs cannot establishing
11 standing and cannot seek redress against the Bureau for choosing to follow the law.

12 C. Plaintiffs’ Injuries are Too Speculative to Confer Standing

13 Separate from redressability and causation, Article III also requires that Plaintiffs establish
14 “injury in fact” by showing that they “ha[ve] sustained or [are] immediately in danger of sustaining
15 a direct injury” as a result of the challenged action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552
16 (2016). The injury must be “concrete and particularized,” *Defs. of Wildlife*, 504 U.S. at 560, and
17 not “merely ‘conjectural’ or ‘hypothetical’ or otherwise speculative.” *Summers v. Earth Island*
18 *Inst.*, 555 U.S. 488, 505 (2009). An alleged future injury must be “*certainly impending*” and cannot
19 rely on a “highly attenuated chain of possibilities”; “[a]llegations of *possible* future injury’ are
20 not sufficient.” *Clapper*, 568 U.S. at 409, 410 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158
21 (1990)).

22 To establish injury-in-fact here, Plaintiffs must show not only an inaccurate count in the
23 census, but an inaccuracy that affects them disproportionately—that is, a differential undercount
24 that harms them. The number of congressional seats for each geographical area is affected not
25 only by that area’s *own* total population, but also by the population of *every other* area in the
26 country. *See* 2 U.S.C. § 2a(a); [https://www.census.gov/topics/public-sector/congressional-](https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html)
27 [apportionment/about/computing.html](https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html); *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 461
28 (1992). Likewise, the allocation of federal funds, which Plaintiffs allege they stand to lose, *see*

1 SAC ¶¶ 430-41, is not directly proportional to population; instead, it is a function of multiple
2 factors, often including the populations of *other* geographic areas. *See, e.g.*, 42 U.S.C. § 1396d(b)
3 (Medicaid formula measuring a State’s per capita income against the national average per capita
4 income); 49 U.S.C. § 5305(d)(1) (apportioning public transit funds to States based on the
5 population of urbanized areas in each State compared to the total population of urbanized areas in
6 all States). An undercount may thus be immaterial if it is replicated elsewhere or does not exceed
7 a certain threshold. *See, e.g., Kantor*, 91 F.3d at 183. So to have standing, Plaintiffs must plausibly
8 allege that any undercount will be so severe and disproportionate that it will cause them to lose
9 legislative seats or funding. *Id.* at 185 (no standing because court could not determine “what effect
10 any methodology for counting the homeless would have on the federal funding of any particular
11 appellant,” since “if a more accurate count would have enlarged some communities’ shares, it
12 likely would have reduced the shares of other communities”); *Ridge v. Verity*, 715 F. Supp. 1308,
13 1318 (W.D. Pa. 1989) (no standing because “none of the plaintiffs in this case can show which
14 states would gain and which would lose representation in Congress”); *Fed’n for Am. Immigration*
15 *Reform v. Klutznick*, 486 F. Supp. 564, 570 (D.D.C. 1980) (no standing because “none of the
16 plaintiffs are able to allege that the weight of his or her vote in the next decade will be affected”
17 since plaintiffs “can do no more than speculate as to which states might gain and which might lose
18 representation,” which depends on “the interplay of all the other population factors which affect
19 apportionment”); *see also Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (no standing to
20 challenge apportionment method because plaintiff “would have to show, at least approximately,
21 the apportionment his interpretation . . . would yield, not only for New York but *for every other*
22 *State as well*” (emphasis added)). Plaintiffs fail to satisfy this requisite showing of injury-in-fact.

