**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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

Plaintiffs,

v.

BUREAU OF THE CENSUS, *et al.*,

Defendants.

No. 8:18-cv-00891-PWG

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT**

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## INTRODUCTION

As this meritless 2020 Census case labors on, the parties continue to debate the settled funding decisions of Congress and the internal, non-binding procedures of the Census Bureau. To what end?

The parties have now entered discovery on Plaintiffs' claim that the 2020 Census is underfunded. But Congress has made its funding decision with enactment of the 2019 Appropriations Act, leaving the Court with nothing to do. Indeed, any further action by the Court would be both a profound intrusion upon the funding prerogatives of a co-equal Branch, and the paragon of an unconstitutional advisory opinion. The Court should therefore find that it has no authority—under the Declaratory Judgment Act or otherwise—to second-guess Congress's exercise of its appropriations power. U.S. Cons. art. I, § 9, cl. 7. Absent such a ruling, the Court should simply dismiss Plaintiffs' underfunding claim as moot or decline to opine on it.

Plaintiffs' APA challenges to the design of the 2020 Census fare no better. For starters, Plaintiffs do not identify a single "final agency action" that would bring their claims within the APA's ambit. Instead, they launch an improper programmatic attack on the Census Bureau's Operational Plan and they quibble with agency decisions that have no legal impact on anyone. Were this not the case, however, their APA claims would still be unreviewable because the minutia of census operations is "committed to agency discretion by law." In any event, as the Court previously predicted, these APA claims are not ripe. Plaintiffs effectively challenge the same agency decisions under the APA that the Court declined to entertain under the Enumeration Clause, and the Court should dismiss them for the same reasons.

The 2020 Census is a massive undertaking to enumerate 330 million people across 3.8 million square miles. This task is hard enough without "the plethora of lawsuits that inevitably accompany each decennial census." *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). Harder still when a pre-census lawsuit targets the inner workings of the Census Bureau and its planned operations. The Court should dismiss this case and allow the Census Bureau to do its job unimpeded.

## BACKGROUND

The Court is intimately familiar with this case. Plaintiffs—organizations and residents in Prince George's County, Maryland, as well as the County itself—filed a Complaint in March 2018 and a First Amended Complaint ("FAC") in June 2018. ECF Nos. 1, 38. They asserted only one claim: that nearly two years before a single person is counted, preparations for the 2020 Census were so deficient as to violate the Enumeration Clause. *See* FAC at 20–21. Specifically, Plaintiffs alleged that underfunding, understaffing, and lack of leadership at the Census Bureau, along with design flaws in certain census operations, would result in an undercount of racial and ethnic minorities. *See* FAC ¶¶ 32–94. Among these purported design flaws were the cancellation of field tests, the use of online census questionnaires, the danger of cybersecurity threats, the "significant reduction in on-the-ground presence and field workers," and the reliance on state administrative databases. *See* FAC ¶¶ 44, 67–94, 120.

Defendants moved to dismiss, and the parties argued that motion during the 2018–19 government shutdown. *See* ECF Nos. 52, 58. The Court ruled on Defendants' motion shortly after the shutdown ended but while another shutdown "loom[ed] like a Damoclean sword if the three-week extension of a continuing resolution fail[ed] to result in congressional appropriation of lasting funding that is signed into law by the President." *NAACP v. Bureau of Census*, --- F. Supp. 3d ---, 2019 WL 355743, at *16 (D. Md. Jan. 29, 2019). Just such an appropriation was enacted about two weeks later, allocating $3.5 billion to the Census Bureau for use through 2021. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 ("2019 Appropriations Act"). By that point, however, the Court had already allowed Plaintiffs' underfunding claim to proceed, although it had dismissed their remaining constitutional claims—like those related to purported design flaws—as unripe. *NAACP*, 2019 WL 355743, at *25.

For its part, the Census Bureau never faltered in its 2020 Census preparations, continuing to run tests, refine procedures, and innovate operations as it has done throughout the decade. *See NAACP*, 2019 WL

355743, at *16. To that end, the agency released Version 4.0 of the 2020 Census Operational Plan[1] in February 2019, which, like the previous three versions, chronicled the census's numerous planned operations. Despite demonstrating that many of Plaintiffs' prior design-flaw complaints were either misplaced or mooted, Plaintiffs took issue with this newest Operational Plan. Indeed, they immediately sought to not only add claims under the Administrative Procedure Act ("APA"), but also to reinstate the Enumeration Clause claims that the Court had dismissed less than three weeks earlier. *See* ECF No. 68. Although prudently rejecting this "not-so-subtle attempt at reconsideration" for their constitutional claims, the Court allowed Plaintiffs to file a Second Amended Complaint ("SAC") with APA challenges to the Operational Plan.[2] *See* Letter Order at 3–4, ECF No. 76. This motion follows.

## LEGAL STANDARDS

For the relevant legal standards, Defendants respectfully refer the Court to their motion to dismiss Plaintiffs' FAC. ECF No. 43-1 at 5–6.

## ARGUMENT

### I. PLAINTIFFS' UNDERFUNDING CLAIM SHOULD BE DISMISSED

In denying Defendants' prior motion to dismiss in part, the Court allowed one allegation to proceed: Plaintiffs' claim that the 2020 Census will be unconstitutionally underfunded. With the 2019 Appropriations Act, that claim is now moot. Nonetheless, the Court has no power—under the Declaratory Judgment Act or

[1] Available at: https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf ["Operational Plan"]. Plaintiffs refer to this as the "Final Operational Plan," Second Am. Compl. at 3, ECF No. 91 ("SAC"), despite no indication that the Operational Plan is immutable. *See*, *infra*. The Court may examine the Operational Plan because it is "explicitly incorporated into the [SAC] by reference" and integral to Plaintiffs' allegations. *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016).

[2] The Court also permitted Defendants to argue that the 2019 Appropriations Act moots Plaintiffs' underfunding claim. *See* Letter Order at 4.

otherwise[3]—to declare some arbitrary level of funding unconstitutional. Even if it did, the Court should decline this opportunity to opine on Congress's appropriation because the purposes of the Declaratory Judgment Act are ill-served by a ruling that would not settle any legal relations. Plaintiffs' Enumeration Clause claim should be dismissed.

