19-1863

United States Court of Appeals
for the
Fourth Circuit

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; PRINCE GEORGE'S COUNTY, MARYLAND; PRINCE GEORGE'S COUNTY MARYLAND NAACP BRANCH; ROBERT E. ROSS; H. ELIZABETH JOHNSON,

Plaintiffs-Appellants,

v.

BUREAU OF THE CENSUS; STEVEN DILLINGHAM, Director, Bureau of the Census; WILBUR ROSS, Secretary of the Department of Commerce; THE UNITED STATES,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland
No. 8:18-cv-00891-PWG, Hon. Paul W. Grimm, Judge Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 5

STATEMENT OF THE ISSUES 6

STATEMENT OF THE CASE 7

FACTUAL BACKGROUND 9

PROCEDURAL BACKROUND AND DECISIONS BELOW 20

SUMMARY OF ARGUMENT 27

ARGUMENT 29

I. THE DISTRICT COURT ERRED IN FINDING PLAINTIFFS' CONSTITUTIONAL CLAIM UNRIPE 29

A. Legal Standard 29

B. Delayed Review Will Cause Hardship to the Plaintiffs 30

C. The Court Improperly Assumed that the Deficiencies Would Be Remedied Without Court Intervention 35

D. The District Court Erred in Demanding Additional Factual Development at the Pleading Stage 37

II. PLAINTIFFS HAVE STANDING. 38

A. Legal Standard 38

B. Plaintiffs Have Alleged Standing Sufficiently at This Stage 39

1. Plaintiffs Allege Several Cognizable Injuries 40

2. Plaintiffs' Harms Are Traceable to Defendants' Conduct 41

3. Plaintiffs Have Alleged Redressable Harms 42

III. PLAINTIFFS' CLAIMS ARE JUSTICIABLE 45

A. Legal Standard 45

B. Defendants' Conduct Is Not Immune from Judicial Review 46

1. The Text of the Enumeration Clause Does Not Commit Sole Discretion to Congress 46

2. There Are Judicially Manageable Standards for Plaintiffs' Claims 47

IV. The District Court Erred in Dismissing Plaintiffs' APA Claims 48

A. Standard of Review 49

B. Plaintiffs Have Sufficiently Alleged APA Claims. 49

1. The Challenged Decisions Are "Agency Action." 49

2. The Challenged Agency Actions Are "Final." 55

3. The Bureau's Actions Are Not Committed to Agency Discretion. 56

4. Plaintiffs' APA Claims Are Ripe 57

C. The Challenged Actions Are Arbitrary, Capricious, and Contrary to Law 58

TABLE OF AUTHORITIES

Page(s)

CASES

Baker v. Carr,
369 U.S. 186 (1962)..46

Bennett v. Spear,
520 U.S. 154 (1997)..41

Bostic v. Schaefer,
760 F.3d 352 (4th Cir. 2014) 39

Carey v. Klutznick,
637 F.2d 834 (2d Cir. 1980)...46, 55

City of New York v. U.S. Dep't of Defense,
913 F.3d 423 (4th Cir. 2019) 50, 52, 53

City of Philadelphia v. Klutznick,
503 F. Supp. 663 (E.D. Pa. 1980)..34

City of Willacoochee, Ga. v. Baldrige,
556 F. Supp. 551 (S.D. Ga. 1983) 34

Clear Sky Car Wash LLC v. City of Chesapeake, Va.,
743 F.3d 438 (4th Cir. 2014) 50

Dep't of Commerce v. New York,
139 S. Ct. 2551 (2019)...passim

Dep't of Commerce v. U.S. House of Representatives,
525 U.S. 316 (1999)..30, 31, 33, 58

Dist. of Columbia v. U.S. Dep't of Commerce,
789 F. Supp. 1179 (D.D.C. 1992)..34

Doe v. Va. Dep't of State Police,
713 F.3d 745 (4th Cir. 2013) 29

Equity in Athletics, Inc. v. Dep't of Educ.,
639 F.3d 91 (4th Cir. 2011) 43

Flue-Cured Tobacco Stabilization Corp. v. E.P.A.,
313 F.3d 852 (4th Cir. 2002) 53

Franklin v. Massachusetts,
505 U.S. 788 (1992)..53

Golden & Zimmerman LLC v. Domenech,
599 F.3d 426 (4th Cir. 2010) 53

Guadamuz v. Ash,
368 F. Supp. 1233 (D.D.C. 1973)...44

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982)..39

Hunt v. Washington State Apple Advertising Comm'n,
432 U.S. 333 (1977)..39

In re Aiken Cty.,
725 F.3d 255 (D.C. Cir. 2013)..44

Indep. Equip. Dealers Ass'n v. EPA,
372 F.3d 420 (D.C. Cir. 2004)..51

Invention Submission Corp. v. Rogan,
357 F.3d 452, 454 (4th Cir. 2004) 53

Kravitz v. U.S. Dep't of Commerce,
336 F. Supp. 3d 545 (D. Md. 2018)...55

Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC,
713 F.3d 187 (4th Cir. 2013) 41

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)...38, 39, 40

Massachusetts v. E.P.A.,
549 U.S. 497 (2007)..43

Massachusetts v. Mosbacher,
785 F. Supp. 230 (D. Mass. 1992) 34

Miller v. Brown,
462 F.3d 312 (4th Cir. 2006) 30, 31, 33, 37

Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 59, 60

New York v. U.S. Dep't of Commerce,
351 F. Supp. 3d 502 (S.D.N.Y. 2019) 3, 58

Nixon v. United States,
506 U.S. 224 (1993) 46

Norton v. Southern Utah Wilderness Alliance (SUWA),
542 U.S. 55 (2004) 48, 50, 51

Purcell v. Gonzalez,
549 U.S. 1 (2006) 33

Ramirez v. U.S. Immigration & Customs Enf't,
310 F. Supp. 3d 7, 21 (D.D.C. 2018) 51

Republican Party of N. Carolina v. Martin,
980 F.2d 943 (4th Cir. 1992) 49

Scoggins v. Lee's Crossing Homeowners Ass'n,
718 F.3d 262 (4th Cir. 2013) 29

Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.,
554 U.S. 269 (2008) 42

Susan B. Anthony List v. Driehaus,
134 S. Ct. 2334 (2014) 40

Texas v. Mosbacher,
783 F. Supp. 308 (S.D. Tex. 1992) 34

Townes v. Jarvis,
577 F.3d 543 (4th Cir. 2009) 42

U.S. Army Corps of Eng'rs v. Hawkes,
136 S. Ct. 1807 (2016)....................55, 56

Upstate Forever v. Kinder Morgan Energy Partners, L.P.,
887 F.3d 637 (4th Cir. 2018)....................35

Vill. of Bald Head v. U.S. Army Corps of Eng'rs,
714 F.3d 186 (4th Cir. 2013)....................56

W. Virginia Dep't of Health & Human Res. v. Sebelius,
649 F.3d 217 (4th Cir. 2011)....................50

Wisconsin v. City of New York,
517 U.S. 1, 19–20 (1996)....................48

Young v. Klutznick,
497 F. Supp. 1318 (E.D. Mich. 1980)....................47

Zivotofsky ex rel. Zivotofsky v. Clinton,
566 U.S. 189 (2012)....................45

STATUTES

Census Act, 13 U.S.C. § 141....................9, 31, 57

28 U.S.C. § 1291....................5

28 U.S.C. § 1331....................5

Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*....................passim

Del. Code Ann. Title 29, § 805....................31

OTHER AUTHORITIES

Cal. Const. Article XXI, § 1....................31

Census Bureau, 2010 Census Be Counted and Questionnaire
Assistance Centers Assessment at 6 (May 2012), available at
https://www2.census.gov/programs-surveys/decennial/2010/
program-management/5-review/cpex/2010-memo-194.pdf....................16

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https://www2.census.gov/programs-surveys/decennial/2020/program-management/pmr-materials/02-01-2019/pmr-op-plan-2019-02-01.pdf? 56

Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies Appropriations Act, Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2480 (1997) 10, 11

Beyond the Citizenship Question: Repairing the Damage and Preparing to Count 'We the People' in 2020: Hearing Before the H. Comm. on Oversight & Reform, 116th Cong. (July 24, 2019), https://oversight.house.gov/legislation/hearings/beyond-the-citizenship-question-repairing-the-damage-and-preparing-to-count-we. 17, 36

PRELIMINARY STATEMENT

This case arises out of the Defendants' imminent failure to conduct the 2020 Census in an equal and accurate manner, an obligation expressly enshrined in the Enumeration Clause of the Constitution and buttressed by the passage of the Fourteenth Amendment and its nullification of the Three-Fifths Clause. In March 2018, Plaintiffs, who represent historically undercounted communities of color, brought this action because Defendants were choosing to ignore that obligation without any reasonable justification.

Plaintiffs—the NAACP; Prince George's County, Maryland; the Prince George's County Maryland NAACP Branch; and two NAACP members and African-American residents of Prince George's County—challenge Defendants' stated "final" plan to conduct the 2020 Census with drastic, unsupported, and unnecessary reductions in the resources needed to count Hard-to-Count communities accurately. Specifically, Defendants' final plans for the 2020 Census include: (1) canvassing fewer than 40 percent of the addresses in the field to assemble their initial address list (compared to virtually 100 percent in prior censuses); (2) drastically reducing the resources devoted to their community partnership program, which is essential to increasing self-reporting in Hard-to-Count communities; and (3) cutting their workforce and field offices in half (cuts totaling ***hundreds of thousands*** of census takers), despite the increase in population and in distrust of government.

Plaintiffs alleged that Defendants recognized that these drastic cuts will inevitably and imminently lead to a severe undercount of Plaintiffs' communities, causing harm to Plaintiffs in violation the Enumeration Clause. Plaintiffs also alleged that Defendants' decisions were pretextual, arbitrary and capricious, and contrary to law under the Administrative Procedure Act ("APA").

