IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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, vs. BUREAU OF THE CENSUS; STEVEN DILLINGHAM, Director, Bureau of the Census; WILBUR ROSS, Secretary of Commerce; and THE UNITED STATES, Defendants.	)	Case No. 8:18-cv-00891-PWG

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

INTRODUCTION

Three months ago, this Court denied Defendants' first motion to dismiss Plaintiffs' claim that the Bureau of the Census (the "Bureau") lacks sufficient funds to carry out the 2020 Census in accord with Defendants' obligations under the Enumeration Clause of the U.S. Constitution. (ECF 64, at 55.) Since then, the reasons for letting this constitutional claim proceed have only grown stronger, as the Bureau barrels toward the 2020 Census without a realistic assessment of the funding it needs to meet constitutional standards. Meanwhile, the Bureau has finalized design choices that will cause a severe differential undercount if they are not set aside under the Administrative Procedure Act ("APA"). The Court should reject Defendants' new attempt to deprive Plaintiffs of a meaningful opportunity to vindicate their right to a fair and accurate census and proceed to adjudicate these statutory claims.

The time for correcting deficiencies in the 2020 Census is running out. On February 1, 2019, the Bureau released its final operational plan (the "FOP") for the census. In that plan, the Bureau made clear that certain critical decisions are now final, including decisions to hire far fewer enumerators than in the 2010 Census; to open *half* the field offices of the 2010 Census; to reduce significantly the community outreach geared toward Hard-to-Count communities; to replace crucial address-listing block visits with cost-saving office work; and to give up quickly on counting some households based on unreliable administrative records. The Bureau also confirmed that its previously postponed field tests are cancelled, meaning that its drastic rollbacks are based on little data and will not be subject to reversal based on such field tests. Plaintiffs' Second Amended Complaint challenges these final decisions as arbitrary, irrational, and contrary to law.

In their new motion to dismiss, now less than a year from the census, Defendants seek to evade any legal action by arguing that no Bureau decision will be truly final until the census has come and gone. But with every day that goes by, these decisions irreversibly undermine the proven

strategies to count the Hard-to-Count communities Plaintiffs represent. Because these choices affect the enumeration itself, rather than simply post-census reapportionment and redistricting, they cannot be remedied after the census. These decisions require judicial review now.

First, the Court should deny Defendants' motion to dismiss the APA claims. Defendants bend over backwards to argue that what the Bureau calls its "final operational plan" is not final agency action, and misconstrue Plaintiffs' claims as aimed at every ministerial aspect of the 220-page document. These arguments fail. Plaintiffs' APA claims target discrete, final, and critical agency actions as irrational and irreconcilable with Defendants' obligations to reach Hard-to-Count communities. Similarly, the Court should join the overwhelming majority of courts to decide the issue and hold that Defendants' census-related conduct is not committed to agency discretion under the APA.

Second, the Court should reject Defendants' demand to reconsider its January 29 decision on the funding claim. Defendants contend that because the 2019 Appropriations Act ended the government shutdown, the funding claim is "moot." But when the Court issued its decision and allowed discovery to proceed, it did not predicate the viability of the funding claim on an endless government shutdown and, in fact, ordered such discovery *after* the shutdown had ended. The Court also already addressed and rejected Defendants' arguments about declaratory judgments. (ECF 64 at 50.) Nothing about the funding claim has changed, except its ever-growing urgency.

BACKGROUND

I. Procedural History

On March 28, 2018, Plaintiffs brought this action asserting a single constitutional claim—a violation by Defendants of Article I, Section 2 of the Constitution's requirement to conduct an "actual Enumeration" of all residents every ten years. Citing the urgency of the approaching 2020

Census, Plaintiffs immediately sought to move the case forward, requesting narrow initial discovery and an expedited briefing schedule on Defendants' first motion to dismiss. (ECF 19, 42.) In July 2018, Defendants moved to dismiss the action in its entirety. (ECF 43.)

On January 29, 2019, this Court granted in part and denied in part the motion to dismiss, holding that, for all claims, Plaintiffs sufficiently alleged standing and a justiciable non-political question, and had stated a claim for relief. The Court further found that Plaintiffs' claim regarding underfunding of the census was ripe because the Court could "issue a declaratory judgment that Congress has failed to appropriate sufficient funds for the Secretary to perform the constitutionally required 'Actual Enumeration' of the population as of April 1, 2020." (ECF 64, at 34-35.)

The Court dismissed Plaintiffs' "claim for injunctive relief with respect to the methods and means of conducting the 2020 Census" as unripe, "at least at this time." (ECF 64, at 6.) The Court stated that, assuming Congress appropriates sufficient funding, "it is inevitable that many of the alleged deficiencies in staffing, census design, and testing will be addressed and, where deficient, corrected." (*Id.* at 32.) The Court also explained that it would benefit from further factual development, including the potentially forthcoming results of tests that the Defendants at that point had "postponed." (*Id.* at 33.)

The Court then approved Plaintiffs' requests for targeted discovery on the underfunding claim (ECF 82), well after the government's shutdown had ended. In a discovery conference, the Court identified Plaintiffs' two objectives as "clearly relevant" to the underfunding claim:

> First, . . . the budget request and assumptions in the Census Bureau with regard to their estimates of the cost to conduct the 2020 census. And, secondly, the extent to which insufficient funding, if that is, in fact, what has happened, would impose limits on the Bureau's ability to perform an actual enumeration as required by the Constitution.

Tr. of Mar. 6, 2019 Hrg, at 4–5. On March 26, 2019, the Court set a schedule for Plaintiffs to pursue fact and expert discovery under those theories. (ECF 89.)