A. Plaintiffs' underfunding claim is mooted by the 2019 Appropriations Act.

"It has long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (citations omitted). Accordingly, "[a] case is constitutionally moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Kaur v. Wells Fargo Bank, N.A.*, 2017 WL 5466812, at *2 (D. Md. Nov. 14, 2017) (Grimm, J.) (citations omitted). "To survive a challenge of constitutional mootness, a party must have suffered an actual injury that 'can be redressed by a favorable judicial decision.'" *Id.*

In allowing Plaintiffs' underfunding claim to proceed, the Court previously reasoned that "there is a justiciable claim as to sufficiency of funding *given the government shutdown* (the longest in the nation's history, and still looming like a Damoclean sword if the three-week extension of a continuing resolution fails to result in congressional appropriation of lasting funding that is signed into law by the President) and appropriations lapse." *NAACP*, 2019 WL 355743, at *16 (emphasis added). Due to the potential for further lapse in appropriations, the Court differentiated Plaintiffs' funding claim from their other claims:

> While Plaintiffs' other claims could be addressed through post-census litigation, census funding obviously cannot be increased after the fact. Moreover, the federal government shutdown recently ended through a continuing resolution that only allows the Bureau to continue with already-funded operations for three weeks, but adds no additional funding beyond that already appropriated. Thus, *given the prediction that, even by Defendants' estimate, current census funding will run out by April 2019 (if not earlier)—a full year before the 2020 Census—, delayed review would cause hardship to the plaintiffs*. Additionally, "judicial intervention" would not "inappropriately interfere with further administrative action"—it will require no more than

[3] As the Court previously recognized, it has no authority to issue injunctive relief on Plaintiffs' constitutional claim for underfunding. *NAACP*, 2019 WL 355743, at *22. ("No, the Court cannot order Congress to adequately fund the 2020 Census.").

> elementary school arithmetic to demonstrate (from the Bureau's existing estimates) what funds are needed to complete the 2020 Census, and *the shortfall the funding lapse has caused*.

*Id.* (emphasis added and citations omitted). The Court's January 2019 opinion—using phrases like "given the government shutdown," "given the prediction that . . . current census funding will run out by April 2019 (if not earlier)," and "the shortfall the funding lapse has caused"—could not be clearer: the justiciablility of Plaintiffs' underfunding claim hinged on "the recent acrimonious partial government shutdown, which may yet re-emerge, phoenix-like, in the event that the three-week hiatus fails to result in more permanent funding." *Id.* at *23. This concern made it seem, at the time of the Court's decision, that "it is at least as speculative, if not more, to believe that sufficient funds will be appropriated in time to allow proper preparations for the 2020 Census than to believe that they will not." *Id.*

But the Court's prior rationale has now evaporated. As the Court recognized, the Census Bureau's funding was unaffected despite the *prior* lapse in appropriations. *Id.* at *16. And sufficient funds *were* "appropriated in time to allow proper preparations for the 2020 Census." *Id.* at *23. So rather than a government shutdown "re-emerg[ing], phoenix-like" after a "three-week hiatus," Congress enacted "more permanent" appropriations for the 2020 Census totaling over $3 billion.[4] Thus, the Court's only rationale for finding Plaintiffs' underfunding claim justiciable—the possibility of an additional government shutdown causing such severe underfunding that the Court must declare it unconstitutional—is "no longer 'live'" due to the 2019 Appropriations Act. *See Kaur*, 2017 WL 5466812, at *2.

[4] Congress "permanently" appropriated funds insofar as the over $3.5 billion allocated to Census Bureau—which includes over $3 billion for the 2020 Census—is available for use through 2021. 2019 Appropriations Act, 133 Stat. at 94 ("For necessary expenses for collecting, compiling, analyzing, preparing, and publishing statistics for periodic censuses and programs provided for by law, $3,551,388,000, to remain available until September 30, 2021."). This matched the President's 2020 Census budget request. *See* Appendix, Proposed Budget of the United States Government, Fiscal Year 2019 at 185, https://www.whitehouse.gov/wp-content/uploads/2018/02/appendix-fy2019.pdf.

B. The Court has no power to declare a lack of funding unconstitutional.

The Court previously concluded that it could declare, during a hypothetical government shutdown, that "there are insufficient funds to conduct the 2020 Census within the time mandated by the Constitution." *NAACP*, 2019 WL 355743, at *22. That conclusion must be reassessed in light of the 2019 Appropriations Act.

"In a case of actual controversy within its jurisdiction," the Declaratory Judgment Act allows "any court of the United States" to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). With this enactment, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Put differently, jurisdiction "over a declaratory action depends on the answer to a hypothetical question: had the Declaratory Judgment Act not been enacted, would there have been a nondeclaratory action (i) concerning the same issue, (ii) between the same parties, (iii) that itself would have been within the federal courts' subject-matter jurisdiction?" Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 841 (7th Ed. 2015). This Court has already answered that question: "[n]o, the Court cannot order Congress to adequately fund the 2020 Census." *NAACP*, 2019 WL 355743, at *22. That alone should establish a lack of redressability and a concomitant lack of jurisdiction to issue a declaratory judgment.

A look at the purposes of the Declaratory Judgment Act demonstrates this concept. The Act was meant for situations where a party wants to undertake or escape a particular action, but is unsure of its legal rights.[5] In such cases, the Declaratory Judgment Act "relieves potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure—

[5] For this reason, insurance disputes are particularly conducive to declaratory judgments. *See NAACP*, 2019 WL 355743, at *21 (this Court noting that declaratory judgments are common in insurance litigation). Indeed, "[i]t is well established that a declaration of parties' rights under an insurance policy is an appropriate use of the declaratory judgment mechanism" because "[t]he declaratory judgment action is designed to allay exactly the sort of uncertainty that flows from the threat that ambiguous contractual rights may be asserted." *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998); *see State Farm Mut. Auto. Ins. Co. v. Bates*, 542 F. Supp. 807, 817 (N.D. Ga. 1982) ("Federal courts long have held that an insurance company seeking determination of its liabilities under an insurance contract could utilize the Declaratory Judgment Act.").

or never." *Glenn v. Thomas Fortune Fay*, 222 F. Supp. 3d 31, 36 (D.D.C. 2016) (citations omitted). In other words, "the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (citations omitted); *see United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998) (noting that the Declaratory Judgment Act "allows [an] uncertain party to gain relief from the insecurity caused by a potential suit waiting in the wings"); *Emp'rs Liab. Assur. Corp. v. Ryan*, 109 F.2d 690, 691 (6th Cir. 1940) (explaining that the Declaratory Judgment Act's "purpose is to provide a remedy to the challenger of a right, who otherwise could not have his challenge adjudicated until his adversary took the initiative"); *The Hipage Co. v. Access2Go, Inc.*, 589 F. Supp. 2d 602, 615 (E.D. Va. 2008) ("[D]eclaratory judgments are designed to declare rights so that parties can conform their conduct to avoid future litigation.").