Without reaching the merits, the District Court dismissed all of Plaintiffs' claims on procedural grounds, contrary to Supreme Court and Fourth Circuit precedent. First, the District Court dismissed Plaintiffs' constitutional claims for injunctive relief as unripe, reasoning that Plaintiffs could reinstate these claims later after completion of the census. But Plaintiffs pled that the Bureau's 2020 Census procedures—which the Bureau has confirmed it is employing—will lead to disastrous results for Hard-to-Count communities; the District Court erred by requiring Plaintiffs, contrary to Supreme Court precedent, to wait until those results materialize, leaving them without an effective remedy. Plaintiffs' claims were ripe when filed and are even more plainly so now that Defendants have actually commenced the very census operations Plaintiffs challenge.

Second, the District Court dismissed Plaintiffs' constitutional claims for declaratory relief standing and justiciability grounds. But these holdings were based on the Court's erroneous premise that Plaintiffs were exclusively challenging the amount of funding appropriated by Congress rather than the Bureau's own plans to

cut, without reasonable justification, the resources necessary to reach Hard-to-Count communities. As nearly every court to consider this question has held, including most recently the Supreme Court in *New York v. Department of Commerce*, Plaintiffs have standing based on the harms that result from a census undercount, and their claims are justiciable.

Third, the District Court dismissed Plaintiffs' APA claims on the grounds that Plaintiffs sought to challenge the Bureau's entire plan for conducting the census. But this misconstrued the challenges to discrete Bureau decisions detailed in Plaintiffs' complaint. The District Court also held that Defendants' conduct does not sufficiently impact Plaintiffs to determine their rights and obligations, a holding inconsistent with the Supreme Court's acknowledgment, in the standing context, that a differential undercount causes direct harms to individuals such as Plaintiffs.

Plaintiffs request this Court's urgent review of the District Court's errors in dismissing Plaintiffs' claims at the pleading stage, contrary to decades of census-related precedent, including multiple Supreme Court rulings. The District Court's jurisdictional rulings would effectively eliminate judicial review of the Executive's express constitutional duties to enumerate the people accurately and equally, even in the face of allegations (and now publicly available facts) that the Bureau has purposefully and arbitrarily flouted that constitutional obligation. Plaintiffs seek a remand to the District Court so that their claims can be quickly resolved and

Defendants may be ordered to fulfill their constitutional and statutory obligations to reduce the imminent harms faced by Plaintiffs and the minority communities they represent.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this action under 28 U.S.C. §§ 1331. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the District Court entered judgment dismissing the action on August 1, 2019, and Plaintiffs-Appellants filed a timely notice of appeal on August 6, 2019.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in holding that Plaintiffs' claims for injunctive relief challenging key operations of the 2020 Census are unripe because they were brought prior to the beginning of the 2020 Census;

2. Whether the District Court erred in holding that Plaintiffs lack standing to challenge the Census Bureau's decisions to significantly reduce key resources despite the imminent harms alleged by Plaintiffs, including decreased political representation, diminished allocations of federal funding, and diverted organizational resources;

3. Whether the District Court erred in holding that this case is immune from judicial review pursuant to the political question doctrine;

4. Whether the District Court erred in dismissing Plaintiffs' APA claims, on the ground that the six challenged actions in the Bureau's "Final Operational Plan" are not "agency actions" because they are not sufficiently discrete and do not determine Plaintiffs' rights or obligations, or for any other reason urged by the government.

STATEMENT OF THE CASE

On March 28, 2018, Plaintiffs-Appellants initiated this action to challenge Defendants' violation of their constitutional obligation to conduct an "actual Enumeration" by drastically reducing the components of the 2020 Census required to reach minority communities, including eliminating critical resources for community outreach and slashing workforce and field infrastructure. Plaintiffs sought injunctive and declaratory relief to ameliorate these decisions and the resulting harms that Plaintiffs would face, including diminished political representation and funding.

On January 29, 2019, the District Court granted in part and denied in part Defendants' motion to dismiss the First Amended Complaint, dismissing Plaintiffs' claim for injunctive relief "without prejudice to being reinstated later," holding that Plaintiffs' claim for declaratory relief could proceed, and denying Defendants' motion in all other respects. *See* JA 564-618 (*NAACP et al. v. Bureau of the Census et al.*, No. 8:18-cv-00891-PWG (Jan. 29, 2019)) [hereinafter, January Opinion].

In February 2019, Defendants released their "Final Operational Plan" announcing the completion of planning for the 2020 Census. *See* JA 61-280 (United States Census, *2020 Census Operational Plan: A New Design for the 21st Century* (Dec. 2018) ("Final Operational Plan" or "FOP")). Plaintiffs sought leave to amend their complaint to add claims under the APA and reinstate their constitutional claim

for injunctive relief challenging the decisions described in the complaint and finalized in the Plan. The District Court allowed Plaintiffs' to add the APA claims, but did not allow Plaintiffs to reinstate their constitutional claim for injunctive relief.

On August 1, 2019, the District Court issued an opinion granting Defendants' motion to dismiss the action in its entirety, and entered judgment for Defendants. *See* JA 623-648 (*NAACP et al. v. Bureau of the Census et al*, No. 8:18-cv-00891-PWG (Aug. 1, 2019)) [hereinafter, August Opinion].

Plaintiffs-Appellants timely appealed. On August 12, 2019, the day Plaintiffs' appeal was docketed, Plaintiffs moved for expedited consideration of their appeal. On August 20, 2019, this Court granted Plaintiffs' motion to expedite.

FACTUAL BACKGROUND

A. Defendants' Affirmative Obligation to Conduct a Census

Article I, Section 2 of the Constitution requires the federal government to conduct an "actual Enumeration" of every resident of the United States every ten years. Congress delegated this duty to the Secretary of Commerce, 13 U.S.C. § 141, who oversees the Census Bureau. The decennial census results have far-reaching implications. Census data is used for allocating hundreds of billions of dollars in federal funding, apportioning seats in the U.S. House of Representatives, drawing boundaries for congressional districts and state legislative districts, and enforcing voting rights. JA 19-60 (Second Amended Complaint ("SAC") ¶¶ 14-15.)

Since the nation's founding, however, the United States has systematically undercounted African Americans in the decennial census. First, this was by design: the Three-Fifths Clause appeared in the same constitutional provision that mandates a decennial census. Although the passage of the Fourteenth Amendment nullified the Three-Fifths Clause and instilled equality as a core value of the decennial census, the undercount of African Americans has persisted throughout history.

More recently, Congress has called on the Census Bureau to address that historic inequity. For at least the last three decades, Congress has tasked the Bureau with reducing the differential undercount, *i.e.*, the net undercount compared to other groups, of "individuals who have historically been undercounted." Dep'ts of

Commerce, Justice, & State, the Judiciary, & Related Agencies Appropriations Act, Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2480 (1997) (emphasizing need for "aggressive and innovative promotion and outreach campaigns in hard-to-count communities"). In furtherance of that goal, the Bureau has historically made concerted efforts to reach Hard-to-Count communities, groups including racial and ethnic minorities, non-English speakers, lower income people, the homeless, and undocumented immigrants. SAC ¶¶ 21-22.

For the 2020 Census, however, the Bureau has drastically scaled back these efforts, announcing multiple decisions that effectively abandon this goal. The Bureau's actions will inevitably significantly increase the differential undercount of African Americans and other minority groups, thereby harming Plaintiffs by decreasing their political representation, reducing federal funding, and diverting organizational resources.

B. The Bureau's Severe and Irrational Cutbacks to Key Operations for Reaching Hard to Count Populations

The Bureau plans to slash its outreach and operations in each of the 2020 Census' key phases. These reductions include fundamentally cutting the Bureau's resources for compiling its "master" address list (the cornerstone of its effort to reach households), for its community outreach and advertising campaign (which is critical for reaching Hard-to-Count communities), and in-field follow up with non-responding populations (the core operation through which the Bureau contacts

households in person). SAC ¶¶ 66-68. Hard-to-Count populations, and African-American and Hispanic communities in particular, will bear the brunt of these cuts in the form of diminished political representation and significantly reduced federal funding. *Id.* ¶¶ 176-203. As alleged in the Complaint and as shown by publicly available information, Defendants have neither reliable data nor reasonable justifications to support these cuts and rely instead on a supposed lack of funds—a rationale made all the more implausible by the Bureau's retention of over $1.3 billion in appropriated, but unspent, funds.

1. Defunding of Human Resources to Build the Master Address File

Address canvassing is the first major step of census field operations and involves surveying the nation's housing units to assemble and verify a comprehensive list of addresses to which the Bureau will mail surveys and send enumerators. SAC ¶¶ 140-41. This list, called the Master Address File, must be as comprehensive and accurate as possible; if households do not receive a survey or visit, they are unlikely to be counted. *Id.* To ensure accuracy, in past censuses, Bureau employees have sent field workers to walk nearly 100 percent of blocks and identify housing units in person. *Id.* ¶ 142.

To cut costs for the 2020 Census, however, the Bureau has departed from this past practice and reduced the number of addresses that it will canvass on foot from 100 percent to 38 percent, relying instead on new "in-office" processes to confirm

addresses, such as looking at satellite maps to determine if current housing units match those on their address lists. *Id.* ¶ 143-44. Although this change is drastic, the Bureau has performed little testing to understand its effects on the accuracy of its address list. Even that limited testing shows that the novel "in-office address canvassing" produces errors, finding discrepancies in 61 percent of addresses. *Id.* ¶¶ 151-52. The Bureau has no countervailing evidence that an in-office process is more accurate or reliable, and its own plans acknowledge that an in-field process generally yields "greater quality" results than an office-based process. *Id.* ¶ 153.[1]

In making these changes, the Bureau failed to analyze or consider the effects on Hard-to-Count communities. *Id.* ¶ 154.[2] In fact, the increased errors in the Master Address File will disproportionately impact Hard-to-Count communities and render them less likely to be counted.