II. Defendants' Final Operational Plan Confirms Drastic and Irrational Rollbacks

On February 1, 2019, the Bureau issued its plans for conducting the 2020 Census with the release of Version 4.0 of the 2020 Census Operational Plan.[1] Defendants object to calling it the Final Operational Plan, (ECF 95, at 4 n.1), but this is what the Bureau stated, with the release of the plan: "This is the final operational plan."[2] The FOP "documents the design" for conducting the 2020 Census, and "covers all operations to execute the 2020 Census, starting with pre-census address and geographic updates, and ending once census data products are disseminated and coverage and quality are measured."[3]

Plaintiffs do not challenge this detailed plan in its entirety. Rather, Plaintiffs challenge as arbitrary, irrational, and contrary to law certain discrete decisions made final in the plan. SAC ¶ 67. On their own, and together, these challenged decisions amount to an abandonment of Defendants' responsibility to reach Hard-to-Count communities such as those represented by the NAACP and those that make up much of Prince George's County.

A. Defendants' Irrational Decision to Understaff the 2020 Census

A central task of every decennial census is Nonresponse Follow-up ("NRFU"), in which the Bureau follows up with the millions of households that do not self-respond to the initial questionnaires. The key staff members carrying out this work are enumerators, the individuals who physically visit these households.

---

[1] 2020 Census Operational Plan: A New Design for the 21st Century (Version 4.0), U.S. CENSUS BUREAU (December 2018), https://www2.census.gov/programs-surveys/decennial/2020/programmanagement/planning-docs/2020-oper-plan4.pdf. Although dated December 2018, the Plan was made public for the first time on February 1, 2019.

[2] 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).

[3] *Id.*

The FOP announces in no uncertain terms that one of the "[k]ey [i]nnovations" for the 2020 Census is a redesigned field operation that will involve a "[r]educed number" of enumerators. FOP at 30; SAC ¶ 70. The FOP thus puts the stamp of finality on the Bureau's long-contemplated plan to hire a dramatically smaller enumerator staff for 2020 than it did for 2010. And, as recent Bureau documents from both before and after the release of the FOP confirm,[4] this reduction will be radical indeed: Defendants have decided to hire about 400,000 enumerators—a decrease of two hundred thousand from what was planned for the 2010 Census, despite an approximate 6 percent increase in population from 2010 to 2020. SAC ¶ 71. By drastically reducing the number of people conducting NRFU operations, Defendants will be far less able to reach Hard-to-Count communities, and will increase the differential undercount, harming Plaintiffs.

In the FOP, Defendants appear to justify such a severe reduction by suggesting there will be more productive workers and a reduced NRFU workload. *Id.* ¶ 74. But Plaintiffs are prepared to prove that these justifications are irrational. With significantly reduced field testing, Defendants do not have reliable data from which to draw conclusions about productivity. The FOP confirms that Defendants' postponed field tests from 2017 and 2018 and that they will not be rescheduled. In the few field tests they did conduct, Defendants removed key elements, such as the Census Coverage Measurement and the enumeration of transitory individuals. *Id.* ¶¶ 130–36. Defendants' field testing cancellations, on their own, will limit their ability to reach Hard-to-Count communities. *Id.* ¶¶ 137–39. And these cancellations are particularly problematic given Defendants' reliance on a purported reduced NRFU workload for their staffing cuts.

[4] *See U.S. Census Bureau's Budget, Fiscal Year 2020* at CEN-3 (March 2019), https://www2.census.gov/about/budget/FY-2020-Congressional-Budget-Submission.pdf; *Innovations and Improvements for the 2020 Census* at 2 (Jan. 7, 2019), https://drive.google.com/drive/folders/11-P22hZNQBD1m1S2dvlZxURkjFgVPTY6.

Moreover, rather than supporting a reduced NRFU workload, the available evidence indicates that enumerators will have ***more*** households to cover because the self-response rates will be significantly lower in 2020 than in 2010. As the SAC alleges, the recently published results of the 2020 Census Barriers, Attitudes and Motivators Study ("CBAMS") revealed that only 67 percent of respondents were "extremely likely" or "very likely" to fill out a census form—almost ***twenty percentage points*** lower than the analogous figure from the lead-up to the 2010 Census. *Id.* ¶¶ 81-83.[5] The self-response rate is likely to be lower still for Hard-to-Count communities. *Id.* ¶ 84. These foreseeable drops in self-response, together with the nation's population increase, require a greater number of enumerators—certainly not 200,000 fewer.

The FOP points to the use of Internet Self-Response ("ISR") for the 2020 Census as justifying a reduced NRFU workload. But Defendants' use of ISR is likely to ***decrease*** self-response rates, in part by stoking public concerns about the security of census data. Defendants have not explained how they will protect individuals' information amidst widespread cybersecurity concerns, decreasing individuals' likely willingness to use ISR. *Id.* ¶¶ 95, 100-04. Due to the "digital divide"—the lower rates of internet access and use in Hard-to-Count communities—ISR will also worsen the differential undercount. *Id.* ¶¶ 96-99.

The FOP's remaining justification for the staffing cut is that the Bureau will rely on federal administrative records to impute non-responding households, rather than enumerators to count them. First, due to its testing cancellations, the Bureau has not shown how it will reliably do this or how it will make up for a drastic reduction of enumerators. *Id.* ¶¶ 106-13. Second, the records that the Bureau intends to rely upon, including IRS, Medicare, and Medicaid records,

[5] As the CBAMS results themselves point out, the actual response rate is likely to be even lower than this rate, as it was in the 2010 Census, by 10 percentage points. *Id.*

underrepresent residents in Hard-to-Count communities. *Id.* ¶ 112. Accordingly, the use of administrative records in place of field workers is likely to increase the differential undercount.