Plaintiffs' underfunding claim could not be further from a proper declaratory judgment action. There is no "Damoclean threat" of Plaintiffs being sued because the Census Bureau is purportedly underfunded. *See Glenn*, 222 F. Supp. 3d at 36. Nor do Plaintiffs need any declaration from this Court before they engage in some arguably illegal census-related conduct. *See MedImmune*, 549 U.S. at 129 ("[P]utting the challenger to the choice between abandoning his rights or risking prosecution" is "a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." (citations omitted)). There is nothing for the Court to declare, or otherwise order, that would affect Plaintiffs' rights. *See NAACP*, 2019 WL 355743, at *22 ("No, the Court cannot order Congress to adequately fund the 2020 Census.").

This Court previous relied on *Franklin v. Massachusetts* and *Utah v. Evans* in finding that it could declare some amount of funding unconstitutional. In those cases, "the Supreme Court [ ] observed that it is 'substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination.'" *NAACP*, 2019 WL 355743, at *21 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)); *Utah v. Evans*, 526 U.S. 452, 463–64 (2002). True enough. But both *Franklin*—concerning the counting of Americans overseas—and *Utah*—concerning the

use of imputation—involved claims "that the Census Bureau followed legally improper counting methods." *Utah*, 526 U.S. at 460. And in both cases, the challengers sought an order directing "the Secretary of Commerce to recalculate the numbers and recertify the official result." *Id.* at 460–61. Were that to happen "before new Representatives are actually selected," then the "correction [of the official result] translates mechanically into a new apportionment of Representatives without further need for exercise of policy judgment." *Id.* at 462. So, understandably, the Supreme Court twice held that "[t]he Secretary certainly ha[d] an interest in defending her policy determinations concerning the census." *Franklin*, 505 U.S. at 803; *see Utah*, 526 U.S. at 463–64.

This case is a far cry from *Franklin* and *Utah*. Unlike those cases, only non-party Congress has an interest in defending its funding determinations. Indeed, dissenting in *Utah*, Justice Scalia disagreed with the majority's standing analysis but took solace knowing "[t]he Court no doubt realizes that it is not even conceivable that appellants could have standing if redress of their injuries hinged on action by Congress." *Utah*, 536 U.S. at 513 (Scalia, J., dissenting). Yet that is exactly what Plaintiffs request here: review of *Congress's* census-related funding decisions. *See* SAC ¶¶ 36–59.

More troubling still is the 2019 Appropriations Act's subsequent enactment. To the extent the Court could have legal authority to declare, during a hypothetical government shutdown, that "there are insufficient funds to conduct the 2020 Census within the time mandated by the Constitution," *NAACP*, 2019 WL 355743, at *22, that logic is now undermined by Congress's over $3 billion in "more permanent" 2020 Census appropriations. Defendants already had no interest in defending the funding choices of another Branch during a government shutdown, so they certainly have no interest in doing so when that Branch's appropriations conform to their needs. *See State of Washington v. Moniz*, 2015 WL 7575067, at *12 (E.D. Wash. Aug. 13, 2015) (noting that plaintiff, the State of Washington, "would not have the power to change [the Department of Energy]'s budget requests or obtain more money from Congress"). Simply put, a declaratory judgment against Defendants—who have no appropriations power—would contravene the Supreme Court's command that "the dispute be definite and concrete, touching the legal relations of parties having adverse legal interests,"

and that it "admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *MedImmune*, 549 U.S. at 127 (citations omitted). The Court is now positioned to issue an unconstitutional advisory opinion on just such "a hypothetical state of facts." *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" (citation omitted)).

The slope only gets more slippery from there. Allowing Plaintiffs to challenge Congress's duly enacted funding for the Census Bureau would mean that private citizens essentially have a freestanding constitutional right to some hypothetical level of funding for their favorite agency. This concept finds no support in the law. *See Farbstein v. Hanks*, 2006 WL 6628293, at *4 (E.D.N.Y. June 30, 2006) ("The Plaintiff does not cite any case law nor is this Court aware of any Constitutional right to [agency] funding or Congressional assistance in gaining [agency] funding."), *aff'd,* 331 F. App'x 890 (2d Cir. 2009). And Plaintiffs' position becomes no more viable simply because they are proceeding under the Enumeration Clause, which provides for a decennial census. The Constitution also provides for the Post Office, U.S. Cons. art. I, § 8, cl. 7, the Army, U.S. Cons. art. I, § 8, cl. 12, and the Navy, U.S. Cons. art. I, § 8, cl. 13. Can anyone inject federal courts into the appropriations process by simply suing the Post Office or the Department of Defense under the theory that these agencies are unconstitutionally underfunded? For that matter, can someone file suit and proceed to discovery, as here, by alleging that the *Supreme Court* is unconstitutionally underfunded? *See* U.S. Cons. art. III, § 1 (mandating a Supreme Court). Surely not. The Court should balk at such a usurpation of Congress's appropriations power. *See Md. Dep't of Human Res. v. U.S. Dep't of Agric.*, 976 F.2d 1462, 1481–82 (4th Cir. 1992) ("[A]ny exercise of a power granted by the Constitution to the judicial branch is limited by a valid reservation of congressional control over funds in the Treasury.").

Although this Court previously allowed Plaintiffs to proceed on their theory of unconstitutional underfunding, it should now dismiss that claim due to the 2019 Appropriations Act. The D.C. Circuit said it best: "the matter of whether or not an appropriation will be made rests wholly upon the determination of

Congress, and with that determination this court has nothing to do." *Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 590 n.16 (D.C. Cir. 1977) (quoting *Hetfield v. United States*, 78 Ct. Cl. 419, 422 (1933)).