The Bureau's in-field address canvassing process began in August 2019, and will continue through mid-Fall. FOP at 52, 95 (JA 118, 161). The failure to

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[1] Compounding these error rates, the Bureau cancelled both its Active Block Resolution procedure and "Coverage Study"—both of which were designed to assess and improve the accuracy of address canvassing—citing budget constraints for both of these decisions. *Id.* ¶ 145-46.

[2] Indeed, an OIG Report concluded that the Bureau "does not know which populations or regions will be most affected by the missed household blocks." JA 281-305 (Department of Commerce, OIG, 2020 Census: Issues Observed During the 2018 End-to-End Census Test's Address Canvassing Indicate Risk to Address List Quality at 1, No. OIG-19-008-A (Feb. 2019) ("OIG, Address Canvassing Risk").)

promptly remedy the defects in the Bureau's plans will contribute to a significantly higher differential undercount of minority communities.

2. Reductions in Critical Outreach and Partnership Programs

After compiling the address list, the Bureau undertakes a comprehensive advertising and outreach campaign to raise awareness of the census and increase response rates among traditionally low-responding communities. As part of these efforts, the Bureau relies on staff in its Partnership Program to build relationships with communities and non-profit organizations that can spread its message. SAC ¶ 168. These efforts are particularly important in the upcoming census for increasing the response rates for Hard-to-Count communities given increased distrust among minority communities regarding the Administration's use of census data, as the Bureau's own research acknowledges. *Id.* ¶ 172.

Yet the Bureau is significantly decreasing its partnership outreach despite a significantly larger population, increased mistrust of the government among minority communities, and increased media and communication challenges. *Id.* ¶¶ 81-84. Whereas the Bureau spent $334 million on partnership staff for the 2010 Census, the Bureau has reduced its budget to $248 million for the 2020 Census—an over one-third reduction, accounting for inflation. *Id.* ¶ 170. The Bureau has achieved these reductions by eliminating an entire category of partnership staff. The Bureau hired 1,750 partnership assistants for the 2010 Census; it will hire none in

the 2020 Census. *Id.* ¶ 171. The Bureau made these decisions despite its own survey data revealing an increased need for community outreach and communication. *Id.* ¶¶ 172-73.

Plaintiffs' communities will be less likely to respond to the census and will face an increased differential undercount as a result of these cuts. The Bureau's advertising and partnership program begins in November 2019. Accordingly, its deficiencies must be remedied promptly.

3. Drastic Reductions in Enumerators and Field Offices

After sending out its mailings and conducting advertising and outreach, the Bureau receives responses from a portion of the population that responds on their own. The Bureau then conducts Non-Response Follow-Up ("NRFU") efforts to count the remaining portion of the population that did not respond to the initial mailings. This includes sending enumerators door-to-door to contact households. SAC ¶ 69. Because Hard-to-Count communities are less likely to "self-respond" to the initial mailings, the Bureau must conduct robust NRFU efforts to ensure that minority communities are fully counted.

As Plaintiffs alleged in their initial complaint and as the Bureau's plans confirmed, the Bureau intends to hire drastically fewer enumerators for the 2020 Census, which the Bureau frames as a cost-saving "innovation." FOP at 30 (JA 96); SAC ¶ 70. Public documents reveal that the Bureau will hire approximately 400,000

enumerators to carry out the 2020 Census— a decrease of 200,000 individuals from 2010 despite a six percent increase in the population to be counted.[3]

In addition to its reduced workforce, the Bureau will further gut its field presence by opening drastically fewer field offices than in 2010. In the last census, the Bureau had 495 field offices, from which it hired and trained enumerators and responded to problems during NRFU operations. SAC ¶¶ 114-16. For the 2020 Census, the Bureau will only open 248 area census offices, cutting its physical infrastructure in half, and leaving it less able to do the field work necessary to reach hard-to-count communities. *Id.* An April 2018 report from the Office of the Inspector General of the Department of Commerce stated that it "found no evidence that the Bureau reconciled the increased NRFU workload and associated increase in the number of enumerators" with its plan to open only 248 offices. *Id.* ¶ 128.

The Census is also eliminating another key form of community infrastructure: questionnaire assistance centers ("QACs"), at which individuals can be counted if they did not receive a mailing at their address. In 2010, the Bureau relied upon nearly 30,000 QACs and nearly 10,000 "Be Counted" sites to count over 760,000

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[3] Discovery in this action revealed that the Bureau plans to actually deploy even fewer enumerators in the field than it will hire, relying on approximately 250,000 "core enumerators", and holding back the rest. This level of reduction would amount to an over 50-percent reduction of its central workforce.

people who would otherwise not have been counted.[4] The Bureau has eliminated *all* of those 40,000 sites this cycle.

A robust on-the-ground field presence is essential for reaching Hard-to-Count communities and the Bureau's reduction will thus result in an increased differential undercount. *Id*. ¶¶ 72-73; 120-21. After the census begins in 2020, it will be too late to open more offices or hire additional enumerators. Accordingly, Plaintiffs' challenges to these decisions must be resolved promptly.

4. The Bureau's Lack of Reliable Data or Support for These Decisions

To the extent the Bureau has offered any justification for these severe reductions in the resources necessary to reach Hard-to-Count communities, its reasons are unsupported by any reliable data or are contradicted by publicly available information.

First, the Bureau has justified nearly all of these decisions by the need to reduce the cost of the 2020 Census. But budget constraints alone cannot justify the severity of the Bureau's actions and their effects on Hard-to-Count communities. Moreover, discovery in this action and public information have revealed that this reason is pretextual; the Bureau has left unspent over $1.3 billion as it has rolled

[4] *See* Census Bureau, 2010 Census Be Counted and Questionnaire Assistance Centers Assessment at 6 (May 2012), available at https://www2.census.gov/programs-surveys/decennial/2010/program-management/5-review/cpex/2010-memo-194.pdf.

back these crucial operations. Members of Congress have urged the Bureau to use these funds for the necessary resources to reach Hard-to-Count communities, including opening questionnaire assistance centers.[5]

Second, with regard to the NRFU operations, the Bureau has claimed that it will need fewer enumerators and offices because there will be a reduced NRFU workload, *i.e.* more people will initially self-respond. The Bureau emphasizes its first-ever Internet Self-Response option, in which individuals may provide their information to the government online. But the available evidence – including the Bureau's own field testing – indicates that response rates will be ***worse*** for the 2020 Census, not better, and that the Bureau will need an ***increased*** workforce for its NRFU efforts, not a significantly decreased one. SAC ¶¶ 80-84.

Third, Defendants have also attempted to reduce their NRFU workload by replacing in-person visits to certain housing units with data from administrative records. Based on U.S. Postal Service Undeliverable-As-Addressed ("UAA") information, the Bureau will omit certain units from the full NRFU protocol, paying them only a single field visit. *Id.* ¶¶ 157-58. But the Bureau has not reconciled this

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[5] *See Beyond the Citizenship Question: Repairing the Damage and Preparing to Count 'We the People' in 2020: Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. (July 24, 2019), https://oversight.house.gov/legislation/hearings/beyond-the-citizenship-question-repairing-the-damage-and-preparing-to-count-we.

decision with its testing showing that UAA information is an inaccurate predictor of whether households are vacant or nonexistent. *Id.* ¶¶ 162-63.

Finally, the Bureau has claimed that its reduced in-field workforce will be able to handle more work because it will be more productive. But this justification, implausible on its face, *id.* ¶ 77, is also belied by the Bureau's lack of reliable data to support it. Defendants have cancelled most of the field testing necessary to support their productivity assumptions. *Id.* ¶¶ 130-37. Defendants are entering the 2020 Census with little reliable data to assess where their dramatic changes to the operations of the census may go wrong.

C. Plaintiffs Face Imminent Harm as a Result of the Bureau's Cutbacks

Plaintiffs live in and represent historically undercounted communities. In 2010, Prince George's County, a majority African-American county characterized in part as Hard-to-Count, experienced a net undercount of 2.3%, one of the highest in the nation among large counties. SAC ¶¶ 177-82. The 2010 undercount led to the loss of federal funding for Prince George's County and diminished political representation within the state. *Id.* ¶¶ 185-89. Defendants' failures will result in a significantly higher net undercount for Prince George's County, causing an even greater loss in federal funding and political representation. *Id.* ¶¶ 28-29.

The increased differential undercount will also injure NAACP members across the country. NAACP members are disproportionately located in Hard-to-

Count communities and will face increased differential undercounts as a result of the Defendants' actions. *Id.* ¶¶ 190-93. Accordingly, NAACP members' communities will incur diminished federal funding and political representation. *Id.* ¶¶ 194-95. Defendants' actions have also harmed the NAACP itself because it has had to divert resources to address Defendants' deficiencies for the 2020 Census. *Id.* ¶ 197.

Plaintiffs brought this action to challenge Defendants' finalized decisions that are causing imminent and actual harm to Plaintiffs and their communities.

PROCEDURAL BACKROUND AND DECISIONS BELOW

A. The Complaint and Plaintiffs' Requests to Expedite The Case Schedule

In March 2018, Plaintiffs filed a single-count Complaint alleging that the Bureau's actions were violating the Enumeration Clause of the U.S. Constitution. The Complaint described decisions to decrease key operations, their effects on Hard-to-Count communities, and the harm to Plaintiffs. Moreover, because Defendants had publicly justified many of these decisions by pointing to insufficient funding, Plaintiffs presented context on the underfunding of the Census Bureau.

Immediately after filing the Complaint, Plaintiffs filed a letter seeking an "expedited case schedule," including a request for targeted expedited discovery and an expedited briefing schedule for any motion to dismiss that Defendants might file. (ECF 19.) The District Court granted Plaintiffs' request for limited expedited discovery and set an expedited motion schedule. The Defendants moved to dismiss on July 13, 2018, and the motion was fully briefed by September 4, 2018. On January 14, 2019, the Court held a hearing, and at the Court's request, the parties then submitted supplemental briefing.