23 Whereas Plaintiffs originally predicated their claims of harm on a theory that the Replan
24 would not allow sufficient time to complete the count at all, in their SAC Plaintiffs have now
25 shifted to speculating that the actual *completed* enumeration was somehow insufficiently accurate.
26 In particular, Plaintiffs concede, as they must, that the Bureau has reached completion rates of
27 greater than 99% in every State and in the District of Columbia. SAC ¶ 34. Indeed, the Bureau
28 has reached in all but one State a completion rate of 99.9%, resulting in one of the highest overall

1 national address resolution rates in history of 99.98%. *See* Total Response Rates by State,
2 <https://2020census.gov/en/responserates/nrfu.html>. However, Plaintiffs assert that these
3 “completion metrics are inflated” and “misleading” and “riddled with potential problems.” SAC
4 ¶¶ 34, 35, 39. For these allegations, Plaintiffs appear to rely principally on submissions from
5 enumerators which Defendants have already rebutted under oath. SAC ¶ 39; *see* ECF Nos. 127-
6 1, 133-1, 219-1, 234-1, 244-1, 260-1, 266-1, 278-1, 283-1. Plaintiffs also advance a theory that
7 the Bureau has utilized an “artificially low” denominator in calculating its completion rate. SAC
8 ¶ 35. These allegations are facially insufficient.

9 Any claim of harm from inaccurate completion metrics is, by Plaintiffs’ admission,
10 “depend[ent] on the location of the additional housing units artificially excluded,” and only
11 “might” lower the completion rate in certain regions below 99%. *Id.* Besides an apparent
12 conflation of completion rate with accuracy of the count, this type of speculative allegation cannot
13 confer standing because it does not establish a *differential* undercount, let alone one that affects
14 Plaintiffs. The same goes for Plaintiffs’ critique of an October 21 media call held by the Bureau,
15 SAC ¶ 36—nowhere do Plaintiffs explain how the data referenced on that call relates to a
16 differential undercount. Finally, Plaintiffs’ efforts to “read[] between the lines” to “triangulat[e]”
17 standing based on perceived comparative differences in the use of proxies and administrative
18 records, *see* SAC ¶ 37, also fall short. Again, Plaintiffs do not plausibly allege anything about the
19 relative “accuracy” of these methods, where they were used, or whether that use would create a
20 *differential* undercount necessary for standing. In any event Defendants have explained under oath
21 the extent to which they relied on particular methods during the NRFU process. *See* Fourth
22 Declaration of Albert E. Fontenot, Jr., ECF No. 323-1. The Bureau even explicitly stated that it
23 “has no indication at this point that the data it has collected in the NRFU operation is of inferior
24 quality to prior censuses.” *Id.* ¶ 11.

25 Plaintiffs’ allegations thus leave the Court with nothing to evaluate but guesswork, even
26 were the Court to venture into the inchoate task of assessing the “accuracy” of the 2020 Census
27 before it has been completed. And even if Plaintiffs plausibly alleged disproportionate inaccuracy,
28 the Court would further have to guess whether and how those inaccuracies could affect Plaintiffs.

1 Such guesswork does not support jurisdiction. *See Clapper*, 568 U.S. at 414 n.5 (no Article III
2 standing exists if a plaintiff’s theory of injury rests on an “attenuated chain of inferences necessary
3 to find harm”).

4 To be sure, Plaintiffs contend that the possibility of *any* inaccuracy or undercount in the
5 census is injurious because it (1) decreases the quality of data they use for various purposes, and
6 (2) leads them to expend additional resources in an attempt to mitigate the undercounting. SAC
7 ¶¶ 449-59. But Plaintiffs “cannot manufacture standing merely by inflicting harm on themselves
8 based on their fears of hypothetical future harm that is not certainly impending.” *Clapper*, 568
9 U.S. at 416. As discussed above, whether any inaccuracies will appear in the final census data,
10 and whether those inaccuracies will have any effect on Plaintiffs, are purely speculative. And in
11 any event, Plaintiffs’ preference for using census data for other non-statutory purposes is not a
12 basis for showing harm. Indeed, on that basis, any entity that uses census data for any purpose
13 would have standing to bring suits challenging every detail of census operations that could
14 conceivably affect accuracy. *See, e.g., Wisconsin*, 517 U.S. at 6 (noting that “[d]espite consistent
15 efforts to improve the quality of the count, errors persist” and that “no census is recognized as
16 having been wholly successful in achieving” accuracy); *Karcher v. Daggett*, 462 U.S. 725, 732
17 (1983) (recognizing that “census data are not perfect,” and that “population counts for particular
18 localities are outdated long before they are completed”); *Gaffney v. Cummings*, 412 U.S. 735, 745
19 (1973) (census data “are inherently less than absolutely accurate”); *NAACP v. Bureau of the*
20 *Census*, 945 F.3d 183, 186 (4th Cir. 2019) (“[I]t is widely acknowledged that each decennial
21 Census inevitably results in an ‘undercount’ of the American public.”).