C. If the Court has the power to issue a declaratory judgment, it should decline to do so.

Even if the Court could overlook the 2019 Appropriations Act to pass judgment on Congress's exercise of its appropriations power, the Court should decline the ill-advised opportunity to do so. The Declaratory Judgment Act "confer[s] on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *MedImmune*, 549 U.S. at 136. "A district court, when deciding whether to exercise its discretion, should determine whether hearing the case would serve the objectives for which the Declaratory Judgment Act was created." *Takeda Pharm. Co. v. Mylan Inc.*, 62 F. Supp. 3d 1115, 1126 (N.D. Cal. 2014). Put another way, courts should decline to issue declaratory judgments where the relief sought (i) will not serve a useful purpose in settling the legal relations in issue or (ii) will not afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Daimler Tr. v. Prestige Anapolis*, LLC, 2017 WL 3085680, at *11 (D. Md. July 20, 2017). Because Plaintiffs' underfunding claim does not "serve the objectives for which the Declaratory Judgment Act was created," the Court should decline any declaratory relief.

As noted above, "declaratory judgments are designed to declare rights so that parties can conform their conduct to avoid future litigation." *The Hipage Co. v. Access2Go, Inc.*, 589 F. Supp. 2d at 615. But there is no "Damoclean threat" of Plaintiffs being sued because the Census Bureau is purportedly underfunded. *See Glenn*, 222 F. Supp. 3d at 36. And Plaintiffs need no declaration from this Court before they engage in some arguably illegal census-related conduct. So without "a potential suit waiting in the wings," there is no reason for the Court to inject itself into a political dispute over the adequacy of census funding. *See United Capitol Ins. Co.*, 155 F.3d at 494 (noting that the Declaratory Judgment Act "allows [an] uncertain party to gain relief from the insecurity caused by a potential suit waiting in the wings"). No legal relations will be settled. No uncertainty relieved. No insecurity quelled. And no controversy resolved. *See Daimler Tr.*, 2017 WL 3085680, at *11. Plaintiffs' underfunding claim should therefore be dismissed.

## II. PLAINTIFFS' APA CLAIMS SHOULD BE DISMISSED

Plaintiffs' APA claims fail on every level: they do not challenge a cognizable "agency action," any supposed agency action is not "final," and review of any "final agency action" is nevertheless barred because such operational details are "committed to agency discretion by law." Worse still, Plaintiffs' APA claims are unripe. As the Court predicted less than three months ago, Plaintiffs have tried to replead their dismissed constitutional claims as APA claims, daring the Court to reject them again. It should.

### A. Plaintiffs do not challenge a cognizable "agency action".

The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. "The term 'action' as used in the APA is a term of art that does not include all conduct on the part of the government." *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019). Cognizable "agency action" under the APA must satisfy two key criteria: it must be "circumscribed and discrete," and it must "determine rights and obligations." *City of New York*, 913 F.3d at 431 (alterations omitted). That is because the APA is "a scheme allowing courts to review only those acts that are specific enough to avoid entangling the judiciary in programmatic oversight, clear enough to avoid substituting judicial judgments for those of the executive branch, and substantial enough to prevent an incursion into internal agency management." *Id.* at 432. Plaintiffs' SAC disregards each of these threshold requirements by attacking the Operational Plan, and their SAC should be dismissed accordingly.

#### 1. Plaintiffs improperly level a broad, programmatic attack on the design of the 2020 Census.

"When challenging agency action—whether it be a particular action or a failure to act altogether—the plaintiff must [ ] identify specific and discrete governmental conduct, rather than launch a 'broad programmatic attack' on the government's operations." *City of New York*, 913 F.3d at 431. As the Fourth Circuit recently explained, "[c]ourts are well-suited to reviewing specific agency decisions, such as rulemakings, orders, or denials," but they are "woefully ill-suited [ ] to adjudicate generalized grievances asking [courts] to

improve an agency's performance or operations." *Id.* In such cases, "courts would be forced either to enter a disfavored 'obey the law' injunction, or to engage in day-to-day oversight of the executive's administrative practices. Both alternatives are foreclosed by the APA, and rightly so." *Id.* (citations omitted).

Plaintiffs' improper, programmatic attack on the design of the 2020 Census could not be more obvious. By Plaintiffs' own account, "[t]he government's preparations for the 2020 Census [ ] are so conspicuously deficient as to extend far beyond the failures of past censuses." SAC at 2. And while the Court previously dismissed their programmatic claims under the Enumeration Clause (except for underfunding), Plaintiffs now try to smuggle these same claims into their SAC under the guise of the APA. *See* SAC ¶ 68 ("Individually and collectively, these decisions amount to an abandonment of the Census Bureau's designated goal of reaching Hard-to-Count communities in the 2020 Census."); ¶¶ 209–14 (alleging that various aspects of the census's design "individually and cumulatively, constitute agency action that is 'contrary to constitutional right' because it deprives Plaintiffs of their constitutional right to a fair and accurate census in 2020"). But the only way the Court could attempt to determine whether census design features are "contrary to constitutional right," 5 U.S.C. § 706(2)(B), is to examine the Operational Plan "cumulatively." *See* SAC ¶ 212. This claim, then, is nothing more than a transparent attempt to challenge many of the logistical decisions in the 10-year lead up to the census—across two separate Presidential Administrations, at least four separate Census Directors or acting Directors, and at least five separate sessions of Congress—that culminate in Version 4.0 of the Operational Plan. The APA straightforwardly bars such a "'broad programmatic attack' on the government's operations." *City of New York*, 913 F.3d at 431.

The Fourth Circuit precluded a similar scenario several months ago, dismissing an APA challenge to the Department of Defense's performance of statutory obligations. *City of New York*, 913 F.3d at 432–34. Under the NICS Improvement Amendments Act of 2007, DOD and other agencies must report certain information to the National Instant Criminal Background Check System, a database used for firearms-related background checks. *Id.* at 427–29. The plaintiffs—three cities that use the database—sued DOD, arguing that it routinely failed to comply with its reporting obligations. *Id.* at 429–30. The Fourth Circuit

unequivocally rejected this challenge, holding that the plaintiffs were merely asking the court to "supervise an agency's compliance with the broad statutory mandate of the NIAA," rather than discrete agency actions. *Id.* at 433 (citations omitted). Importantly, the court was unpersuaded by the plaintiffs' argument that they were challenging "an aggregation of many small claims, each one seeking to compel the individual reports required by the NIAA." *Id.* It explained that "any limit on programmatic assessment would be rendered meaningless if such an argument prevailed" because "[a]ll governmental programs are the aggregation of individual decisions, many of which are required by law. The APA ensures that it is the individual decisions that are assessed as agency action, rather than the whole administrative apparatus." *Id.*