B. The District Court's January 29 Decision

On January 29, 2019, the District Court issued a decision granting in part and denying in part Defendants' motion to dismiss. The Court separated Plaintiffs' claim into two parts: a claim for injunctive relief as to the Bureau's "methods and means"

for conducting the census, and a claim for declaratory relief as to the sufficiency of the Bureau's funding. The Court dismissed the claim for injunctive relief as unripe at that time, "without prejudice to being reinstated later." Jan. Op. at 34. The Court reasoned that Plaintiffs could still obtain relief "after the enumeration has taken place," pointing to remedies proposed in other census-related lawsuits such as a "reallocation of congressional seats" or an "upwards adjustment of alleged differential undercounts." *Id.* at 31. The Court also held that the Defendants had not yet finalized the plans Plaintiffs challenged, and the Court stated that "it is inevitable that many of the alleged deficiencies in staffing, census design, and testing will be addressed and, where deficient, corrected," assuming that sufficient funding was appropriated. *Id.* at 32.

However, the Court held that it could "issue a declaratory judgment that congress has failed to appropriate sufficient funds" for Defendants to carry out the 2020 Census in a constitutional manner, particularly in light of the government shutdown in effect at the time. *Id.* at 34-35. The Court found this claim ripe because "[w]hile Plaintiffs' other claims could be addressed through post-census litigation, census funding obviously cannot be increased after the fact." *Id.* at 36.

The Court then rejected all of Defendants' other arguments in their motion. *Id.* at 37 n.16. The Court held that Plaintiffs had standing because they alleged the concrete injury of a "disproportionate undercount, which in turn would result in

reducing funding and representation," *id.* at 41, that this injury was fairly traceable to Defendants' reductions and deficiencies for the 2020 Census, *id.* at 44-46, and was redressable by injunctive and declaratory relief. *Id.* at 50.

The Court then held that the political question doctrine did not preclude review of Plaintiffs' Enumeration Clause claim, noting "Courts have routinely held that the Enumeration Clause does not textually commit exclusive, non-reviewable control over the census to Congress." *Id.* at 53. Finally, the Court held that Plaintiffs had pled sufficiently that "proceeding as Defendants are with the 2020 Census will 'unreasonably compromise the distributive accuracy of the census,' thereby stating a claim for violation of the Enumeration Clause." *Id.* at 54-55.

C. The Final Operational Plan and Plaintiffs' Second Amended Complaint

On February 1, 2019, Defendants released the Final Operational Plan, which the Bureau stated "reflects our final design" for the 2020 Census. SAC ¶ 33. On February 11, 2019, Plaintiffs sought leave to add APA claims challenging the Bureau's final decisions and to reinstate their constitutional claim for injunctive relief. (ECF 68.)

On February 28, 2019, following additional correspondence from the parties, the Court allowed Plaintiffs to amend the complaint to add the APA claims, but did not allow Plaintiffs to reinstate their constitutional claim for injunctive relief. JA

619-22. The District Court also set a briefing schedule for Defendants' planned motion to dismiss. *Id.*

On April 1, 2019, Plaintiffs filed their Second Amended Complaint, detailing Bureau decisions that will inevitably result in a significantly undercount of Hard-to-Count communities, and African-American communities in particular. These decisions include the Bureau's "plan to hire an unreasonably small number of enumerators," the "drastic reduction in the number of Census Bureau field offices," the "cancellation of crucial field tests," the "decision to replace most in-field address canvassing with in-office address canvassing," the "decision to make only extremely limited efforts to count inhabitants of housing units that appear vacant or nonexistent based on unreliable administrative records," and "a significant reduction in the staffing of the Bureau's partnership program." SAC ¶ 67. The allegations were consistent with Plaintiffs' allegations in prior pleadings, but provided additional detail regarding the finalization of the decisions in the Final Operational Plan.

D. Discovery Proceeds, and Plaintiffs Seek Emergency Relief

On March 11, 2019, the Court ordered discovery on Plaintiffs' constitutional claim. (ECF 85.) Discovery proceeded from March through July 2019. On July 25, 2019, Plaintiffs filed a pre-motion letter seeking emergency relief on their claims because "the Bureau [was] about to begin critical early stages for carrying out the Census, and recent discovery and public disclosures show that the Bureau has chosen

to cut costs in key areas despite overwhelming evidence that the accuracy of the Census will be undermined as a result." JA 558-61. Plaintiffs noted that the Bureau had made these "radical cuts . . . on the purported grounds of cost savings," but was holding over one billion dollars in reserve that Congress had appropriated for the 2020 Census. *Id.*

On July 29, the Court issued an order "permitting Plaintiffs to file their proposed emergency motion as requested," and directing the parties to "submit a proposed schedule for expeditious briefing of the emergency motion." (ECF 150.) The parties agreed on a schedule, whereby Plaintiffs would file their motion on August 5, 2019. (ECF 152, 153.)

E. The District Court's August 1 Decision

Before Plaintiffs could file their motion, on August 1, 2019, the District Court issued a decision granting Defendants' motion to dismiss the APA claims. The Court also held that the remaining portion of Plaintiffs' constitutional claim, the request for declaratory relief, should be dismissed as moot in light of Congress's February 2019 appropriations bill which granted the Bureau's funding request and thus "completely and irrevocably eradicated the effects of the alleged violation." Aug. Op. at 7.

The Court also revised its decision on the justiciability of Plaintiffs' underfunding claim, holding that Plaintiffs no longer had standing and were

challenging a non-justiciable political question. Focusing solely on the question of whether Congress had appropriated sufficient funding, the Court held that Plaintiffs lacked standing because it "would be speculative to conclude that Congress will fail to appropriate those funds." *Id.* at 9. The Court also noted Plaintiffs' concerns over the Bureau's refusal to spend appropriated funds and held that directing the Bureau to expend already-appropriated funds is "not a remedy that a court has the authority, expertise, or time to provide." *Id.* at 10. Finally, the Court held that Plaintiffs' constitutional claim now raised a non-justiciable political question because the Court interpreted Plaintiffs as asking "whether the appropriated funding" provided by Congress "is sufficient." *Id.* at 13.

The District Court also dismissed Plaintiffs' APA claims. The Court held that Plaintiffs were not challenging "agency action" because the disputed actions were not sufficiently discrete, some were interrelated, and none "determine rights or obligations."[6] Even where the Court considered Plaintiffs' challenges discrete, it held that Plaintiffs' prayer for relief sought a "sweeping overhaul to the Final Operational Plan" that the Court could not order. *Id.* at 20-21.

The District Court also determined that the Bureau's actions did not qualify as agency action because they "do not determine rights or obligations." The Court

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[6] The Court did not reach the other arguments raised by Defendants, including that the actions were not "final," that they were committed to agency discretion by law, and that the APA claims were not ripe. *Id.* at 17.

held that the effects of the Bureau's conduct in carrying out the 2020 Census were too "attenuated" to sufficiently impact Plaintiffs. *Id.* at 25.

Plaintiffs timely appealed the Court's dismissal of their claims.

SUMMARY OF ARGUMENT

The District Court's rulings improperly bar Plaintiffs, at the pleading stage, from raising any challenge to the Defendants' arbitrary and unlawful conduct related to one of the Government's most important affirmative obligations: its duty to conduct a fair and accurate census. As Plaintiffs have alleged, this conduct will cause them direct harm in the form of lost federal funding, diminished political representation, and diverted organizational resources.

First, the District Court erred in its January Opinion by dismissing Plaintiffs' claims for injunctive relief as unripe and holding that Plaintiffs could only obtain relief by waiting for the 2020 Census results. This holding contravenes Plaintiffs' allegations against plans and procedures that are going into use *now*, and which, if unaddressed, will irrevocably harm Plaintiffs. For support, the District Court cited several cases where plaintiffs challenged the decennial census *after* it was conducted, but did not address how these cases justified a rule that a plaintiff must *always* wait until after the census to seek relief. There is no such rule and applying one here would deprive Plaintiffs of an effective remedy.

Second, although the District Court correctly held in its January Opinion that Plaintiffs' had alleged sufficiently their standing for their constitutional claim and that such claim was justiciable, the District Court improperly reversed these holdings in its August Opinion. In its August Opinion, the court misconstrued Plaintiffs'

claims as asking for Congress to appropriate additional funds—something Plaintiffs have never sought. Plaintiffs have standing based on the harms they alleged resulting from Defendants' conduct, as the Supreme Court's decision earlier this summer in *New York* confirms.

Third, the political question doctrine does not bar review of Plaintiffs' Enumeration Clause claim. The text of the Constitution does not commit the census exclusively to Congress, and there are manageable judicial standards that have been applied to census-related litigation for decades. Indeed, in five decades of census litigation, not a single court has agreed that census-related claims present a non-justiciable political question.

Fourth, the District Court erred by dismissing Plaintiffs' APA claim as not challenging "agency action." Contrary to the Court's holding, Plaintiffs do not seek an "overhaul" of the Final Operational Plan. Rather, Plaintiffs challenge discrete agency decisions, each of which may be remedied on its own. The District Court further erred in holding that the Bureau's decisions do not "determine rights or obligations," a decision contrary to existing law on standing, which recognizes that a failure to properly carry out the census directly affects individuals and entities like Plaintiffs. The District Court gave no reason for departing from that precedent here.

Finally, to the extent Defendants contend that the dismissal of Plaintiffs' APA claims would be warranted on other grounds, those arguments should be rejected.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING PLAINTIFFS' CONSTITUTIONAL CLAIM UNRIPE

In the January Opinion, the District Court erroneously dismissed the majority of Plaintiffs' Enumeration Clause claim as unripe. In doing so, the Court misconstrued Plaintiffs' claims. Plaintiffs challenge the procedures the Bureau will use to conduct the 2020 Census, and *not* the later uses of census data. Plaintiffs also challenge final decisions by the Bureau about the procedures for the 2020 Census, not some future action. These claims are ripe for review.