22 **III. PLAINTIFFS’ CLAIMS, EVEN IF JUSTICIABLE, ARE NOT RIPE**

23 In addition to their standing defects, Plaintiffs’ claims are not ripe for adjudication before
24 the 2020 Census has been completed and its results reported. Put simply, Plaintiffs cannot assail
25 the supposed inaccuracy of a count that has not yet been fully completed, let alone one that has yet
26 to be processed through the apportionment formula for determining congressional representation.
27 Only *after* the 2020 Census is complete, the apportionment results confirmed and transmitted to
28 Congress, will it conceivably be possible to evaluate Plaintiffs’ claims of harm from the alleged

1 deficiencies of the Replan. For certain of Plaintiffs’ claims of harm—for example those related to
2 alleged overall inaccuracy, *see* SAC ¶¶ 449-53—even more detailed data of the type that
3 accompanies the redistricting data sent to States would be required.

4 “Article III of the Constitution empowers [courts] to adjudicate only ‘live cases or
5 controversies,’ not ‘to issue advisory opinions [or] to declare rights in hypothetical cases.’” *Clark*
6 *v. City of Seattle*, 899 F.3d 802, 808 (9th Cir. 2018) (quoting *Thomas v. Anchorage Equal Rts.*
7 *Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000)). The ripeness doctrine is thus “designed to ‘prevent
8 the courts, through avoidance of premature adjudication, from entangling themselves in abstract
9 disagreements.’” *Id.* Ripeness includes both a constitutional and a prudential component. The
10 constitutional component of ripeness “is often treated under the rubric of standing because ripeness
11 coincides squarely with standing’s injury in fact prong.” *Id.* (citation omitted). Thus, for the same
12 reasons that Plaintiffs have not sufficiently alleged injury-in-fact—because their assertion of a
13 “disproportionate[] undercount,” SAC ¶ 423, is inherently speculative—their claims fail to satisfy
14 constitutional ripeness requirements.

15 Even were the Court to disagree, however, Plaintiffs would nonetheless fail to meet the
16 “two overarching considerations” governing prudential ripeness: “the fitness of the issues for
17 judicial decision and the hardship to the parties of withholding court consideration.” *Skyline*
18 *Wesleyan Church v. Cal. Dep’t of Managed Health Care*, 968 F.3d 738, 751 (9th Cir. 2020)
19 (quotation omitted). Evaluating Plaintiffs’ claims of inaccuracy and disproportionate undercount
20 at this juncture is not an inquiry fit for judicial decision because the existence or extent of any
21 purported undercount—let alone whether it is differential or disproportionate—is unknowable
22 until, at the earliest, apportionment data have been finalized and published. The Court presently
23 lacks any basis to determine whether the ongoing process of completing the census is somehow
24 “inaccurate,” and that task, if it is justiciable at all, would be substantially aided by an
25 understanding of how the 2020 Census ultimately affects apportionment (as well as any federal
26 funding formulas that depend on the final results of the census).