As in *City of New York*, Plaintiffs improperly seek review of broad constitutional and statutory mandates by advancing the same "aggregation" argument recently rejected by the Fourth Circuit. In both cases, "the requested remedy tells the real story." *Id.* at 434. Plaintiffs seek "an injunction that requires Defendants to propose and implement, subject to this Court's approval and monitoring, a plan to ensure that hard-to-count populations will be actually enumerated in the decennial census," as well as the APA equivalent, which is "an injunction that prohibits Defendants Bureau of the Census and U.S. Department of Commerce from re-enacting the unlawful agency actions." SAC at 40; *see NAACP*, 2019 WL 355743, at *3 (recognizing that, "as relief, the Plaintiffs request nothing short of this Court injecting itself directly into the final planning of the Census to superintend the process"). The *City of New York* court saw strikingly similar requested relief: the plaintiffs there requested "immediate injunctive relief to compel Defendants to repair this broken system and to cure once and for all the potentially deadly gaps in the NCIC database." *City of New York*, 913 F.3d at 434. The Fourth Circuit concluded that this relief equated to an inappropriate, programmatic attack, and it barred the plaintiffs' APA claim accordingly. This Court should do the same.

Plaintiffs simply want "better" compliance with broad constitutional and statutory obligations to conduct a decennial census. *See Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013) (recognizing that "[t]he term 'action' as used in the APA is a term of art that does not include all conduct such as, for example, constructing a building, *operating a program*, or performing a contract" (emphasis

added)). But "[i]f a party could seek review any time the federal government's alleged non-compliance made a government program less useful than it might otherwise be, the possibilities for litigation would be endless." *City of New York*, 913 F.3d at 435. For example, "a recipient of the mail could sue the Postal Service for improper employment practices, alleging that it caused inefficient package deliveries," or "[a] disgruntled grant applicant could sue the National Institutes of Health for violations of financial management laws, arguing that with more money in its coffers more grants could be issued." *Id.* "The APA, however, is a creature of Congress; the legislative branch has not put it to this sort of use," and there are "no workable limits" for Plaintiffs' theory. *Id.*

**2. The design of the 2020 Census does not determine any rights or obligations.**

More fundamentally, the Court should dismiss Plaintiffs' APA claims because the Operational Plan does not "determine rights and obligations." *City of New York*, 913 F.3d at 431. APA claims are limited in this manner because it "ensures that judicial review does not reach into the internal workings of the government, and is instead properly directed at the effect that agency conduct has on private parties." *Id.* "To meet this requirement, a party must demonstrate that the challenged act had an immediate and practical impact, or altered the legal regime in which it operates." *Id.* (citations omitted). "It is not enough for plaintiffs to simply identify a governmental action that ultimately affected them through the 'independent responses and choices of third parties,' or mere 'coercive pressures.'" *Id.* (citations omitted). The Operational Plan, and any discrete operations described therein, fail this test.[6]

[6] To the extent Plaintiffs' APA claims are targeted at the Census Bureau's *failure* to act, *see, e.g.*, SAC ¶ 138 (arguing against the Census Bureau's decisions to "cancel some field tests and eliminate major elements of other field tests for the 2020 Census"), these claims are also unavailing. Under the APA, "actions that can be compelled are only those that have been 'unlawfully withheld or unreasonably delayed,'" which "requires that the plaintiff identify action that is 'legally required.'" *City of New York*, 913 F.3d at 432 (citing 5 U.S.C. § 706(1) and *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004)). Plaintiffs can point to no legal requirement that the Census Bureau conduct certain field tests, hire a specific number of enumerators, open a specific number of Census Bureau field offices, or take any other action Plaintiffs would prefer. *See* SAC ¶¶ 66–175. Nor do Plaintiffs identify any "discrete" agency actions properly reviewable under § 706(1).

Indeed, Plaintiffs' APA claims are the paradigmatic example of improperly "reach[ing] into the internal workings of the government." *Id.* The Operational Plan is simply the Census Bureau's detailed strategy for enumerating 330 million people across 3.8 million square miles; it does not change or impose any legal requirements on private parties. *See* Operational Plan at 1 ("The U.S. Census Bureau's 2020 Census Operational Plan documents the design for conducting the 2020 Census."). United States residents are required to truthfully answer the census regardless of the enumerators employed or field offices opened. *See* 13 U.S.C. § 221; *see* SAC ¶ 67 (disliking the purported "plan to hire an unreasonably small number of enumerators" and the "drastic reduction in the number of Census Bureau field offices"). The Operational Plan therefore has no impact whatsoever on private parties, let alone an "immediate and practical" one. *See City of New York*, 913 F.3d at 431.

The Court need look no further than the other recent challenges to the 2020 Census to understand this point. In those cases, plaintiffs challenged the Secretary's decision to include a citizenship question on the 2020 Census, arguing that it violated the Constitution and the APA. *See, e.g.*, *California v. Ross*, 358 F. Supp. 3d 965 (N.D. Cal. 2019). Moving to dismiss plaintiffs' APA claims, the government acknowledged that the Secretary's decision was "final agency action." *See, e.g.*, *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 627 (S.D.N.Y. 2019) ("There is no dispute th[at] Secretary Ross's decision constitutes 'final agency action' reviewable under the APA."). Why? Because the Secretary's decision not only consummated the agency's decisionmaking process, but it also imposed an obligation on private parties—*i.e.*, United States residents—to truthfully answer the citizenship question in 2020. *See* 13 U.S.C. § 221. Here, in contrast, none of the Census Bureau's preparations or operations obligate private parties to do anything they were not otherwise required to do.

It also cannot be said that the Operational Plan "alter[s] the legal regime in which it operates." *City of New York*, 913 F.3d at 431. It neither prohibits the Census Bureau from making further adjustments to census operations, nor is anyone exposed to civil or criminal penalties for failing to follow it. *Cf. Bennett v. Spear*, 520 U.S. 154, 178 (1997) (holding that the legal regime is altered by one agency's determination when the action

agency would expose itself to civil and criminal penalties if it disregarded that determination); *see Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002) (holding that an EPA Report did not alter the legal regime because "no statutory scheme triggers potential civil or criminal penalties for failing to adhere to the Report's recommendations"). Unlike census questions, the Operational Plan in no way "determine[s] rights and obligations" for Plaintiffs, the Census Bureau, or anyone else. *See City of New York*, 913 F.3d at 431.