Further, the District Court imposed an unjustified legal rule requiring Plaintiffs to wait to raise these challenges until after the census has been conducted in an unconstitutional manner. No such rule appears in any of the census cases the District Court relied upon, and such a rule is expressly contradicted by Supreme Court precedent. This Court should reverse the erroneous dismissal of Plaintiffs' constitutional claim for injunctive relief.

A. Legal Standard

Ripeness doctrine "prevent[s courts] from becoming entangled in 'abstract disagreements.'" *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). A case is only unripe where "the plaintiff has not yet suffered any injury and any future impact remains wholly speculative." *Doe v. Va. Dep't of State Police*, 713 F.3d 745,

758 (4th Cir. 2013) (internal citations omitted). But where a dispute raises "purely legal" issues because the "action in controversy is final," a case is ripe for review. *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006).

This Court reviews a district court's dismissal on ripeness grounds *de novo*. *Id.* at 316.

B. Delayed Review Will Cause Hardship to the Plaintiffs

The District Court's holding that Plaintiffs may obtain relief for their injuries after the 2020 Census contravenes Plaintiffs' well-pleaded allegations, deprives Plaintiffs of effective relief, and is contrary to ripeness decisions from this Circuit and the Supreme Court. The 2020 Census is already underway with a flawed design that will – according to the Bureau's own data and Plaintiffs' well-pled allegations – severely undercount African-American and other Hard-to-Count communities. When the census is completed, it will be too late to remedy the significantly increased differential undercount.

Binding precedent is contrary to the District Court's ripeness rule. The Supreme Court has recognized that pre-census resolution of disputes is essential, and the Court need not "wait until the census has been conducted . . . because [delay] would result in extreme—possibly irremediable—hardship." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999) ("*U.S. House of Representatives*"); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565

(2019) ("*New York*") (finding injuries from depressed turnout due to addition of citizenship question to be clearly impending before the census). This is because plans must be adjusted and hiring increased to correct decisions which are unconstitutional or which violate the APA. *See U.S. House of Representatives*, 525 U.S. at 332 ("[I]f the Bureau is going to alter its plan to use sampling in the 2000 census, it must begin doing so by March 1999."). Plaintiffs seek precisely these remedies in the present case.

As in *Miller*, "[w]aiting until the last minute" until the census is conducted, or even later, would "severely diminish the effectiveness" of any relief that they can obtain. 462 F.3d at 321. Like the election procedures in *Miller*, the census involves numerous dates fixed by statute: Census Day is April 1, 2020, and by January 1, 2021 the Bureau is required to report the results to the President. 13 U.S.C. § 141(a)-(b). By April 1, 2021, the Bureau must transmit the results to the states, *id.* § 141(c), and many states engage in redistricting immediately thereafter. *See, e.g.*, Cal. Const. art. XXI, § 1 (redistricting required in 2021); Del. Code Ann. tit. 29, § 805 (requiring redistricting by June 30, 2021).

Waiting until after the Census Bureau's enumeration operation is complete will harm Plaintiffs because it will result in a failure to accurately count African-American and other Hard-To-Count communities. The Bureau's error-ridden address canvassing process, which is disproportionately likely to leave Hard-

to-Count communities off the Master Address File, means those individuals will *never* be counted. *See* SAC ¶¶ 148-55. Delaying Plaintiffs' challenge will mean that the Bureau cannot remedy these errors. Similarly, the Bureau is currently hiring partnership staff and conducting outreach that is critical to ensuring those Hard-To-Count communities actually respond during the census operation. Without immediate review, it will be too late for the Bureau to adequately fund the Partnership Program and to hire and train an adequate amount of partnership staff. *Id.* ¶¶ 171-75. And if the delay continues, it will also be too late for the Bureau to reverse its 50% cut to NRFU operations. *Id.* ¶¶ 72-73; 118-21. Without these changes, Hard-to-Count communities will be irrevocably left out of the 2020 Census, with devastating effects on Plaintiffs' federal funding and representation. Thus Plaintiffs plausibly allege that they are incurring harms that must be remedied *now*, allegations which the District Court improperly disregarded. SAC ¶¶ 201-03.

To justify its incorrect holding, the District Court essentially fashioned a *per se* rule that cases alleging injuries from Defendants' improper administration of the census must be brought "after the census already had been taken and preliminary population counts announced." Jan. Op. at 31. The District Court cited no census case that directly supported this rule, but only cases where plaintiffs *chose* to bring lawsuits after the census. There is no basis for this barrier, which contravenes Supreme Court decisions that resolved pre-census challenges on the merits. For

instance, in *New York*, the Court held that the challenges to the addition of the citizenship question to the 2020 Census was sufficiently "concrete, particularized, and actual or imminent" to confer standing. 139 S. Ct. at 2565 (citation omitted); *see also U.S. House of Representatives*, 525 U.S. at 332 ("[I]t is certainly not necessary for this Court to wait until the census has been conducted to consider" a challenge to plans to use statistical sampling in the 2000 Census.).

The District Court also held that Plaintiffs could not bring their claims because effective relief would be available after the results of the census were known. But a case filed after the Bureau's statutory deadline to transmit the results to the President – January 1, 2021 – would affect redistricting decisions a mere six months later and elections four months after that. Both here and in *Miller*, procedural violations and unconstitutional decisions threaten to taint results that cannot be redone; further delay raises serious practical concerns for states' abilities to rely on Census results to plan elections and undertake redistricting. 462 F.3d at 321. Delayed review thus presents far greater practical problems, including the possibility of relief being ordered on the eve of elections. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (cautioning against orders affecting elections close to election date). All of these hardships will be avoided, however, if this Court orders immediate review of the Bureau's final and discrete procedural decisions at issue in this case.

Moreover, the cases cited by the District Court do not support its conclusion that challenges to any part of the census become ripe only after enumeration. For instance, most of the cases the lower court cited sought relief relating to the *use* of census data and were not concerned with how the count itself was conducted. Jan. Op. at 31.[7] But Plaintiffs in this case are not challenging what is done with census data after the census is taken. Instead, they challenge the Bureau's decision to slash resources for programs designed to count Hard-to-Count communities, because those decisions compromise the distributive accuracy of the Census and violate the Enumeration Clause. The Plaintiffs challenge the methods of the census and not the application of the census data after the fact.

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[7] The District Court cited cases challenging the use of census data to justify dismissing Plaintiffs' claim as unripe: *Dist. of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179 (D.D.C. 1992) (challenge to allocation of *already counted* prisoners as Virginia residents); *Massachusetts v. Mosbacher*, 785 F. Supp. 230 (D. Mass.) (challenge to allocation of *already counted* federal employees serving overseas), *rev'd sub nom. Franklin v. Massachusetts*, 505 U.S. 788 (1992); *City of Willacoochee, Ga. v. Baldrige*, 556 F. Supp. 551 (S.D. Ga. 1983) (post-census challenge to Bureau's failure to adjust inaccurate census *results*); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980) (post-census challenge to Bureau's decision not to share preliminary census *results* with local governments). It also cited *Texas v. Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992), a post-census challenge to procedures used to count Latinos in Texas. But that decision did not address what relief the plaintiffs could obtain – and that court does not appear to have ever addressed the issue. *See id.* at 317 ("The court need not spell out what shape relief will take, if any in fact is needed, at this time because there is no record before it to allow it to venture such speculations.").

In relying on this inapposite case law, the District Court offered little to no explanation of how Plaintiffs would obtain effective relief if the Bureau's procedures are as inadequate as Plaintiffs allege—which must be accepted at the pleading stage. The constitutionally deficient decisions that will harm Plaintiffs are final and imminent, and Plaintiffs' constitutional claim is ripe for review.

C. The Court Improperly Assumed that the Deficiencies Would Be Remedied Without Court Intervention

In finding a lack of ripeness, the District Court also improperly assumed that the Bureau would remedy its unconstitutional decisions. Jan. Op. at 32 (finding that challenged deficiencies would all be addressed eventually by adequate funding).

This holding turns the standard of review on its head and contravenes Plaintiffs' well-pleaded allegations. A court may grant a motion to dismiss for lack of jurisdiction "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 645 (4th Cir. 2018) (citation omitted). Although the District Court stated that its decision was based only on the pleadings, it nonetheless assumed facts not in the pleadings (and not otherwise susceptible of judicial notice) by concluding that the deficiencies would later be remedied without its intervention. But Plaintiffs disputed whether Defendants would remedy their own

unconstitutional and arbitrary decisions,[8] and continue to dispute this now, with support from Defendants' own documents. The Court ignored this factual dispute and, instead, adopted an unjustified factual position adverse to Plaintiffs to dismiss the bulk of their constitutional claim.

There is no basis in the complaint or the record to assume that the Bureau will deviate from its stated plans for the 2020 Census absent court intervention. Even by early 2019, when the District Court ruled on the issue, the Bureau had stated its fixed plans for the census that Plaintiffs were, and are, challenging. Those plans have only been formalized further: since then, the Bureau has released its final plans and subsequent documents confirming its planned changes. In short, the Bureau has no plans to remedy on its own the actions the Plaintiffs are challenging. Indeed, the Bureau is sitting on over $1 billion in appropriated funds that it has refused to spend on correcting the challenged deficiencies, in spite of a congressional mandate to do so.[9] This clear error by the District Court led to its erroneous ripeness finding.

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[8] *See, e.g.*, Pls.' Mem. of Law in Opp. to Defs.' Mot. to Dismiss, Dkt. No. 46, at 18-19; Suppl. Br. of Pls. in Opp. to Defs.' Mot. to Dismiss, Dkt. No. 63, at 14-15.