B. Defendants' Drastic and Arbitrary Reduction of Their Field Presence

In each census, the government employs local field offices throughout the country, or area census offices ("ACOs"), to hire and train its local staff of enumerators and listers (the individuals responsible for putting together lists of addresses), and to identify and respond to problems in the field during NRFU operations. *Id.* ¶¶ 114–15. In 2010, the Bureau opened 495 field offices. *Id.* ¶ 116. The FOP provides that the Bureau will only open 248 ACOs, cutting its field presence in half. *Id.* With its field presence gutted, the Bureau will be unable to handle NRFU operations sufficiently and will be less able to reach Hard-to-Count communities.

The Bureau's apparent explanation for this decrease is that fewer ACOs are needed because there are so many fewer enumerators. *Id.* ¶ 123. Putting aside the many problems with having fewer enumerators, as described above, this explanation is still irrational. The Bureau first calculated its number of 248 ACOs based on an earlier estimate of approximately 173,000 "core enumerators." *Id.* ¶ 125. In 2017, the Bureau revised the number of enumerators upwards to approximately 250,000, which would require opening 349 ACOs in order to maintain the same enumerator-to-ACO ratio. *Id.* ¶ 126. Instead, the Bureau kept the number of ACOs at 248. *Id.* ¶ 127. 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 the assumptions underlying the original plan to open only 248 ACOs. *Id.* ¶ 128.

Accordingly, the Bureau's number of crucial field offices is not only based on an irrationally low number of enumerators, but is also irrational on its own terms, due to the failure

to revise the number of field offices upward along with the number of enumerators.

C. Defendants' Significant Reduction of Community Outreach

Both the Bureau and Congress have recognized previously that counting Hard-to-Count communities requires extensive community outreach efforts, including targeted advertising and working closely with established community organizations and networks. Here too, Defendants are significantly reducing these crucial efforts. In 2010, the Bureau allocated $334 million to community partnership staff at its local and regional offices. *Id.* ¶ 170. According to the Bureau's most recent Life Cycle Cost Estimate, it will allocate only $248 million to partnership staff in 2020—or $213 million in 2010 dollars, a 50 percent decrease. *Id.* Similarly, despite claiming that it will increase its hiring of partnership specialists, it will drastically decrease other partnership staff, eliminating ***all*** of the 1,750 partnership assistants hired in 2010. *Id.* ¶ 171.

The Bureau has not offered a rational justification for these decreases. And the reduced community outreach is particularly troubling in light of the CBAMS results, which indicated a higher need for community engagement due to projected lower self-response rates and lower awareness of the census. *Id.* ¶ 172. Defendants' reduction in community outreach will directly impact Hard-to-Count communities and increase the differential undercount.

D. Defendants' Roll-back of Field-Based Canvassing and Counting

Finally, the FOP announces two cost-saving measures that replace more reliable field work with cheaper office-based measures, and that are likely to increase the differential undercount. First, the FOP eliminates most in-field address canvassing. In past censuses, the Bureau's "listers" would canvass virtually every block to determine the universe of households to which the Bureau would mail survey forms. *Id.* ¶ 140. But in the 2020 Census, the Bureau will conduct a majority of address canvassing in office, updating its address list through external information sources and

satellite imagery, which is likely to result in more errors. *Id.* ¶¶ 144, 151. Second, the Bureau will further decrease its workload by supplanting in-person contacts to certain housing units with the use of administrative records. Based on U.S. Postal Service Undeliverable-As-Addressed ("UAA") information, the Bureau will exempt certain housing units that do not self-respond from the full NRFU protocol, paying them only a single field visit. *Id.* ¶¶ 157-58. The FOP does not reconcile this decision with the Bureau's own field testing, which indicates that the UAA information is a highly inaccurate predictor of whether housing units are vacant or nonexistent. *Id.* ¶¶ 162-63.

Both of these decisions are irrational and will increase the differential undercount by making households in Hard-to-Count communities more likely to be overlooked in the address list and less likely to be counted in NRFU.

III. Defendants Continue to Suffer Deficiencies as a Result of Funding Shortfalls, and Yet Encourage Further Budget Reductions

Initial budget constraints imposed by Congress, and then additional budget constraints self-imposed by the Trump Administration, have crippled the Bureau and prevented it from carrying out its constitutional mandate. *Id.* ¶¶ 36–52. These budget cuts led to deficiencies in testing, resources, and preparations that were already accumulating *prior* to the longest government shutdown in U.S. history. *Id.* On January 25, 2019, the government shutdown concluded with the signing of the Consolidated Appropriations Act of 2019, which provided $3.82 billion to the Census Bureau for fiscal year 2019. *Id.* ¶ 54. Adjusted for inflation, this amount constitutes a decrease of over $1 billion from the funding provided in 2009, despite the growth in population, the prior funding shortfalls that have set in, and new challenges, such as the costs added by the citizenship question. *Id.* ¶¶ 55–56.

Amidst the funding deficiencies that have accumulated over the last few years, the low

self-response rates that the Bureau's testing has found, and the various challenges that have arisen regarding the 2020 Census, the Trump Administration inexplicably revised its FY2020 budget request for the census *downward*. *Id.* ¶ 57. For FY2020, the Administration requested approximately $6.15 billion for the entire Census Bureau—over $500 million less than the Department of Commerce had previously estimated would be needed in FY2020 for the 2020 Census alone. *Id.* This budget request also excludes a contingency fund that the Commerce Department had identified as necessary in 2017. *Id* ¶ 58. The continued funding shortfalls, combined with the reduced funds requested by the Administration for FY2020, make it impossible for Defendants to carry out their constitutional mandate to conduct an actual enumeration of residents of Hard-to-Count communities.