27 Moreover, there is no conceivable hardship to Plaintiffs from withholding consideration of
28 their claims until such developments have occurred. First, transmission of apportionment data is

1 scheduled to occur in approximately two months (with redistricting data sent to the States
2 approximately three months after that). Second, even if the Court were to identify some flaw in
3 the Bureau's completion of the census, it could presumably provide relief after the fact by, for
4 example, ordering some appropriate measure of corrective data processing. The Ninth Circuit
5 assumed as much when it reinstated the statutory deadline for completing the census: "If the
6 Bureau meets the December 31 date by using procedures that violate any accuracy requirement
7 embedded in the Enumeration Clause, or proceeds in an arbitrary and capricious manner, *existing*
8 *data can be reprocessed more easily than data collection can be restarted.*" *NUL II* at 20
9 (emphasis added). And the Supreme Court has repeatedly decided census cases in the same
10 posture, explaining that post-apportionment remedies are available. *See, e.g., Utah*, 536 U.S. at
11 463 ("Victory [for Utah] would mean a declaration leading, or an injunction requiring, the
12 Secretary to substitute a new 'report' for the old one.").

13 While Plaintiffs attack the alleged inaccuracy of the 2020 Census, their claims necessarily
14 rest on speculation about what the actual results of the census will be. But those results are not yet
15 known, and any potential injury that could ensue from those results will not be known, at the
16 earliest, until the final apportionment figures are reported to Congress by the President.
17 Accordingly, even if they could clear the other justiciability hurdles, Plaintiffs' claims are not yet
18 ripe for adjudication, and this Court should refrain from deciding them.

19 **IV. JURISDICTION IS LACKING OVER PLAINTIFFS' APA CLAIMS**

20 Even assuming Plaintiffs could overcome the political question doctrine and the lack of
21 Article III standing and ripeness, their APA claims should nonetheless be dismissed. To start,
22 Plaintiffs have launched a wholesale programmatic attack on the Census Bureau's plans to
23 complete the 2020 Census, which fails both the discreteness and finality requirements for judicial
24 review under the APA. And there is furthermore no standard in the Census Act by which the Court
25 could determine, for example, whether the timetables and operational components the Bureau
26 chose when developing the Replan, as opposed to some other timetables or operational choices,
27 are contrary to law.

1 **A. The Replan is Not Final Agency Action and Therefore Is Not Reviewable.**

2 “To maintain a cause of action under the APA, a plaintiff must challenge ‘agency action’
3 that is ‘final.’” *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2013) (citing *Norton*
4 *v. S. Utah Wilderness All.* (“*SUWA*”), 542 U.S. 55, 61-62 (2004)). Congress defined “agency
5 action” to include “the whole or a part of an agency rule, order, license, sanction, relief, or the
6 equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). And “final” agency action
7 within the meaning of § 704 of the APA, requires that two conditions be met: “First, the action
8 must mark the ‘consummation’ of the agency’s decision–making process—it must not be of a
9 merely tentative or interlocutory nature. And second, the action must be one by which ‘rights or
10 obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v.*
11 *Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). The Replan is neither “agency action”
12 nor, of necessity, “final agency action,” and Plaintiffs’ APA claims therefore fail at the outset.

13 *1. The Replan is not “agency action” under the APA.*

14 The Supreme Court has held that, to satisfy the “agency action” requirement, 5 U.S.C.
15 § 551(13), the matter at issue must be a “circumscribed, discrete agency action[.]” that exhibits a
16 “characteristic of discreteness.” *SUWA*, 542 U.S. at 62-63. This statutory limitation, the Court
17 explained, “precludes [a] broad programmatic attack” on an agency’s operations. *Id.* at 64. Thus,
18 the APA does not permit a plaintiff to attack an agency program “consisting principally of . . .
19 many individual actions” simply by characterizing it as “agency action” under the APA. *Lujan v.*
20 *Nat’l Wildlife Fed’n*, 497 U.S. 871, 893 (1990). A plaintiff seeking improvement or changes to an
21 agency program must seek it in “the halls of Congress, where programmatic improvements are
22 normally made,” rather than by “court decree.” *Id.* at 891; *see also San Luis Unit Food Producers*
23 *v. United States*, 709 F.3d 798, 808 (9th Cir. 2013) (holding that “a broad, programmatic challenge
24 to [an agency’s] operation and management of [a statutory obligation] . . . [is] not cognizable under
25 the APA”).