[9] *See* JA 306-533 (Census Bureau, FY 2020 Budget Request, at CEN-51 (JA 362) (showing $1.02 billion left over from Bureau's Fiscal Year 2018 and 2019 appropriations)); *see also Beyond the Citizenship Question: Repairing the Damage and Preparing to Count 'We the People' in 2020: Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. (July 24, 2019), https://oversight.house.gov/legislation/hearings/beyond-the-citizenship-question-repairing-the-damage-and-preparing-to-count-we.

D. The District Court Erred in Demanding Additional Factual Development at the Pleading Stage

The District Court also erred in finding that more factual development was required to allow Plaintiffs' claim to proceed to discovery. For support, it offered as its only example that "completing the testing that the Bureau so far has postponed will provide essential information regarding the accuracy of digital procedures that will be employed in the 2020 Census." Jan. Op. at 33. But this finding again contravenes Plaintiffs' allegations, and was refuted by the Bureau's announcement soon after the Court's opinion that it had *cancelled* these very tests. SAC ¶¶ 130-39. The District Court acknowledged that there "may come a date" before the Census when Defendants' failures, such as the "failure to have conducted the testing," are sufficiently ripe for challenge. Jan. Op. at 33 n.14. But the District Court's ruling, and its letter order declining to allow Plaintiffs to reinstate their claim, prevents Plaintiffs from doing so, despite their having alleged sufficiently that the date has come.

The Bureau has announced its final plans for the 2020 Census as to the decisions Plaintiffs are challenging and has already begun or will soon begin implementing those plans. Accordingly, this case *is* like the citizenship question cases, where there was a "final agency action" to challenge. Jan. Op. at 22-24, 33 (distinguishing those cases on that basis). Plaintiffs' Enumeration Clause claim presents "purely legal" questions, *Miller*, 462 F.3d at 319; namely, whether the

Bureau's decisions violate the Enumeration Clause because they "unreasonably compromise the distributive accuracy of the census." Jan. Op. at 55. There is no risk of "premature adjudication." *Id.* at 28. The Bureau will conduct an unconstitutionally and arbitrarily designed 2020 Census absent immediate judicial intervention, and Plaintiffs' claims are ripe.

II. PLAINTIFFS HAVE STANDING.

In its August Opinion, the District Court dismissed Plaintiffs' Enumeration Clause claim for lack of standing, characterizing Plaintiffs' claim as a concern that "Congress will fail to appropriate [sufficient] funds." Aug. Op. at 9. But this misconstrues Plaintiffs' claim entirely. In its January Opinion, the District Court correctly concluded, consistent with nearly every court to consider the question at the pleading stage, that Plaintiffs have standing to challenge Defendants' violation of the Enumeration Clause. Jan. Op. at 37-51. Moreover, since that opinion, the Supreme Court has ruled—unanimously—that standing exists for the same census-related injuries in a highly analogous causal chain to what Plaintiffs allege here. *New York*, 139 S. Ct. at 2565-66.

A. Legal Standard

For constitutional standing, the plaintiff must allege an actual or threatened injury that is not hypothetical, the injury must be fairly traceable to the challenged conduct, and a favorable decision must be likely to redress the injury. *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). At the pleading stage, the burden of establishing standing to proceed is not a heavy one; rather, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561 (citations and internal quotation marks omitted).

An organization such as Plaintiff NAACP may also establish standing if the conduct it complains of causes it to divert its resources or frustrates its mission. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Or it may sue in a representational capacity, on behalf of its members, provided it can adequately allege, and eventually prove, that at least one of its members is injured by the challenged conduct. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

B. Plaintiffs Have Alleged Standing Sufficiently at This Stage

Plaintiffs have adequately alleged each of the prongs of standing, a conclusion that necessarily follows from the Supreme Court's unanimous decision in *New York*. Plaintiffs' complaint sets forth well-recognized forms of concrete and particularized harms—including but not limited to vote dilution, malapportionment, loss of federal

funding, and diversion of organizational resources—which are imminent and have a substantial risk of occurring, are directly traceable to Defendants' conduct, and are redressable by judicial action.

1. Plaintiffs Allege Several Cognizable Injuries

An "injury in fact" is any invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 560. The imminence requirement is satisfied if "there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

In its January Opinion, the District Court held that Plaintiffs plausibly alleged that "Defendants' preparations for the 2020 Census will exacerbate the undercount Prince George's County historically experiences," and that this "in turn would result in reduced funding and representation." Jan. Op. at 40-41. This holding was correct and is supported by every court to consider the question, including the Supreme Court and multiple Courts of Appeals.

Most notably, the Supreme Court in *New York* unanimously held that the same harms alleged by Plaintiffs here were sufficient for Article III standing. The plaintiffs in *New York* alleged that the Bureau's conduct (in that case, instituting a citizenship question) would "depress the census response rate and lead to an inaccurate population count," causing a "diminishment of political representation,

loss of federal funds, degradation of census data, and diversion of resources." 139 S. Ct. at 2565. Plaintiffs have similarly alleged that Defendants' deprivation of the key resources for counting Hard-to-Count communities will lead to an undercount in those communities, causing the same harms recognized by the Supreme Court in *New York*. *See, e.g.*, SAC ¶¶ 187-89; 194. Accordingly, Plaintiffs have sufficiently alleged injury in fact. The District Court's decision to reverse course in its later ruling was error.

2. Plaintiffs' Harms Are Traceable to Defendants' Conduct

At the pleading stage, the burden of alleging traceability is "relatively modest." *Bennett v. Spear*, 520 U.S. 154, 171 (1997). Traceability is satisfied "where the plaintiff suffers an injury that is produced by the determinative or coercive effect" of the Defendants' conduct "upon the action of someone else." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 197 (4th Cir. 2013) (quoting *Bennett*, 520 U.S. at 169).

In its January Opinion, the District Court held that Plaintiffs satisfied the traceability prong because Plaintiffs alleged that the "reduced . . . number of area offices and workers," among other things, would "lead to an even higher undercount of 'minority and low-income' individuals." Jan. Op. at 45-46. Thus, Plaintiffs had plausibly alleged that the disproportionate undercount and the resulting injury was "fairly traceable to Defendants' plans for conducting the 2020 Census." *Id.* at 46.

In *New York*, the Supreme Court held the plaintiffs' harms were traceable to government action. The Court found that "noncitizen households have historically responded to the census at lower rates than other groups," and that the worsening of those low rates was attributable to the "predictable effect of Government action." 139 S. Ct. at 2566. In doing so, the Supreme Court rejected the government's argument, also made by Defendants in this case, that the harms are "not fairly traceable to [the Bureau's conduct] because such harm depends on the independent action of third parties choosing to violate their legal duty to respond to the census." *Id.* at 2565. In this case, Plaintiffs have alleged that minority communities historically respond to the census at lower rates and that their differential undercount will predictably worsen as a result of Defendants' action, namely the removal of key resources for reaching those populations. This is sufficient to allege traceability, and the District Court's contrary holding in its August Opinion is erroneous.

3. Plaintiffs Have Alleged Redressable Harms

The redressability prong focuses on whether the injury that a plaintiff alleges is likely to be redressed through a favorable decision arising from the litigation. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 286-87 (2008); *Townes v. Jarvis*, 577 F.3d 543, 547 (4th Cir. 2009). The relief need not be total but satisfies the standard so long as the injury can be "reduced to some extent." *Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007). "[N]o explicit guarantee of

redress . . . is required to demonstrate a plaintiff's standing." *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 100 (4th Cir. 2011).

In its January Opinion, the District Court held that the redressability prong was met because the Court could issue declaratory or injunctive relief that could remedy the Bureau's "method and means" for conducting the census, if they are "as deficient as Plaintiffs expect." Jan. Op. at 50. Though much of the Court's opinion focused on its ability to issue declaratory relief regarding the funding of the census, it made clear that it was addressing Plaintiffs' claims for injunctive relief as well. *Id.* at 37 n. 16, 50. And the Court noted correctly, it need not spell out the "exact contours" of the relief it could offer following an evidentiary hearing or trial, because that was "unnecessary to predict . . . at this preliminary stage of the case." *Id.* at 51.

The District Court's January ruling was correct. Plaintiffs have alleged injuries arising out of the Bureau's radical reductions in certain key programs, including in-field address canvassing, community outreach and partnership, and field staffing and infrastructure. If this case advances to an evidentiary hearing or trial, there is nothing barring the District Court, as a matter of law, from enjoining those deficiencies and reducing Plaintiffs' resulting injuries at least "to some extent." *Massachusetts*, 549 U.S. at 526.

In its August Opinion, the District Court erred by reversing its earlier holdings on standing and instead finding that Plaintiffs' claim was not redressable because it

asked the Court to "order the appropriation of funds," Aug. Op. at 10, something that Plaintiffs have never sought in this case.[10] Moreover, the Court stated that it does not have the "authority, expertise, or time" to order the Bureau to spend appropriated funds. *Id.* Although an order that the Bureau must spend certain appropriated funds is but one of many possible remedies in this case, and not a basis for dismissal, this holding was incorrect.[11]

First, where an agency refuses to spend funds appropriated by Congress, courts have the authority to remedy that failure. *See, e.g.*, *In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (Kavanaugh, J.) ("[T]he President does not have unilateral authority to refuse to spend" "less than the full amount appropriated by Congress for a particular project or program."); *Guadamuz v. Ash*, 368 F. Supp. 1233, 1244 (D.D.C. 1973) ("Money has been appropriated by the Congress to achieve the purposes of both programs and the Executive has no residual constitutional power to refuse to spend these appropriations."). Second, the District Court was premature in holding that it lacked the "expertise" to decide whether the

[10] Because Plaintiffs are not actually challenging the level of funding appropriated to the Bureau, Judge Grimm's concerns about the "transform[ation] [of] the federal courts into a venue for every person or entity with an axe to grind or an agenda to advance" are entirely unfounded. Aug. Op. at 11-12.

[11] The parties did not brief whether the Bureau could be ordered to spend the appropriated funds that it was holding in reserve, contrary to Congress's instructions. The District Court appeared to have lifted the argument from Plaintiffs' pre-motion letter, filed only a week prior.

