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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

After 60 pages of briefing, limited but substantial pre-motion discovery, and public access to a huge volume of information regarding census operations, two things are clear: this Court has no jurisdiction here and Plaintiffs are no closer to a meritorious case than they were when their complaint was filed in March. In opposing Plaintiffs' attempt, in essence, to install the Court as Director of the Census Bureau, Defendants set forth the multiple reasons this case is not justiciable and explained why the Court should not second guess complex policy decisions regarding pre-census funding, staffing, leadership, and operations. Plaintiffs' opposition does nothing to dispel these justiciability concerns. In particular, Plaintiffs fail to explain how the Court has any power to award relief that may remedy their purported injuries. Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss, at 16-18, ECF No. 46 ("Pls.' Opp'n"). And Plaintiffs say next to nothing about how this case is ripe for review in light of the numerous funding, staffing, leadership, and operational changes that may occur before April 1, 2020, and the hardship of judicial review on Defendants. *Id.* at 18-19. As for their remaining arguments concerning the political question doctrine and the Enumeration Clause, Plaintiffs misread governing case law in an attempt to gloss over the fact that the First Amended Complaint ("FAC") does not, and could not, allege that the Secretary is estimating rather than counting the population. For these reasons, and those set forth in Defendants' previous memorandum, the Court should decline Plaintiffs' invitation to constitutionalize for judicial review every logistical decision in the 10-year lead up to the census, and should dismiss this case.[1]

[1] Plaintiffs did not oppose Defendants' argument (Defs. Mem. at 29-30) that Plaintiffs' claims against the President are improper and, therefore, such claims should be deemed abandoned and dismissed. *See Ferdinand-Davenport v. Children's Guild*, 742 F. Supp. 2d 772, 783 (D. Md. 2010) ("By her failure to address these arguments in her opposition to [defendant's] motion to dismiss, [plaintiff] has abandoned this claim.").

ARGUMENT

I. THIS CASE IS NOT JUSTICIABLE

A. Plaintiffs Lack Standing to Maintain this Action.

Plaintiffs' contention that they have standing to bring this action does nothing to refute the plain fact that their claims are based entirely on self-serving speculation about both Defendants' preparations to conduct the 2020 Census and any tangible, concrete impact Plaintiffs may incur. Plaintiffs are also unable to explain how any of the purported harm is traceable to any action of Defendants or how this Court could provide any remedy that would redress the tentative claims of injury upon which their complaint rests.[2]

1. Plaintiffs Have Failed To Plausibly Allege a Concrete, Particularized Injury in Fact.

Plaintiffs do not and cannot dispute that their allegations of injury are entirely dependent on a series of tenuous guesses about what *might* occur over a period of several years. But in order to allege a claim of an injury that is "concrete and particularized," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), and that plaintiff is "immediately in danger of sustaining," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016), Plaintiffs must plausibly allege that there is an immediate danger of a significant differential undercount, and that as a result of this differential undercount there is an immediate risk of concrete harm to Plaintiffs. They have failed to do so.

As Defendants explained in their motion to dismiss, Mem. of Law in Supp. of Defs.' Mot. to Dismiss, at 8-10, 21-22, ECF No. 43-1 ("Defs.' Mem."), Plaintiffs' allegations that the 2020 Census may result in a differential undercount relies upon complete and utter speculation. Defendants' current plans to maximize responses so the enumeration can be as complete and accurate as possible consists of a multi-pronged approach deploying online, mail, telephonic, and in-person outreach and

[2] Despite the significant pre-motion discovery produced by Defendants, Plaintiffs' Opposition cites none of the information provided.

follow-up efforts, as well as administrative record databases. There is simply no basis, other than pure speculation, that such an approach will result in a significant differential undercount. Plaintiffs' argument to the contrary consists of nothing more than an allegation that past censuses, which have not used all of these same methods of enumeration, have resulted in an undercount of certain minority groups, and then making the illogical and entirely unsupported prediction that the 2020 Census will result in a more severe differential undercount. Pls.' Opp'n at 10. However, the Supreme Court has held that such "merely 'conjectural' or 'hypothetical' or otherwise speculative" assertions are insufficient for standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009) (quoting *Defs. of Wildlife*, 504 U.S. at 560).

Even if Plaintiffs *had* plausibly alleged that the 2020 Census will result in a significant differential undercount, Plaintiffs have still failed to plausibly allege that there is an immediate danger that they would suffer any kind of concrete, particularized injury from such an undercount. Many of the cases cited by Plaintiffs were initiated *after* the census was conducted and the enumeration occurred, so those plaintiffs could plausibly allege both that a differential undercount had actually occurred, and that a particularized, concrete harm had resulted. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 464 (2002) (plaintiffs had standing to challenge Census calculation methodology when they alleged a differential undercount that had actually lost Utah a Congressional seat after enumeration); *City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) (plaintiffs had standing when they made allegations that differential undercount had occurred and alleged loss of funding for specific federal programs which were appropriated on a per capita basis). The decision in *Glavin v. Clinton*, 19 F. Supp. 2d 543, 548-49 (E.D. Va. 1998), *aff'd*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), in which a court found that plaintiffs had standing to sue in advance of the 2000 Census, likewise rested on concrete allegations. There, unlike here, the court found standing because plaintiffs had alleged that a proposed statistical sampling methodology would result in a differential undercount based on

the results of an identical methodology used by the Census Bureau between the decennial censuses, potentially causing Georgia to receive one less Representative.