ARGUMENT

IV. Plaintiffs Have Adequately Pled Final Agency Action Subject to Review

The APA prohibits agency action that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "(B) contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2). To qualify as final agency action subject to judicial review, "the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And . . . the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1810 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The decisions Plaintiffs challenge constitute final agency action for the purposes of the APA. First, the FOP sets forth final decisions, even if they are not immutable. Second, the plan determines rights and obligations from which legal consequences will flow. Last, Plaintiffs

challenge a discrete set of decisions subject to judicial review, including: (1) the decision to remove one third of all enumerators from the 2020 Census; (2) the decision to cut the number of field offices in half; (3) a drastic reduction in community outreach; (4) the decision to rely on office records rather than field work for most address canvassing; (5) the decision to deprive certain housing units of full NRFU efforts based on unreliable administrative records; and (6) the decision to cancel, not merely postpone, crucial field tests.

A. The "Final Operational Plan" Sets Forth Final Actions

The Bureau has stated plainly that the Plan "is the *final* operational plan and reflects [the] *final* design" for the 2020 Census.[6] In other words, the Bureau has now completed the planning phase of the decennial census, and has begun implementing its design choices as laid out in the Plan. SAC ¶ 31; *see Hawkes*, 136 S. Ct. at 1813 (finding jurisdictional determination by the Army Corps of Engineers to be final where it was described by the agency as "final" and completed the agency's "decisionmaking process on that question"). The publication of the Plan thus "mark[s] the consummation of the agency's decisionmaking process" as to a number of crucial choices about how the decennial census will be carried out. *Bennett*, 520 U.S. at 178.

Plaintiffs need not await the eventual execution of the agency's unlawful decisions—decisions the Bureau has announced and begun to implement—to seek relief. *See Vill. of Bald Head Island v. U.S. Army Corps of Engineers*, 714 F.3d 186, 194–95 (4th Cir. 2013) (finding that the U.S. Army Corps of Engineers' "approval [of a project], not the Corps' subsequent activities in carrying it out, was the final agency action."); *see also Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question [of finality] is whether the agency has completed its

[6] Stempowski, *2020 Census Operational Plan*, at Slide 19 (emphasis added).

decisionmaking process, and whether the result of that process is one that will directly affect the parties").

Defendants respond that the FOP is not "final" because the Bureau may need to adjust elements of its designs.[7] Defs.' Mem. at 19. But the possibility of revision "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Hawkes*, 136 S. Ct. at 1814 (finding decision final even where it could be adjusted based on new information); *see also Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012) (finding EPA compliance order to be final and reviewable despite the "possibility that [the] agency might reconsider" its course). Courts take a "pragmatic approach" to finality, in which agency decisions are reviewable even when they have "no authority except to give notice" of how an agency will act. *Hawkes*, 136 S. Ct. at 1815 (citation omitted); *see also Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 285 (4th Cir.), *vacated on other grounds*, 138 S. Ct. 2710 (2018) ("[A]n agency action is 'immediately reviewable' when it gives notice of how a certain statute will be applied even if no action has yet been brought.") (citations omitted).

Nor does it matter that some minority of decisions still remain to be made. *See* FOP at 1 (noting that the document "identif[ies] decisions made *and* remaining decisions") (emphasis added). This case is not about those unmade decisions. Plaintiffs challenge several discrete FOP decisions that have *already* been made and will cause Plaintiffs irreparable harm, such as the

[7] Defendants' reliance on the Bureau's statement 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" is misplaced. MTD at 19. The Bureau has made clear that the Operational Plan *already* "incorporates lessons learned from the 2018 End-to-End Census Test." Stempowski, *2020 Census Operational Plan*, at Slide 19. More fundamentally, with less than a year to go, the Bureau's vague gesture to the possibility of future revision does nothing to undermine the Bureau's statement that "[m]ost design decisions have been made and are reflected in" the Plan. FOP at 1; *see also id.* at 2 (the Plan announces "what *will* be done during the 2020 Census and, at a high level, how the work *will* be conducted") (emphasis added).

decisions to hire far fewer enumerators and to open many fewer field offices. SAC ¶¶ 71, 116; FOP at 167 ("The 2020 Census field office infrastructure will include 248 field offices").

Finally, Defendants' reliance on *Franklin* is misplaced. Defendants argue that the FOP cannot be final because, under *Franklin*, not even the Secretary of Commerce's post-enumeration report conveying the census results to the President is "final agency action." Defs.' Mem. at 16. But *Franklin* was a reapportionment case; its concern was how already-collected census data would be translated into Congressional seat totals. The Secretary's report was held not to be "final agency action" only because *reapportionment* required further action by the President before the states acquired any "entitlement to a particular number of Representatives." *Franklin*, 505 U.S. at 796. This case, by contrast, concerns certain critical decisions the Bureau has made about how it will conduct the 2020 Census and what that means for *who* will be counted. With the publication of the FOP in February 2019, the Bureau has now finalized these key design choices. SAC ¶ 31–33. No further decision by anyone is necessary to give those choices effect and to cause a disproportionate undercount.

This matters because courts regularly distinguish between situations in which further steps are necessary to finalize an agency's decision—as in *Franklin*—and those in which there is merely a chance that an agency changes course, as in *Hawkes* and *Sackett*. *See Sackett*, 566 U.S. at 127 (holding that the agency's invitation for plaintiffs to "engage in informal discussion of the terms and requirements" of the EPA's decision did not make an "otherwise final agency action nonfinal"). Because the FOP is the government's self-titled "final" word on the decisions that Plaintiffs are challenging, this case has more in common with *Hawkes* and *Sackett* than it does with *Franklin*. Accordingly, the Court should reject Defendants' challenge to the finality of their final decisions about key 2020 Census operations.