The Supreme Court's decision in *Franklin v. Massachusetts* alone resolves this case. 505 U.S. 788 (1992). There, plaintiffs challenged the Secretary's method of counting federal employees serving overseas, arguing that the Secretary's tabulation of census results was therefore arbitrary and capricious under the APA. *Id.* at 796. Strikingly, the Supreme Court held that the Secretary's final report to the President conveying the census results did not constitute "final agency action" because "the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President." *Id.* at 797. So if the Secretary's tabulation of final census results is not "final agency action" under the APA, then certainly the Census Bureau's plan for *executing* the census—almost two years prior to the finalized results—cannot constitute "final agency action" either.

Fourth Circuit law reinforces this point, consistently rejecting APA claims like those at issue here. *City of New York*, 913 F.3d at 434–35 (holding that the Department of Defense's compliance with statutory requirements was not "agency action" under the APA because it did not "in any way determine [the plaintiffs'] rights and obligations"); *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 188–93 (4th Cir. 2013) (finding no "agency action" where plaintiffs "commenced [the] action to challenge the adequacy of [a project's] performance and to require the [Army Corps of Engineers] to do what it had undertaken to do when approving the project," which was not a "determination of rights and obligations"); G*olden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 427–28 (4th Cir. 2010) (discussed below); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 460 (4th Cir. 2004) (holding that the Patent and Trademark Office's advertising campaign was not "final agency action" because it "was not the consummation of any decisionmaking process that determined rights or obligations or from which legal consequences flowed"); *Flue-Cured Tobacco Coop.*

*Stabilization Corp. v. EPA*, 313 F.3d 852, 861 (4th Cir. 2002) (holding that publication of an EPA report that classified environmental tobacco smoke as a potentially harmful human carcinogen was not an "agency action" reviewable under the APA).

In G*olden & Zimmerman, LLC v. Domenech*, for example, the plaintiffs challenged the "Federal Firearms Regulations Reference Guide 2005, which was published by the Bureau of Alcohol, Tobacco, Firearms and Explosives ('ATF') to provide information designed to help licensees comply with all of the laws and regulations governing the manufacture, importation, and distribution of firearms and ammunition." 599 F.3d at 427–28 (alterations omitted). The court rejected this challenge because, among other reasons, it did not determine any rights or obligations. *Id.* at 432. Although the Reference Guide "inform[ed] the regulated community of what violates the law," it did "not itself determine the law or the consequences of not following it." *Id.* at 432–33. Notably, the court explained, "if the ATF had never published the Reference Guide . . . the ATF would still have had the authority to prosecute licensees for engaging in the conduct described in [it] because legal consequences do not emanate from [the Reference Guide] but from the Gun Control Act and its implementing regulations." *Id.* at 433. The Operational Plan here is even further removed from "determin[ing] the law" than the Reference Guide in G*olden & Zimmerman*: it provides no information to "the regulated community of what violates the law," but merely functions as an internal operating guide for Census Bureau employees. Surely, if a Reference Guide explaining the law to regulated parties does not "determine rights and obligations," then neither does the Census Bureau's design plan. And, like the Reference Guide in G*olden & Zimmerman*, the Census Bureau could implement the same census design *without* the Operational Plan; its ability to conduct the decennial census derives from the Constitution and the Census Act, not an internal guidance document.

A parallel example neatly illustrates why Plaintiffs' efforts are misguided. As the Fourth Circuit explained, the APA term "agency action" is "similar in concept to the meaning of 'final decision' as used in describing the appealability of court orders." *Vill. of Bald Head Island*, 714 F.3d at 193 (citing 28 U.S.C. § 1291). But the Census Bureau's Operational Plan is no more "agency action" than the Court's discovery plan is a

"final decision." *See Adapt of Phila. v. Phila. Hous. Auth.*, 433 F.3d 353, 360 (3d Cir. 2006) ("Discovery orders are not final decisions within the meaning of 28 U.S.C. § 1291."); *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 119 (4th Cir. 1994) (noting that "[d]iscovery orders generally do not meet" the finality requirement of 28 U.S.C. § 1291). Both documents explain how and when information will be shared, but neither settles the rights or obligations of anyone.

At bottom, Plaintiffs simply wish that the Census Bureau—while operating under various constraints, *see* SAC ¶¶ 36–59 (alleging underfunding)—would run the 2020 Census differently. But only decisions that determine rights and obligations are actionable; the APA "does not provide judicial review for everything done by an administrative agency." *Invention Submission Corp.*, 357 F.3d at 459 (citations omitted). To hold otherwise would mean that Congress intended "to create private rights of actions to challenge the inevitable objectionable impressions created whenever controversial research by a federal agency is published." *Flue-Cured Tobacco*, 313 F.3d at 861. That is not the law. "Such policy statements," like the Operational Plan, "are properly challenged through the political process and not the courts." *Id.*

B. Plaintiffs do not challenge any action that is "final".

Even if Plaintiffs challenged some "agency action," it is not "final" agency action. To be considered "final" under the APA, an agency decision "must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016); *Sackett v. EPA*, 566 U.S. 120, 127 (2012) (explaining that an agency decision is "final" where it is "not subject to further agency review"); *id.* at 131 (Ginsburg, J., concurring) (noting "final" agency action where the agency has "ruled definitively"); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (remarking that agency action is "final" when the agency "rendered its last word on the matter in question"). The Supreme Court's decision in *Franklin v. Massachusetts* again resolves this issue. 505 U.S. at 796–801. As discussed above, if the Secretary's tabulation of final census results is not "final agency action" under the APA, then certainly the Census Bureau's plan for *executing* the census cannot be "final agency

action." *Id.* at 797 ("For potential litigants, [ ] the 'decennial census' still presents a moving target, even after the Secretary reports to the President.").