26 That Plaintiffs have leveled an improper, programmatic attack on the Bureau’s efforts to
27 conduct the 2020 Census could not be more obvious. As this Court now knows, the conduct of
28 the census is a dynamic, ever-changing process comprised of numerous decisions. The APA does

1 not permit Plaintiffs to have this Court dictate, according to Plaintiffs’ preferences, how the Bureau
2 carries out and completes the census, *see* SAC ¶ 488 (demanding that Court enjoin Defendants
3 from “unlawfully interfering with the COVID-19 Plan”). That the Supreme Court stayed the
4 previous issuance of such relief—necessarily concluding that Plaintiffs were not likely to succeed
5 on the merits of their APA claims—suggests its unavailability as a matter of law. Moreover, like
6 similar attempts to wrest operational control of the census away from the Bureau, Plaintiffs’
7 requested emergency relief would undoubtedly entail “a sweeping overhaul to the [Replan], which
8 exceeds the scope of reviewable ‘agency action.’” *NAACP*, 399 F. Supp. 3d at 422 (D. Md.), *aff’d*
9 *in part, rev’d in part on other grounds and remanded*, 945 F.3d 183 (4th Cir. 2019)

10 The Fourth Circuit recently rejected a strikingly similar challenge to the Census Bureau’s
11 operational plan for the 2020 Census because the challenged actions were not “‘circumscribed’
12 and ‘discrete.’” *NAACP*, 945 F.3d at 190. The operational plans that the plaintiffs there sought to
13 set aside were, the court concluded, not cognizable discrete agency actions because “the various
14 ‘design choices’ being challenged expressly are tied to one another.” *Id.* at 191. “‘Setting aside’
15 one or more of these ‘choices’ necessarily would impact the efficacy of the others, and inevitably
16 would lead to court involvement in ‘hands-on’ management of the Census Bureau’s operations.”
17 *Id.* (citing *SUWA*, 542 U.S. at 66-67). That outcome, the court concluded, “is precisely the result
18 that the ‘discreteness’ requirement of the APA is deigned to avoid.” *Id.* (rejecting the “broad,
19 sweeping nature of the allegations that the plaintiffs have elected to assert under the APA”).

20 Precisely the same conclusion is warranted here. As prior proceedings in this case amply
21 demonstrate, entertaining Plaintiffs’ challenge to the Replan would embroil the Court not only in
22 difficult—indeed, unanswerable—questions concerning what operational and scheduling
23 measures the law purportedly requires, but also in monitoring of the Bureau’s efforts going
24 forward. *See Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 506 (9th Cir. 1997) (denying relief
25 “which would require reaching into an agency of the executive branch and dictating the details of
26 its internal operations” (quotation omitted)). And Plaintiffs can point to no discrete requirements
27 to conduct field operations or data processing for a certain duration, to maintain staffing at certain
28 levels, or to rely to some specified degree on a certain number of in-person follow-up visits rather

1 than administrative records, proxies, or imputation—let alone any requirement to do all of these
2 things. *NAACP*, 399 F. Supp. 3d at 423 (challenged actions by Census Bureau neither “discrete in
3 character” not “required by law” and therefore not proper subjects of APA relief).

4 2. *The Replan is not “final agency action” subject to judicial review*

5 Even if all the various facets of the Replan could be considered an “agency action,” it is
6 not “final” agency action that is subject to judicial review under § 704. In *Franklin*, the Supreme
7 Court held that the Secretary’s transmission of a final census report to the President under 13
8 U.S.C. § 141—a report compiled after the execution of the overall census operational plan—is
9 *itself* not final agency action. 505 U.S. at 797 (“[T]he ‘decennial census’ still presents a moving
10 target, even after the Secretary reports to the President.”). Given this holding, it would make no
11 sense to find the Bureau’s antecedent operations judicially reviewable, when those operations are
12 still being implemented and will only lead to a report that is itself non-final.