B. The Challenged Decisions Determine Rights and Obligations and Have Legal Consequences

Plaintiffs also meet the second finality requirement, that the challenged acts "determine rights or obligations," or are acts "from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178. Challenged actions satisfy this prong if they have "an immediate and practical impact,'" or "altered the regime in which [the party] operates." *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 431 (4th Cir. 2019) (citations omitted). The decisions Plaintiffs are challenging—Defendants' final decisions that they will drastically understaff the 2020 Census and gut their own field operations that reach Hard-to-Count communities—have an undeniable impact on how Defendants will carry out their constitutional obligations to conduct the census, thus determining Plaintiffs' right to fair political representation, and the allocation of resources Plaintiffs receive.

Plaintiffs challenge the discrete "decisions set forth in the" FOP, not the document itself. SAC ¶ 203. Defendants portray Plaintiffs' challenge as to the entire 220-page FOP, Defs.' Mem. at 19, to analogize this case to other challenges found not to determine rights or obligations, such as those involving reference guides, frequently asked questions, or other guidebooks. They argue that "the Census Bureau could implement the same census design *without* the Operational Plan." Defs.' Mem. at 17. But Defendants' arguments miss the point. Defendants cannot shield from review critical final decisions based on the nature of the document in which they are announced.

The distinctions between this case and those cited by Defendants underline this point. First, they again misread *Franklin*. In that post-census case, the Supreme Court held that "the final action complained of" in a suit challenging the Secretary's report of census results to the President was in fact an action "of the President, and the President is not an agency within the meaning of the [APA]." 505 U.S. at 796. The Secretary's transmission of tabulated census results "serve[d] more like a tentative recommendation" to the President, rather than a final decision determining rights

and obligations. *Id.* at 797–98. But unlike the Secretary's tabulation, the FOP sets forth the challenged decisions concerning how the census *will* be conducted. *See, e.g.*, FOP at 167 ("The 2020 Census field office infrastructure *will* include 248 field offices").

Unlike the challenges in Defendants' cited cases, Plaintiffs are challenging the discrete final decisions *themselves*, not an agency's mere publication of informational or guidance materials. *See Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426 (4th Cir. 2010) (rejecting a challenge to a "frequently asked question" guide); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004) ("advertising material"); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 861 (4th Cir. 2002) (publication of "controversial research"). *Bald Head Island* actually counsels against dismissal. 714 F.3d at 193. In that case, the Court noted that the Army Corps' approval of a beach reclamation project—a concrete final decision—was a "'determination' that surely amounted to 'agency action,'" but the plaintiffs could not challenge the mere "performance of" that plan. *Id.*; *see also Invention Submission*, 357 F.3d at 459 (holding that the content of the "advertising material" was not agency action, but plaintiff could have challenged "the administrative decision to conduct an advertising campaign at all"). Because Plaintiffs challenge specific decisions set forth in the FOP, and not the performance of the FOP itself, the Court should reject Defendants' argument.

C. Plaintiffs Challenge Discrete Agency Conduct That is Subject to Judicial Review.

Defendants also implausibly argue, based on a single case, that the challenged agency actions are not sufficiently circumscribed and discrete. But Plaintiffs' APA claims set forth discrete agency actions, described in the SAC and herein, that this Court may review.

Defendants' argument hinges on *City of New York*, but that case bears no meaningful resemblance to the facts before the Court here. 913 F.3d at 433. In *City of New York*, three

municipalities brought an APA claim seeking to compel the Department of Defense to provide certain records to the FBI in connection with its administration of the National Instant Criminal Background Check System ("NICS"). *Id.* at 426–27, 429. The plaintiff municipalities were permitted to access the NICS pursuant to a regulation that allowed just that—"access." *Id.* at 432–33. In light of this arrangement, the court reasoned that the plaintiffs were not entitled to "reach into the federal government and compel any legal obligations associated with developing the information in the system." *Id.* at 433. Moreover, it held that the plaintiffs' challenge was improper insofar as the relief it requested was for the court to "supervise an agency's compliance with [a] broad statutory mandate." *Id.*

Plaintiffs here have challenged an agency action, which is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]" 5 U.S.C.A. § 551(13). In particular, and as set forth above, Plaintiffs challenge the Bureau's decisions to (1) employ an unreasonably small number of numerators; (2) drastically reduce the number of Bureau field offices; (3) rely on in-office canvassing, rather than field address canvassing; (4) substantially cut back its community outreach program; (5) rely on unreliable administrative records; and (6) cancel critical field tests. *See* SAC ¶ 67. Plaintiffs are not mounting "a generalized attack" or requesting that the Court "inject itself into the day-to-day agency management[.]" *See Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 21 (D.D.C. 2018). Rather, Plaintiffs contest specific decisions made by the Bureau that have concrete effects, and that run counter to the Bureau's "statutory command . . . to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Franklin*, 505 U.S. at 819–20 (Stevens, J., concurring in part and concurring in the judgment). As Plaintiffs have alleged in substantial detail, each of these discrete decisions, if

not corrected, will directly undermine the accuracy of the upcoming census, particularly with respect to Hard-to-Count communities.

This case thus stands in stark contrast to *City of New York*, where the plaintiffs mounted a broad challenge to the overall "quality of the information" in the background check system to which they were granted access. 913 F.3d at 430. There, the defendants had no statutory (let alone constitutional) obligation to guarantee the quality of the system. Here, the decisions Plaintiffs challenge are both discrete and tied directly to a fundamental statutory and constitutional duty.