Bureau should spend the appropriated funds, since there was "no record before it which would allow it to venture such speculations." Jan. Op. at 51 (citing *Mosbacher*, 783 F. Supp. at 317). Third, whether the District Court has the "time" to issue an appropriate remedy is plainly not an appropriate consideration.

Plaintiffs have adequately alleged standing for their claims.

III. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

Plaintiffs' Enumeration Clause claim is not precluded from review pursuant to the political question doctrine. In its August Opinion, the District Court held that Plaintiffs' claim was non-justiciable, but only because it misconstrued Plaintiffs' claim as being about "whether the appropriated funding [for the 2020 Census] is sufficient." Aug. Op. at 13. In any event, as every other court to consider this issue has found, Defendants' census-related conduct is not immune from review.

A. Legal Standard

The political question doctrine is a "narrow exception" to judicial review. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). The key factors for determining whether a case presents a non-justiciable political question are (1) whether there exists a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; or (2) whether there is a "lack of judicially discoverable and manageable standards for resolving it." *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also* Jan. Op. at 52. The constitutional commitment

of authority must clearly vest *sole* discretion in a political branch "and nowhere else." *See, e.g.*, *Nixon v. United States*, 506 U.S. 224, 229 (1993).

B. Defendants' Conduct Is Not Immune from Judicial Review

Plaintiffs' allege that Defendants' drastic reductions in the key operations for the 2020 Census violate the Enumeration Clause. The text of the Enumeration Clause does not commit this question solely to Congress or anyone else, and judicially manageable standards exist that have been applied over decades of census litigation. Courts have thus "consistently rejected application of the political question doctrine in [census] cases." *New York v. Department of Commerce*, 315 F. Supp. 3d 766, 791 (S.D.N.Y. 2018). This has been true in every census-related case from *Baker*, 369 U.S. at 237 (holding that apportionment based on census figures did not present a non-justiciable political question), to *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (finding that a challenge to the adequacy of address registers and field enumerators for the 1980 Census was not a political question), to the recent citizenship question cases. Similarly, Defendants' conduct in this case should not be immune from review.

1. The Text of the Enumeration Clause Does Not Commit Sole Discretion to Congress

In its January Opinion, the District Court noted that courts "have routinely held that the Enumeration Clause does not textually commit exclusive, non-reviewable control over the census to Congress." Jan. Op. at 53 (quoting *California*

v. Ross & City of San Jose v. Ross, Nos. 18-1865-RS & 18-2279-RS, slip. op. 19 (N.D. Cal. Aug. 17, 2018), ECF No. 47-1). Although Article I, Section 2 provides that Congress shall conduct the census "in such Manner as [Congress] shall by Law direct," courts have consistently held that no part of the text granted Congress exclusive authority. The Enumeration Clause only "impose[s] on Congress the responsibility to provide for the taking of a decennial census. It does not say that Congress and Congress alone has the responsibility to decide the meaning of, and implement, Article 1, Section 2, Clause 3." *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981). Plaintiffs' claim that Defendants are heading into the 2020 Census without the necessary resources, staff, and infrastructure to reach Hard-to-Count populations thus fits within the well-established body of precedent refusing to find Defendants' pre-census conduct immune from judicial review.

2. There Are Judicially Manageable Standards for Plaintiffs' Claims

Census-related claims may be reviewed to ensure that they bear "a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996); *Utah*, 536 U.S. at 478 (concluding that the Enumeration Clause contains an "interest in accuracy" for purposes of judicial review). Here, after the District Court initially rejected Defendants' political question arguments, it

proceeded to apply that standard in holding that Plaintiffs stated a claim under the Enumeration Clause. Jan. Op. at 54-55. The Court held that Plaintiffs "alleged sufficiently that proceeding as Defendants are with the 2020 Census will unreasonably compromise[] the distributive accuracy of the census, thereby stating a claim for violation of the Enumeration Clause." *Id.* (citation omitted). Discovery after the District Court's January decision has only underscored the allegations supporting the Plaintiffs' Enumeration Clause claim. The political question doctrine does not bar the Court from applying this same standard to Defendants' drastic reductions of the resources needed to reach Hard-to-Count populations and their refusal to spend the funds appropriated by Congress for these very purposes. Accordingly, Plaintiffs' claims are justiciable.

IV. The District Court Erred in Dismissing Plaintiffs' APA Claims

In the Second Amended Complaint, Plaintiffs challenged six discrete and final agency actions as arbitrary and capricious under the APA:

> (a) a plan to hire an unreasonably small number of enumerators; (b) a drastic reduction in the number of Census Bureau field offices; (c) cancellation of crucial field tests; (d) a decision to replace most in-field address canvassing with in-office address canvassing; (e) a decision to make only extremely limited efforts to count inhabitants of housing units that appear vacant or nonexistent based on unreliable administrative records; and (f) a significant reduction in the staffing of the Bureau's partnership program.

SAC ¶ 67. The District Court dismissed the claims on the ground that "Plaintiffs do not direct their challenges to acts that meet the definition of 'agency action.'" Aug.

Op. at 17. It "[did] not reach the other grounds that Defendants raise[d]," including that none of the discrete actions challenged are "final," that all are "committed to agency discretion by law," and that all are "unripe." *Id.*

The District Court erred in concluding that Plaintiffs failed to challenge agency action because the actions Plaintiffs challenge are discrete and determine rights and obligations. In addition, because the government may argue that this Court should affirm the decision on alternative grounds, *see Republican Party of N. Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) ("[W]e may affirm a judgment for any reason appearing on the record.")), and because of the urgency of this challenge, (*see* ECF No. 14 (expediting this appeal), Plaintiffs also address those alternative arguments here and urge this Court to adjudicate them in this appeal.

A. Standard of Review

This Court reviews claims regarding agency action *de novo. See W. Virginia Dep't of Health & Human Res. v. Sebelius*, 649 F.3d 217, 222 (4th Cir. 2011) ("We review de novo a district court's evaluation of agency action, as to questions of both law and fact.").

B. Plaintiffs Have Sufficiently Alleged APA Claims.

1. The Challenged Decisions Are "Agency Action."

The District Court erred in concluding that "Plaintiffs do not direct their challenges to acts that meet the definition of 'agency action.'" Aug. Op. at 17. The design choices Plaintiffs challenge are "agency actions" that are both

"circumscribed" and "discrete," *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 62 (2004), and "determin[e] rights and obligations." *Clear Sky Car Wash LLC v. City of Chesapeake, Va.*, 743 F.3d 438, 445 (4th Cir. 2014). As the District Court noted, an agency action "determin[es] rights and obligations" if it has "an immediate and practical impact" on "private parties," *City of New York v. U.S. Dep't of Defense*, 913 F.3d 423, 431 (4th Cir. 2019) (quoting *Golden & Zimmerman LLC v. Domenech,* 599 F.3d 426, 433 (4th Cir. 2010)), or alters "the legal regime in which it operates," *id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). The specific actions challenged directly impact Hard-to-Count communities.

a. The challenged decisions are "circumscribed" and "discrete"

Ignoring Plaintiffs' well-pled allegations, the District Court mischaracterized Plaintiffs' position as seeking "a sweeping overhaul to the Final Operational Plan, which exceeds the scope of reviewable 'agency action.'" Aug. Op. at 21. But Plaintiffs challenge six discrete decisions, each of which fits well within the "broad sweep" of agency action. *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004).

That Plaintiffs challenge multiple decisions by the Bureau does not mean that each challenged action is so "interrelated with other aspects of the Final Operational Plan" that it "cannot be analyzed" alone. Aug. Op. at 18. The broader context in which a program operates frequently informs agency actions. That does not make

the challenged actions any less independent or discrete. Courts can analyze each activity that Plaintiffs challenge without reference to the other activities. For example, the Bureau could increase in-field address canvassing without opening more field offices.

Additionally, neither challenging multiple decisions nor asking for injunctive relief converts this case into a "programmatic attack." *SUWA*, 542 U.S. at 64. "Government deficiencies do not become non-reviewable simply because they are pervasive," *City of New York,* 913 F.3d at 433, and the "aggregation of similar, discrete purported injuries" does not undermine a claim of agency action, *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 21 (D.D.C. 2018). Unlike other cases challenging "the sort of public policy problem that often requires reallocating resources, developing new administrative systems, and working closely with partners across government," *City of New York,* 913 F.3d at 433, Plaintiffs ask that the Bureau conduct the same activities it has conducted in previous censuses and that it has reasonable basis for foregoing.

Finally, the District Court mistakenly concluded, without a sufficient record, that the challenged decisions "are not 'required by law.'" Aug. Op. at 22 (quoting *City of New York*, 913 F.3d at 432). Indeed, the Census Act requires these actions. "[B]y mandating a population count that will be used to apportion representatives . . . the Act imposes 'a duty to conduct a census that is accurate and that fairly accounts

for the crucial representational rights that depend on the census and the apportionment.'" *New York*, 139 S. Ct. at 2568-69 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 820 (1992) (Stevens, J., concurring in part and concurring in judgment).

b. Rights, obligations, and legal consequences flow from the challenged decisions

The District Court also erred in concluding that "the Bureau's acts do not qualify as 'agency action' because they do not 'determin[e] rights and obligations.'" Aug. Op. at 23 (quoting *City of New York*, 913 F.3d at 431). Legal obligations and consequences flow directly from the Bureau's decisions to drastically understaff the 2020 Census and gut the field operations that reach Hard-to-Count communities. The way that Defendants choose to conduct the Census has an "immediate and practical impact" on private parties by exacerbating the undercount of communities of color, diluting their votes, and depriving them of critical federal funds. *City of New York*, 913 F.3d at 431; SAC ¶¶ 187-89, 194, 199.