In any event, the Operational Plan itself debunks Plaintiffs' theory that it "mark[s] the consummation of the agency's decisionmaking process." *Hawkes*, 136 S. Ct. at 1813. As the Operational Plan makes clear up front, "*[m]ost*," but not all, "design decisions have been made and are reflected in this document." Operational Plan at 1 (emphasis added). It then expressly says that "[a]djustments to the design may be required based on analysis and final tests conducted in 2018, in particular the 2018 End-to-End Census Test." *Id.* It could hardly be said that the Census Bureau has "ruled definitively" on the 2020 Census design when the Operational Plan acknowledges that only "*[m]ost* design decisions have been made" and further "[a]djustments to the design may be required" before the census. Has the Army Corps of Engineers "ruled definitely" when it completed *most* of its analysis concerning whether a parcel contains "waters of the United States"? *See Hawkes*, 136 S. Ct. at 1812. How about if the EPA issued *most* of the procedures for implementing national ambient air quality standards? *See Whitman*, 531 U.S. at 478. Certainly not. In none of these scenarios has the agency "rendered its last word on the matter in question." *Id.*

This reality is confirmed by the remainder of the 220-page Operational Plan. *See, e.g.*, Operational Plan at 31 (noting continued "testing to ensure scalability occurring in 2019"); *id.* at 51 (noting further testing "[f]or the period between the 2018 End-to-End Census Test and the 2020 Census," including "a test in the summer of 2019 to better plan for the Nonresponse Followup Operation and communications strategies for the 2020 Census"); *id.* at 102 (explaining further design issues to be resolved for the Integrated Partnership and Communications program); *id.* at 175 ("After key planning and development milestones are completed, stakeholders may disagree with the planned innovations behind the 2020 Census and propose modifications to the design, possibly resulting in late operational design changes."). Even this small sampling of the Operational Plan demonstrates that it is not "final" because it is quite obviously "subject to further agency review." *See Sackett*, 566 U.S. at 127.

As this Court presciently recognized, "the Secretary is in the process of making his decisions about how to conduct the 2020 census, and therefore there is no final agency action to examine." *NAACP*, 2019 WL 355743, at *11. The Court was correct then, and dismissal of Plaintiffs' APA claims is warranted now.

C. Plaintiffs' APA claims are "committed to agency discretion by law".

Even if Plaintiffs had appropriately challenged some "final agency action" in the Operational Plan, their APA claims are nonetheless barred because they are committed to agency discretion by law. 5 U.S.C. § 701(a)(2). Agency action is so barred where "'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Pres. Overton Park, Inc., v. Volpe*, 401 U.S. 402, 410 (1971) (internal citation omitted). Although this is "a 'very narrow exception' to the [APA] presumption favoring judicial review, the Supreme Court and other courts have found numerous administrative decisions unreviewable under this standard." *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 317 (4th Cir. 2008) (citation omitted). This bar applies, moreover, even when "the agency gives a 'reviewable' reason for otherwise unreviewable action." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987).

The Census Act—the relevant statute here—could not provide less guidance on the mechanics of conducting a decennial census. Aside from reporting deadlines, *see, e.g.*, 13 U.S.C. § 141 (reporting final census results to the President); *id.* § 141(f) (congressional reporting deadlines for subjects and questions), the only command of the Census Act is for the Secretary of Commerce to "take a decennial census of population . . . in such form and content as he may determine," *id.* § 141(a). The Census Act is silent about the minute details of the census that Plaintiffs challenge here. It says nothing about the use of online questionnaires over paper questionnaires. It says nothing about the number of area census offices. It says nothing about the number of field tests. It says nothing about the number of enumerators. It says nothing about the use of in-field address canvassing over in-office address canvassing. It says nothing about staffing of the partnership program. And it gives no guidelines for determining any of the foregoing. Indeed, it is difficult to imagine a statute that could more easily meet the test of being "drawn in such broad terms that . . . there is no law to apply.'" *Overton Park*, 401 U.S. at 410.

Courts agree. As the Seventh Circuit explained, "[i]t might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census[.] . . . There is nothing of that sort, and the inference is that these enactments do not create justiciable rights." *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417 (7th Cir. 1992). In fact, the court addressed Plaintiffs' design-of-the-census allegations, explaining that the census statutes simply "specify a timetable, and a procedure for translating fractional into whole seats" but "they say nothing about *how to conduct a census* or what to do about undercounts." *Id.* (emphasis added); *see id.* at 1419 (Ripple, J., concurring) (stating that the census decision at issue was "committed to agency discretion"). Even district courts that found census-related issues reviewable under the APA—like the accuracy of the final census count—have recognized that the mechanics of actually conducting the census are committed to agency discretion.[7] *See City of Willacoochee v. Baldrige*, 556 F. Supp. 551, 555 (S.D. Ga. 1983) (noting that the accuracy of the count is not committed to agency discretion, but that "the grant of discretion in 13 U.S.C. § 141(a) appears to encompass the methods used by the defendants to compile the census"); C*ity of Phila. v. Klutznick,* 503 F. Supp. 663, 678 (E.D. Pa. 1980) (dismissing a claim that the Census Bureau failed to hire skilled enumerators as committed to agency discretion because "[r]eview of this allegation would involve the [c]ourt in second-guessing the managerial decisions of the Bureau").

The Court should follow these cases and hold that Plaintiffs' APA claims are unreviewable because they are "committed to agency discretion by law." *See NAACP*, 2019 WL 355743, at *15 (this Court explaining that there has never been a decision "where a lawsuit such as this one has resulted in the sweeping relief that [Plaintiffs] seek here," which "speaks volumes about the authority (not to mention ability) of courts to second-guess the Secretary's planning of the decennial census as it is taking place, or the standards under which they might attempt to do so.").

[7] Defendants note that these and other lower-court decisions predated the Supreme Court's ruling in *Franklin*, where it held that the Secretary's tabulation of final census results is not "final agency action" under the APA. 505 U.S. at 796–801.

D. As this Court predicted, Plaintiffs' APA claims are not ripe for adjudication.

In their FAC, Plaintiffs took issue with certain "design flaws": the cancellation of field tests, the use of online census questionnaires, the danger of cybersecurity threats, the "significant reduction in on-the-ground presence and field workers," and the reliance on state administrative databases. *See* FAC ¶¶ 44, 67–94, 120. Less than three months ago, this Court dismissed as unripe nearly all of Plaintiffs' Enumeration Clause claims—including these alleged design flaws—and foretold that, "even if they were to seek amendment of the complaint to assert an APA challenge, it is hard to imagine that it would be ripe at the present time, since the Secretary is in the process of making his decisions about how to conduct the 2020 census, and therefore there is no final agency action to examine." *NAACP*, 2019 WL 355743, at *11. The SAC confirms this prophesy. Plaintiffs have now dropped their complaint about state administrative databases, but have reasserted or repackaged the other allegations and added some new ones. *See* SAC ¶¶ 86–105 (disliking the use of online census questionnaires and potential for cybersecurity threats in the context of hiring fewer enumerators); ¶¶ 114–29 (quibbling with the number of planned Census Bureau field offices); ¶¶ 130–39 (arguing against prior cancellation of field tests); ¶¶ 140–55 (taking issue with the planned method of address canvassing); ¶¶ 156–67 (disapproving of the Census Bureau's planned method to identify vacant and nonexistent housing units); ¶¶ 168–75 (disliking the staffing of the partnership program). The Court should follow its prior ruling and dismiss these APA claims.

The ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732–33 (1998). "The ripeness inquiry has three elements: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *NAACP*, 2019 WL 355743, at *13. All three elements counsel dismissal.

**1. Delayed review would cause no hardship to Plaintiffs.**

As the Court previously explained, "the immediacy of Defendants' actions is not tantamount to a certainty of injury or hardship to Plaintiffs in the absence of Court intervention at this time," and Plaintiffs "have not shown that delayed resolution of the issues would foreclose any relief from their alleged injury." *NAACP*, 2019 WL 355743, at *14 (citations omitted). Indeed, "the nearly universal characteristic shared by [ ] challenges to previous censuses is that they were brought *after* the Census Bureau had made its final determinations regarding how the decennial census should be taken, and *after* the census already had been taken and preliminary population counts announced." *Id.* at *14 (emphasis added). The Court's prior reasoning is equally applicable now.

Nothing has changed since the Court dismissed the vast majority of Plaintiffs' FAC less than three months ago. As with the design flaws alleged there, the time "remaining before the start of the 2020 Census will put to the test the new procedures the Secretary has planned to adopt," and "the conduct of the Census itself will result in a preliminary population count that will determine whether the differential undercount that the Plaintiffs fear will adversely affect their federal and local representation and future federal funding." *Id.* at *15. So, in the unlikely event that "the Bureau's finalized plans for the 2020 Census prove to be as deficient as Plaintiffs expect," the "Court will be able to offer" relief at that point. *Id.* at *22. Plaintiffs would suffer no hardship if the Court addressed their challenges later.

**2. Judicial intervention would inappropriately, and grievously, interfere with further administrative action.**

In stark contrast to the lack of hardship for Plaintiffs, judicial intervention would cause grave disruption and hardship for the Census Bureau. The Court already explained that "if the Court were to interject itself into the Bureau's process during the critical final preparations, requiring—as Plaintiffs request—its monitoring and approval of the plans along the way, it is hard to imagine that this oversight would not hinder the process as opposed to facilitate it." *Id.* at *15. Defendants would echo the Court's concerns: we are unaware of a decision "where a lawsuit such as this one has resulted in the sweeping relief that [Plaintiffs]

seek here," which "speaks volumes about the authority (not to mention ability) of courts to second-guess the Secretary's planning of the decennial census as it is taking place, or the standards under which they might attempt to do so." *Id.*

To play this out: Defendants' motion will be fully briefed by mid-May 2019. In Plaintiffs' ideal scenario, the Court would move quickly to deny the motion. Defendants would then begin compiling the voluminous administrative record—an arduous task since the Operational Plan is the ten-year culmination of extensive planning—while conducting discovery on Plaintiffs' underfunding claim (if necessary).[8] The parties would then fully brief and argue cross-motions for summary judgment. In Defendants' best case scenario, we would ultimately prevail on this meritless case after months of litigation had drained critical resources from, and interfered with, the Census Bureau's constitutional task. In Defendants' worst case scenario, Plaintiffs ultimately prevail and obtain their requested APA relief to "set aside" the Operational Plan and have the Court "[e]nter an injunction that prohibits Defendants . . . from re-enacting the unlawful agency actions." SAC at 40. So, mere months before the once-in-a-decade, person-by-person headcount of the United States, the Census Bureau must throw away its ten years of planning, go back to the drawing board, and create all new procedures for, say, determining vacant housing units or opening many more field offices. *See* SAC ¶¶ 114–29; ¶¶ 156–67.

If Plaintiffs are looking for a way to doom the 2020 Census, this lawsuit is the answer. The Court should save them from themselves and, at the very least, dismiss this case as unripe. Otherwise, judicial intervention would imperil the Census Bureau's constitutional duty.

**3. The Court would benefit from further factual development.**

The Court would also benefit from further real-world factual development. As discussed above, the 2020 Census operations are not set in stone. In fact, important refinements will be made throughout the next year, including those related to the Operational Plan's challenged aspects. *Compare* SAC ¶¶ 66–139, 156–75

[8] Defendants would rightly contest any discovery on Plaintiffs' APA claims. If Plaintiffs sought such discovery, this litigation would only be further drawn out and cause greater burden for the Census Bureau.

(complaining about Nonresponse Followup Operations and communications strategies) *with* Operational Plan at 51 (noting further testing "[f]or the period between the 2018 End-to-End Census Test and the 2020 Census," including "a test in the summer of 2019 to better plan for the Nonresponse Followup Operation and communications strategies for the 2020 Census"). As the Court found, the time "remaining before the start of the 2020 Census will put to the test the new procedures the Secretary has planned to adopt." *NAACP*, 2019 WL 355743, at *15. The Court should allow for this and other factual development leading up to the 2020 Census because the Court can order relief later if "the Bureau's finalized plans for the 2020 Census prove to be as deficient as Plaintiffs expect." *Id.* at *22. At the very least, then, the Court should dismiss Plaintiffs' APA claims as unripe.

## CONCLUSION

This case is a study in misguided litigation. Plaintiffs wanted more funding for the 2020 Census, so they sued instead of lobbying Congress. Plaintiffs wanted design changes, so they sued instead of expressing concerns to the Census Bureau. Now they are conducting intrusive discovery on their mooted funding claim and they have added APA claims that reach internal workings of the Census Bureau with no legal impact on anyone. It is notable that Plaintiffs continue to pursue this baseless case at the expense of the very undertaking they purportedly wish to improve.

The Census Bureau has spent over 10 years researching, testing, evaluating, refining, and planning in an effort to count everyone once, only once, and in the right place. Operational Plan at 201. For the reasons set forth above, the Court should reject Plaintiffs' attempt to undermine the most critical period for the Census Bureau's most critical undertaking—the decennial census.

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