Finally, Defendants cannot shield their conduct from review by characterizing Plaintiffs' APA claim as an improper "aggregation" of grievances. That the Bureau's failings are multiple does not make them any less discrete. *See Ramirez*, 310 F. Supp. 3d at 21 ("Defendants confuse aggregation of similar, discrete purported injuries . . . for a broad programmatic attack."). And, unlike in *City of New York*, it is these individual decisions that Plaintiffs challenge, "rather than the whole administrative apparatus." 913 F.3d at 433. Accordingly, this Court has jurisdiction under the APA to entertain a challenge to the Bureau's conduct.

V. Plaintiffs' APA Claims Are Ripe for Review

Defendants argue for dismissal of Plaintiffs' APA claims because they say that this Court "predicted" that Plaintiffs' APA claims would be unripe. Defs.' Mem. at 22. But the Court's prediction came before the FOP and says nothing about the ripeness of an APA challenge to decisions that the Bureau itself has proclaimed "final." With the release of the FOP and the census less than a year away, Plaintiffs' claims are now ripe for review.

To evaluate a claim's ripeness, a court must consider: "(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." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732–33 (1998). In the context of the APA, this analysis—and particularly the latter two factors—blends with the finality analysis. *See, e.g., Save Our Sound OBX, Inc. v. N. Carolina Dep't of Transportation*, 914 F.3d 213, 228 (4th Cir. 2019) (noting that "challenges to agency decisions that are yet to be made are not ripe for review"); *Pashby v. Delia*, 709 F.3d 307, 317 (4th Cir. 2013) ("For a claim to be ripe, "it must involve 'an administrative decision [that] has been formalized and its effects felt in a concrete way by the challenging parties." (citation omitted)).

In its January 29 decision, this Court noted that an APA challenge would be unlikely to be ripe "*at the present time*, since the Secretary [was] in the process of making his decisions about how to conduct the 2020 census, and therefore there [was] no final agency action to examine." (ECF 64, at 23) (emphasis added). This was true before completion of the FOP, but the actions Plaintiffs challenge are now final, according to the Bureau's own public documents. Defendants' arguments relying on this Court's prior ripeness holding as to Plaintiffs' Enumeration Clause claim are thus inapplicable. With the release of the final decisions regarding how many enumerators will be hired, how many offices will be opened, and the reduction in the Bureau's community outreach and certain field procedures, this challenge is plainly ripe.[8]

Plaintiffs have already incurred harm and are at imminent risk of harm if Defendants' actions are not reviewed now. The Bureau's decision to conduct the 2020 Census with two thirds of the 2010 enumerators and half the field offices is as final as the Bureau's decision to add a citizenship question. As Judge Furman held, "delayed review would cause hardship to Plaintiffs"

[8] Indeed, 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.

because the "NGO Plaintiffs are *already* suffering harm from the addition of the citizenship question due to the diversion of valuable resources." *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 626 (S.D.N.Y. 2019). So too with Plaintiffs here. *See, e.g.*, SAC ¶ 197. And Judge Furman noted that "time is of the essence" because the Bureau "needs to begin printing the 2020 census questionnaire." *Id.*; s*ee also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999) ("It is clear that if the Bureau is going to alter its plan to use sampling in the 2000 census, it must begin doing so by March 1999."). Similarly, Plaintiffs will not be able to obtain relief for their discrete challenges if review is delayed until the census has begun. For example, the Bureau is beginning the enumerator-hiring process that will culminate in March 2020, and the address lists that the Bureau is using error-ridden processes to form will be needed in March 2020. Dismissing Plaintiffs' APA claims as unripe would "almost certainly preclude Plaintiffs from obtaining a final ruling on their claims." *Id.*

VI. Defendants' Decisions Are Not Committed to Agency Discretion by Law

Defendants improperly seek to immunize their conduct against all review by arguing that the challenged decisions are "committed to agency discretion by law." Defs.' Mem. at 21-21 (citing 5 U.S.C. § 701(a)(2)). The Census Act contains no language prohibiting judicial review of its decisions, and, as another court in this district recently observed, "a majority of courts" considering whether the Census Bureau's acts are committed to agency discretion "have found that APA claims related to the completion of the decennial census *are reviewable*." *Kravitz v. United States Dep't of Commerce*, 336 F. Supp. 3d 545, 567 (D. Md. 2018) (emphasis added) (holding that "the census is not committed to agency discretion by law"). While the Fourth Circuit has not squarely addressed this question, both the Second and Ninth Circuits have held that the "committed to agency discretion by law" exception is inapplicable to challenges to the Census

Bureau's performance of its statutory duties. *See City of Los Angeles v. U.S. Dep't of Commerce*, 307 F.3d 859, 869 n.6 (9th Cir. 2002); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980).

As these courts have reasoned, there is good reason *not* to apply this exception to the conduct of the Census Bureau. As an initial matter, "[t]here is a strong presumption favoring judicial review of agency action." *Kravitz*, 336 F. Supp. 3d at 566. It is only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply" that the exception set forth in 5 U.S.C. § 701(a)(2) operates to shield agency action from judicial review. *Id.* (quoting *Speed Mining, Inc. v. Fed. Mine Safety and Health Review Com'n*, 528 F.3d 310, 317 (4th Cir. 2008)).