13 Similarly, the Replan does not affect legal rights and obligations. The Replan does not
14 affect any legal right because a respondent has no individualized legal “right” to any particular
15 timetable to respond to the census questionnaire, and Plaintiffs identify none. And insofar as
16 Plaintiffs would resort to a more inchoate “right” to be counted, the Bureau will account for non-
17 responding households through imputations, administrative records, or other methods, just as it
18 would have done under the COVID-19 Plan. *See Confederacion de la Raza Unida v. Brown*, 345
19 F. Supp. 909, 910 (N.D. Cal. 1972) (“Plaintiffs do not contend, and correctly so, that they have an
20 absolute right to be counted [in the census.]”); *Nat’l Law Ctr. on Homelessness & Poverty v.*
21 *Brown*, CIV. A. 92-2257-LFO, 1994 WL 521334, at *8 (D.D.C. Sept. 15, 1994) (“The Constitution
22 does not provide individuals with a right to be counted . . .”). In any event, the data collection
23 phase of the 2020 Census has already concluded.

24 In sum, the Replan sets protocols for the Census Bureau’s own internal operations, and
25 does not require anyone to do, or not do, anything. *See Wild Fish Conservancy*, 730 F.3d at 801
26 (“day-to-day operations that merely implement operational plans” are not final); *Or. Nat. Desert*
27 *Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) (action can be final if it “has the
28 status of law or comparable legal force, and whether immediate compliance with its terms is

1 expected”). Because final agency action is lacking, the Court lacks jurisdiction over Plaintiffs’
2 APA claims.

3 **B. The Bureau’s Choices Regarding How to Meet Its Statutory Obligations to**
4 **Complete the Census are Committed to Agency Discretion, and are Therefore**
5 **Unreviewable**

6 Even assuming a plaintiff has challenged final agency action, APA review is nonetheless
7 unavailable when “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2).
8 “An agency action is ‘committed to [its] discretion by law’ where a ‘statute is drawn so that a court
9 would have no meaningful standard against which to judge the agency’s exercise of discretion’—
10 *i.e.*, where it is ‘drawn in such broad terms that in a given case there is no law to apply.’” *Pac.*
11 *Nw. Generating Co-op. v. Bonneville Power Admin.*, 596 F.3d 1065, 1075 n.7 (9th Cir. 2010)
12 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). This bar against judicial review applies,
13 moreover, even when “the agency gives a ‘reviewable’ reason for otherwise unreviewable action.”
14 *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987).

15 In the Census Act, Congress directed the Secretary to “take a decennial census of
16 population . . . in such form and content as he may determine,” 13 U.S.C. § 141(a), thereby
17 providing the Secretary, and in turn the Census Bureau, with abundant discretion in how to carry
18 out the census. As the Supreme Court has put it, “Congress has delegated its broad authority over
19 the census to the Secretary,” which entails Congress’s “virtually unlimited discretion in conducting
20 the decennial ‘actual Enumeration.’” *Wisconsin*, 517 U.S. at 19 (quoting U.S. Const., art. I, § 2,
21 cl. 3). Wholly absent from the Census Act or any other statute is a “meaningful standard” against
22 which this Court could assess the legality of the multiple discretionary planning choices by the
23 Census Bureau that Plaintiffs challenge here. Neither the Census Act nor any of the Census
24 Bureau’s or Commerce Department’s regulations has anything to say about timetables for field
25 operations, the details of non-response follow-up procedures, data processing requirements,
26 staffing levels, budgetary implications or staff training requirements—and Plaintiffs tellingly fail
27 to cite any such provision. It is difficult to imagine a statute that could more easily meet the test
28 of being “‘drawn in such broad terms that . . . there is no law to apply.’” *Citizens to Preserve*
Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); *cf. NUL I* (dissent) at 10 (“[T]he ‘accuracy’

1 requirement is a general duty arising from the Census Act, not a specific statutory or constitutional
2 mandate.”).