In arguing to the contrary, Defendants have relied on Fourth Circuit precedents holding that various government *communications* do not affect rights and obligations or have legal consequences. *See, e.g.*, *Golden & Zimmerman*, 599 F.3d at 428-29 (ATF Reference Guide); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 454 (4th Cir. 2004) (advertising campaign); *Flue-Cured Tobacco Cooperative*

Stabilization Corp. v. E.P.A., 313 F.3d 852, 855-56 (4th Cir. 2002) (EPA report). These cases are inapposite.

The agency reports and communications at issue in Defendants' cited cases are not "agency action" because their "consequences . . . stem from independent actions taken by third parties." *Flue-Cured Tobacco*, 313 F.3d at 860; *see also Franklin*, 505 U.S. at 2773-74 (declaring that legal consequences stem from "the President's statement to Congress, not the [agency's] report); *Golden & Zimmerman*, 599 F.3d at 428 (finding that the agency's communication was "simply informational" and effected no legal change).

Here, by contrast, the adverse consequences stem directly from the agency's decisions. The Final Operational Plan is not "simply informational." *Golden and Zimmerman*, 599 F.3d at 428. The agency's decisions to hire insufficient personnel, open fewer field offices, and reduce testing will have an undeniable impact on the funding and political representation Plaintiffs receive. SAC ¶¶ 187, 194, 199. This impact rests not on "mere speculation about the decisions of third parties" but "on the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce*, 139 S. Ct at 2566.

Further, in finding that Plaintiffs were not challenging agency action, the District Court reasoned that Plaintiffs were focusing on the effect the Final Operational Plan has on the Census Bureau, rather than on private parties. Aug. Op.

at 25. This mischaracterizes Plaintiffs' claims. Plaintiffs are challenging the Bureau's final plans precisely because they will have drastic—and, if this Court does not act soon, irreversible—effects on Hard-to-Count communities. SAC ¶¶ 187-89, 194, 199, 203. That the Bureau's stated final plans also prevent the Bureau from conducting the census in accordance with its constitutional obligations does not detract from this argument.

The District Court also suggested that the impact on Plaintiffs was not "immediate" because of the "attenuated" link between how the Bureau conducts the 2020 Census and "how many representatives and how much funding Plaintiffs receive." Aug. Op. at 25. Again, ignoring Plaintiffs' well-pled allegations, the District Court mischaracterized the effect of the Bureau's actions on Plaintiffs. The funding and political representation Plaintiffs receive will result *directly* from the outcome of the 2020 Census. SAC ¶¶ 14-15. The relationship between these effects and the Bureau's conduct are well-established in the standing context. *See, e.g.*, *Carey*, 637 F.2d at 838; *Kravitz v. U.S. Dep't of Commerce*, 336 F. Supp. 3d 545, 558 (D. Md. 2018) (finding "the dilution of Plaintiffs' votes within states and their loss of federal funding" sufficient to establish injury-in-fact). The same reasoning applies here. Plaintiffs have sufficiently alleged that the manner in which the Bureau conducts the census will have an immediate effect on their rights and obligations

because of the legal consequences for representation and funding that flow directly from the Bureau's actions.

2. The Challenged Agency Actions Are "Final."

The government incorrectly argued that the challenged actions are not "final" and thus immune from challenge under the APA. Defs.' Mem. at 18. Defendants' actions meet the legal standard for final agency action because they "mark the consummation of the agency's decisionmaking process." *U.S. Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

Plaintiffs allege (and Defendants cannot deny) that the challenged decisions—all part of the agency's Final Operational Plan—are the consummation of the agency's decisionmaking process. SAC ¶¶ 31, 33. The Final Operational Plan itself states that it "reflects [the agency's] final design." SAC ¶ 33.[12] This Court has recognized that an agency's approval of a plan to implement its duties constitutes final agency action, as do the plan's components. *See Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193-95 (4th Cir. 2013) ("[T]he Corps formally approved the revisions to the . . . Project . . . and the revised project included

[12] *See* Deborah Stempowski (Chief, Decennial Management Division), *2020 Census Operational Plan*, Census Bureau (Feb. 1, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/pmr-materials/02-01-2019/pmr-op-plan-2019-02-01.pdf? (Slide 19).

the Corps' plans . . . . That approval, not the Corps' subsequent activities in carrying it out, was the final agency action."). Plaintiffs here only challenge certain parts of the agency's plans, not their implementation. SAC ¶¶ 66, 67.

Defendants' claim that they may yet revise the plan does not alter this conclusion. The mere "possibility" of revision "does not make an otherwise definitive decision nonfinal." *U.S. Army Corps of Eng'rs,* 136 S. Ct. at 1814. Likewise, that the Final Operational Plan is not the culmination of *every* decision-making process does not change the finality of the choices it includes. *See* FOP at 1 (JA 67). Defendants' objection only highlights the specific and independent nature of Plaintiffs' claims in acknowledging that these decisions must be separate from those left unmade.

3. The Bureau's Actions Are Not Committed to Agency Discretion.

Further, the government contended in the District Court that Plaintiffs' claims are barred because they are committed to agency discretion by law. Earlier this year, the Supreme Court squarely rejected the argument that the Census Act commits these decisions to agency discretion and was emphatic that the Census Act "do[es] not leave [the Secretary's] discretion unbounded." *See New York*, 139 S. Ct. at 2568.

The Supreme Court foreclosed all avenues by which Defendants might argue otherwise. "The taking of the census is not one of those areas traditionally committed to agency discretion . . . . Nor is the statute here drawn so that it furnishes no

meaningful standard by which to judge the Secretary's action." *Id.* The operational plan at issue is subject to a cognizable legal standard because "the Act imposes 'a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.'" *Id.* at 2569 (quoting *Franklin*, 505 U.S. at 819-20 (Stevens, J., concurring in part and concurring in the judgment)). Just as the citizenship question in *Department of Commerce* was reviewable, so too are the six decisions challenged by Plaintiffs.

4. Plaintiffs' APA Claims Are Ripe.

In its earlier order, the District Court noted that Plaintiffs' claims would, at that time, be unripe because "the Secretary is in the process of making his decisions about how to conduct the 2020 census," *NAACP*, 382 F. Supp. 3d at 367. The government reiterated that argument. Defs.' Mem. at 22. But that time has since passed. With the Bureau's release of its final plans and its beginning of census operations, the Secretary's decision-making process is complete and Plaintiffs' claims are ripe for review.[13]

As explained in Part I in regard to the ripeness of Plaintiffs' constitutional claims, Plaintiffs have already suffered harm and face even more harm if

[13] With the release of the FOP, a Bureau official stated that it "culminates years of planning" and marks a transition "into the operational phase of the 2020 Census." *02/01/19: 2020 Census Quarterly Program Management Review (PMR)* at 24:35, U.S. Census Bureau (Feb. 1, 2019), https://www.youtube.com/watch?v=b96n0AiZZSE.

Defendants' actions are not reviewed now. *See* SAC ¶¶ 176-203. The Supreme Court has recognized that census design choices may become irreversible if not decided well before the census begins and cause "extreme—possibly irremediable—hardship." *See U.S. House of Representatives*, 525 U.S. at 332 ("[I]f the Bureau is going to alter its plan to use sampling in the 2000 census, it must begin doing so by March 1999."). Further, dismissing Plaintiffs' APA claims as unripe would "almost certainly preclude Plaintiffs from obtaining a final ruling on their claims." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 627 (S.D.N.Y. 2019). In light of Plaintiffs' challenges to Defendants' final actions, this Court should hold their APA claims are ripe for review.

C. The Challenged Actions Are Arbitrary, Capricious, and Contrary to Law.

Defendants' challenged actions are "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law," in violation of the APA. 5 U.S.C. § 706(2)(A) (2018). Plaintiffs have sufficiently alleged six discrete actions that violate the Bureau's statutorily mandated goal to reach Hard-to-Count communities. SAC ¶ 67. These actions evince no "rational connection between the facts found and the choice made," *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

The District Court dismissed the APA claims on the pleadings, without directing the government to produce an administrative record. Thus, it did not examine the agency's justification for each discrete action. Even the government's proffered explanations, without any record, do not justify its decisions to drastically reduce its staff and office presence for the 2020 Census.

For example, one of the Bureau's core arguments for reducing the number of enumerators by one-third compared to 2010 is their supposedly reduced workload. SAC ¶ 74. Yet only 67% of householders say they are "extremely likely" or "very likely" to complete the 2020 Census, *twenty percentage points lower* than the analogous figure in 2010. *Id.* ¶ 81, 83. This strongly suggests a need for more—not fewer—enumerators and partnership staff.

Likewise, in setting the number of field offices, the Commerce Department's Office of the Inspector General stated there was "no evidence that the Bureau reconciled the increased NRFU workload" with the assumptions underlying the original plan to open 248 offices. *Id.* ¶ 128. Each of these decisions constitutes a failure to "examine the relevant data and articulate a satisfactory explanation" for the Bureau's choices. *State Farm*, 463 U.S. at 43.

In each of these instances, the Bureau "entirely failed to consider an important aspect of the problem," "offered an explanation for its decision that runs counter to the evidence before the agency," or both. *Id.* Plaintiffs have sufficiently alleged that

the agency's actions should be set aside as arbitrary and capricious, and at a minimum, Defendants must produce an administrative record that will allow a court to consider the *actual* justifications for each decision, not the post-hoc rationalizations set forth in Defendants' briefing.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and this matter should be remanded to the district court.

Dated: August 30, 2019

Respectfully submitted,

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[Ψ] This motion does not purport to state the views of Yale Law School, if any.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 12,966 words (according to the Microsoft Word 2013 count function), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type style.

Date: August 30, 2019

BY: /s/Jacob D. Alderdice
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CERTIFICATE OF SERVICE

I, Jacob D. Alderdice, certify that today, August 30, 2019, I have caused a true and correct copy of the foregoing Brief of Plaintiffs-Appellants to be filed with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit via the appellate CM/ECF, which will send a notice of this filing to all participants in this case, including counsel for appellees.

BY: /s/Jacob D. Alderdice
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