In this case, "there are in fact judicially manageable standards with which courts can review the Secretary's decisions." *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 787 (S.D.N.Y. 2018). Specifically, "'the overall statutory scheme and the Census Bureau's consistently followed policy provide[] law to apply in reviewing the Secretary's exercise of discretion.'" *Id.* (quoting *Franklin*, 505 U.S. at 819 (Stevens, J., concurring in part and concurring in the judgment)). For example, the Bureau's own regulations require it to "provide the most accurate population estimates possible given the constraints of time, money, and available statistical techniques" and to "provide governmental units the opportunity to seek a review and provide additional data to these estimates and to present evidence relating to the accuracy of the estimates." 15 C.F.R. § 90.2. In addition, "the Constitution imparts a judiciable standard on Congress," which "Congress has passed to the Secretary": "when conducting an 'actual Enumeration'—it must bear a 'reasonable relationship to the accomplishment of an actual enumeration of the population.'" *Kravitz*, 336 F. Supp. at 568. Finally, the APA provides the "arbitrary and capricious standard" of review through which courts "have previously entertained actions challenging the method of

conducting a decennial census." *City of New York v. U.S. Dep't of Commerce*, 713 F. Supp. 48, 54 (E.D.N.Y. 1989)

Given all of this applicable law, it does not matter that the Census Act does not set forth precise requirements related to the particular deficiencies that Plaintiffs challenge here—massive staffing and field presence rollbacks which Defendants dismiss as "minute details," Defs.' Mem. at 20.[9] The decisions that Plaintiffs challenge are directly related to the Bureau's ability to discharge its constitutional and statutory obligations. *See Kravitz*, 336 F. Supp. at 568; *see also Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 422 (D. Md. 2005) (rejecting defendants' argument that plaintiffs' claims were unreviewable under the APA; "while [the Department of Housing and Urban Development] has discretion in regard to allocating its own resources, . . . [federal law provides] a discernable mandate that it must follow"). There are thus "judicially manageable standards" with which to review these decisions, *State of New York*, 315 F. Supp. 3d at 797.

Finally, insulating the Bureau's decisions from judicial review runs counter to the core tenets of the census. As Justice Stevens observed:

> The open nature of the census enterprise and the public dissemination of the information collected are closely connected with our commitment to a democratic form of government. The reviewability of decisions relating to the conduct of the census bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy.

Franklin, 505 U.S. at 818 (Stevens, J., concurring in part and concurring in the judgment). In short, 5 U.S.C. § 701(a)(2) does not preclude judicial review of the Bureau's challenged conduct.

[9] It is also not the case that there is no statutory guidance regarding Plaintiffs' particular challenges. For one, as this Court noted, Congress expects the Bureau will conduct "aggressive and innovative promotion and outreach campaigns in hard-to-count communities" and the "hiring of enumerators from those communities." (ECF 64, at 35 (citing 1998 Appropriations Act § 209(a)(9)).)

VII. Plaintiffs' Underfunding Claim is Not Moot and Remains Redressable

In asking this Court to dismiss Plaintiffs' constitutional underfunding claim, Defendants attempt to relitigate issues already decided. In January, the Court allowed Plaintiffs to proceed on the claim that "there are insufficient funds available for the Bureau to conduct the 2020 Census." (ECF No. 64 at 6.) No developments in the intervening months have resolved this issue, which, as the Court's decision and its March 6 discovery conference made clear, was never limited solely to the question of whether the federal government was shut down or whether Congress had made *any* appropriation (regardless of amount) for the 2020 Census. Accordingly, the Court's authority to fashion declaratory relief has not changed.

A. Plaintiffs' Underfunding Claim is Not Moot

Defendants have not met their "heavy burden when asserting mootness" because they have failed to establish that: "(1) there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Innes v. Bd. of Regents of the Univ. Sys. of Maryland*, 121 F. Supp. 3d 504, 510 (D. Md. 2015). Plaintiffs' underfunding claim is not moot, and, moreover, the Second Amended Complaint includes several updated allegations as to the underfunding of the census, which take into account the 2019 Appropriations Act and the end of the government shutdown.

Defendants do not address these allegations, instead insisting that the mere fact of the 2019 Appropriations Act renders the underfunding claim moot. But the claim is broader than simply inquiring whether the government would remain open and funded. Although the recent shutdown loomed, this Court in its January opinion acknowledged that the heart of the underfunding claim is whether the Bureau lacks "the funding *actually* needed to conduct the census in 2020." *Id*. at 49 (emphasis added). The Court recognized that "a census . . . so underfunded as to fail to bear a

'reasonable relationship to the accomplishment of an actual enumeration' . . . would be unconstitutional." *Id*. at 20 (citing *Wisconsin v. City of New York*, 517 U.S. 1, 19–20 (1996)).

The parties are now engaged in expedited discovery to determine if the Bureau has "what funds are needed to complete the 2020 Census." ECF 64, at 37. The Court explained on March 6 that the "clearly relevant" considerations for the underfunding claim include "the budget request and assumptions in the Census Bureau with regard to their estimates of the cost to conduct the 2020 Census" and "the extent to which insufficient funding, if that is, in fact, what has happened, would impose limits on the Bureau's ability to perform an actual enumeration as required by the Constitution." Tr. of Mar. 6, 2019 Hrg, at 4–5. These issues do not depend on the indefinite continuation of a government shutdown in order to remain live, and Defendants have not met their "heavy burden" to show that the 2019 Appropriations Act has "completely and irrevocably eradicated the effects" of the underfunding of the Bureau. *Innes*, 121 F. Supp. 3d at 510.

B. The Court's Authority to Issue Declaratory Relief is Unchanged

As this Court held on January 29, it can redress Plaintiffs' injuries from an underfunded census by "declar[ing] that Congress and the President have failed to agree upon and finalize legislation to provide the funding actually needed to conduct the census in 2020—when the Secretary is constitutionally obligated to do so." (ECF No. 64 at 48-49.) That holding is equally sound today. This Court's decision rested on the reasoning of the Supreme Court in two census-related cases. *See Franklin*, 505 U.S. at 803; *Utah v. Evans*, 536 U.S. 452, 463–64 (2002) (holding that the Court's declaration "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered").