3 Courts considering challenges to the broad operations of census-taking agree. As the
4 Seventh Circuit explained, “[i]t might be different if the apportionment clause, the census statutes,
5 or the Administrative Procedure Act contained guidelines for an accurate decennial census[.] . . .
6 There is nothing of that sort, and the inference is that these enactments do not create justiciable
7 rights.” *Tucker*, 958 F.2d at 1417. In fact, the court addressed Plaintiffs’ design-of-the-census
8 allegations, explaining that the census statutes simply “specify a timetable, and a procedure for
9 translating fractional into whole seats” but “they say nothing about *how to conduct a census* or
10 what to do about undercounts.” *Id.* (emphasis added); *see id.* at 1419 (Ripple, J., concurring)
11 (stating that the census decision at issue was “committed to agency discretion”). True, the
12 Supreme Court in *New York* held the decision to add a citizenship question was *not* committed to
13 agency discretion. 139 S. Ct. at 2568-69. But there, the Court relied on specific statutory
14 provisions that spoke, for example, to limitations on the Secretary’s power “to collect information
15 through direct inquiries when administrative records are available.” *Id.* at 2568 (citing 13 U.S.C.
16 § 6(c)). Here, by contrast, Plaintiffs do not rely on this provision or any other that meaningfully
17 constrains or dictates to the Census Bureau how it should conduct the operations, timing, staffing,
18 or sequencing of census data collection, or the processing of data—except, that is, the deadlines to
19 deliver the final census report to the President by December 31, and, in turn, the apportionment
20 data to Congress in early January. Plaintiffs ask, in effect, for the Court to require the Bureau to
21 ignore those deadlines, and there is no meaningful standard by which to review that request.

22 Even district courts that (improperly) found census-related issues reviewable under the
23 APA—like the accuracy of the final census count—have recognized that the mechanics of actually
24 conducting the census are committed to agency discretion. *See City of Willacoochee v. Baldrige*,
25 556 F. Supp. 551, 555 (S.D. Ga. 1983) (noting that the accuracy of the count is not committed to
26 agency discretion, but that “the grant of discretion in 13 U.S.C. § 141(a) appears to encompass the
27 methods used by the defendants to compile the census”); *City of Phila. v. Klutznick*, 503 F. Supp.
28 663, 678 (E.D. Pa. 1980) (dismissing a claim that the Census Bureau failed to hire skilled

1 enumerators as committed to agency discretion because “[r]eview of this allegation would involve
2 the [c]ourt in second-guessing the managerial decisions of the Bureau”).³

3 The Court should follow these cases and hold that Plaintiffs’ APA claims are unreviewable
4 because they are committed to agency discretion by law. As the district court in *NAACP* pointed
5 out last year in a challenge to the Bureau’s original Operational Plan, there has never been a lawsuit
6 that “has resulted in the sweeping relief” of a judicially-enforceable directive to conduct the census
7 in a particular manner, which “speaks volumes about the authority (not to mention ability) of courts
8 to second-guess the Secretary’s planning of the decennial census as it is taking place, or the
9 standards under which they might attempt to do so.” *NAACP v. Bureau of the Census*, 382 F.
10 Supp. 3d 349, 373 (D. Md. 2019).

11 CONCLUSION

12 For these reasons, the Court should dismiss Plaintiffs’ Second Amended Complaint.

13
14 DATED: November 10, 2020

Respectfully submitted,

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23
24 ³ Although other courts have concluded that the APA permits judicial review of certain
25 census-related actions, none of those decisions involved the sweeping nature of Plaintiffs’ request
26 here—to dictate, through a judicial injunction, to the Census Bureau that it cannot exercise its
27 discretion to plan and complete the 2020 Census. *See, e.g., California v. Ross*, 362 F. Supp. 3d
28 727, 746 (N.D. Cal. 2018) (reviewing addition of citizenship question to 2020 census
questionnaire); *State v. U.S. Dep’t of Commerce*, 315 F. Supp. 3d 766, 796 (S.D.N.Y. 2018)
(same); *Dist. of Columbia v. U.S. Dep’t of Commerce*, 789 F. Supp. 1179, 1188 n.16 (D.D.C. 1992)
(reviewing decision to count as in-state residents inmates held in a prison in a different state).

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