Defendants attempt to distinguish the instant case from *Franklin* and *Utah*, arguing that here, "only non-party Congress has an interest in defending its funding determinations." Defs.'

Mem. at 8. This argument is unpersuasive. Plaintiffs' underfunding allegations bear on much more than Congressional funding determinations—they concern in significant part choices made by the Bureau and other executive branch officials. *See* SAC ¶¶ 39–40; 57 (adequacy of Administration budget requests); *id*. ¶¶ 41–43; 57 (reliability of Census Bureau cost estimates); *id*. ¶¶ 46-49; 143; 170 (reasonability of Census Bureau decisions made because of budgetary uncertainty). Even though the Court cannot "order Congress to adequately fund the 2020 Census" (ECF No. 64 at 22), Defendants do have an interest in defending these executive-branch choices, and declaratory relief against Defendants could prompt them, for example, to revise their cost estimates, request additional funds, or allocate resources to make up for judicially determined shortfalls. This case thus involves a dispute that is "definite and concrete, touching the legal relations of parties having adverse legal interests," *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007), and declaratory judgment is appropriate.[10]

Moreover, the very logic of the declaratory relief conceived by the Supreme Court in *Franklin* and *Utah* is that non-parties, including Congress, would be likely to respond to a declaratory order in a way that redressed Plaintiffs' injuries. In *Franklin*, the Secretary could not "herself change the reapportionment" in response to a declaratory order, but other non-parties, including both "executive and *congressional officials*," would presumably abide by the District Court's "authoritative interpretation." *Franklin*, 505 U.S. at 803 (emphasis added). Similarly, in *Utah*, the Court reasoned that "a declaration leading … the Secretary [of Commerce] to substitute a new report [of the census results] for the old one" would redress Utah's injuries, since it would

[10] Defendants cite to insurance litigation in order to argue that a declaratory judgment is appropriate in that context and inappropriate here. Defs.' Mem. at 6 n.5. But as Defendants acknowledge, this Court already considered and rejected that precise argument in finding Plaintiffs' injuries may be remedied by a declaratory judgment. (ECF 64, at 47.)

likely lead to action by non-parties, including by causing the House of Representatives to reissue apportionment certificates to the states. 536 U.S. at 463. In this case, too, "a judicial declaration that the 2020 Census cannot be accomplished within the time required by the Constitution and the Census Act because of a lack of funding," even without any accompanying injunctive relief, would likely prompt Congressional and executive officials to provide for "immediate additional funding." (ECF No. 64 at 50.)

Finally, Defendants are wrong that allowing Plaintiffs to proceed means that "private citizens essentially have a freestanding constitutional right to some hypothetical level of funding for their favorite agency." Defs.' Mem. at 9. The Enumeration Clause imposes an affirmative constitutional obligation on the government, and as the Supreme Court has held, the Clause guarantees that census procedures bear a "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the purpose of the census," which is "equal representation." *Wisconsin*, 517 U.S. at 19–20. By contrast, the Constitution does not *mandate* a Post Office, an Army, or a Navy; it simply declares that "The Congress shall have Power," *inter alia*, "to establish Post Offices…; To raise and support Armies,… and To provide and maintain a Navy." U.S. Const. art. I, § 8. Plaintiffs are not merely private citizens in search of more funding for an agency; they have pled concrete injuries that they will suffer as a result of alleged constitutional violations.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss in its entirety.

Dated: April 29, 2019

Respectfully Submitted,

/s/Susan J. Kohlmann

Susan J. Kohlmann, *pro hac vice*
Jeremy M. Creelan, *pro hac vice*
Jacob D. Alderdice, *pro hac vice*
Jenner & Block LLP
919 Third Avenue
New York, NY 10022-3908
Counsel for all Plaintiffs

Rachel Brown, Law Student Intern
Casey Gilfoil, Law Student Intern*
Daniel Ki, Law Student Intern*
Nikita Lalwani, Law Student Intern
Abigail Olson, Law Student Intern
Joseph Schottenfeld, Law Student Intern
Charlotte Schwartz, Law Student Intern
Jeffrey Zalesin, Law Student Intern
Joshua Zoffer, Law Student Intern
Renée Burbank (Bar No. 20839)
Michael J. Wishnie (Bar No. 20350)
Rule of Law Clinic
Yale Law School[11]
127 Wall Street
New Haven, CT 06511
Tel: (203) 436-4780
Fax: (203) 432-1426
michael.wishnie@ylsclinics.org
Counsel for all Plaintiffs

Anson Asaka (Bar No. 20456)
National Association for the Advancement of Colored People, Inc.
4805 Mt. Hope Drive
Baltimore, MD 21215
Tel: (410) 580-5797
Fax: (410) 358-9350

Benjamin D. Alter, *pro hac vice*
National Association for the Advancement of Colored People, Inc.
50 Broadway, 31st Floor
New York, NY 10004
Tel: (212) 626-6412
Fax: (212) 248-5250
Counsel for Plaintiffs NAACP and Prince George's County NAACP Branch

* Law student interns. Petition to practice forthcoming.

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

CERTIFICATE OF SERVICE

I, Jacob D. Alderdice, certify that copies of the foregoing *Memorandum of Law In Opposition to Defendants' Motion to Dismiss*, were served this 29th day of April, 2019 upon the all counsel of record by ECF.

/s/Jacob D. Alderdice
Jacob D. Alderdice