Here, Plaintiffs have failed to provide any equivalent allegation of a concrete, particularized injury that will occur as a result of a differential undercount. They advance no concrete allegation beyond vague claims of "underrepresentation" that Maryland will lose a Congressional seat or that Prince George's County will lose seats in state or local government, *see, e.g.*, FAC ¶¶ 108-109, and make no allegation that they will be harmed by a loss of any particular program or source of federal funding. Such vague, tenuous, unsupported allegations fall well short of a plausible allegation of an immediate risk of concrete injury as required to establish Article III standing.

2. Plaintiffs Have Failed to Plausibly Allege That Their Purported Injuries Are Traceable to Any Action of Defendants.

Plaintiffs have likewise failed to demonstrate that any alleged injury they may suffer would be caused by Defendants, as opposed to the independent actions of third parties. While Plaintiffs continue to repeat that the alleged injuries are "fairly traceable" to Defendants, Pls.' Opp'n at 15, Plaintiffs do not refute that the only way their alleged injuries could occur relies upon a chain of speculative predictions that involves multiple different steps and actors independent from Defendants. Even assuming *arguendo* that the Census Bureau's comprehensive combination of online, telephone, in-person, and administrative records uses result in a less robust effort to enumerate the population than previous decennial censuses, this could only result in a differential undercount if certain groups disproportionately ignore their legal obligation to respond to the 2020 Census. Even then, there would be no injury unless a state or federal government makes some specific appropriations decision that differentiates based on the alleged disproportionate undercount.

While Plaintiffs correctly note that the test for traceability is not as high as the proximate causation test used in other areas of the law, Pls.' Opp'n at 15, neither is it the case that *any* set of events set in motion by Defendants, no matter how remote or tenuous to the eventual alleged harm,

can satisfy the traceability requirement. Here, unlike the cases cited by Plaintiffs in support of their traceability argument, Plaintiffs' alleged injury would require multiple independent intervening acts by multiple parties independent from Defendants, and courts have held that the traceability requirement is not satisfied in such circumstances. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412-14 (2013). As the Supreme Court has cautioned, "we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Id.* at 413. Here, given that Plaintiffs theory of injury rests *entirely* upon this kind of guesswork and is too far attenuated from any action of Defendants, Plaintiffs have failed to satisfy the traceability requirement.

3. Plaintiffs Have Failed to Plausibly Allege That Their Actions Are Redressable By Any Action of This Court.

In order to satisfy the redressability element of standing, a plaintiff must show "that prospective relief will remove the harm," and that they "would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 505, 508 (1975). A plaintiff must establish that it is "likely," not "merely speculative," that the alleged injury will be redressed by a favorable decision from the court. *Defs. of Wildlife*, 504 U.S. at 561 (citation and internal quotation omitted). Tellingly, Plaintiffs are unable to articulate what remedy they seek from this Court, let alone how such relief would tangibly benefit them. Instead, Plaintiffs simply re-state their belief that a constitutional violation has occurred and note that they do not need to state "what precise form" their requested injunctive relief will take.[3] Pls.' Opp'n at 17. This is consistent with Plaintiffs' complaint, in which

[3] Later in their Opposition, Plaintiffs concede that they are not asking this Court to order Congress to appropriate additional funds for the 2020 Census. Pls.' Opp'n at 22 n.9. But because the bulk of Plaintiffs' allegations rely on underfunding, it is unclear what meaningful relief they are seeking the Court to award. *See* FAC ¶¶ 32-54; *see generally* FAC ¶¶ 55-59, 67-94; *see, e.g.*, FAC ¶ 79 ("Defendants' design flaws, coupled with their insufficient funding, planning and staffing deficiencies, have left them unprepared for the challenges that digitization presents."). The Court clearly has no

their requested relief is an injunction "[e]njoin[ing] Defendants from violating their constitutional duty to conduct an accurate actual enumeration of the people" and "requir[ing] 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." Compl. at 21. This relief is vague and circular, and amounts to nothing more than a request that this Court dictate how the Census Bureau should conduct the 2020 decennial census.

However, courts cannot simply order an executive branch agency to improve its function or services. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."); *see also Long Term Care Pharmacy All. v. Leavitt*, 530 F. Supp. 2d 173, 184-85 (D.D.C. 2008) (rejecting challenge to allegedly inadequate notification procedures of Centers for Medicare and Medicaid Services, holding that "an order from this Court directing CMS to be *more* timely or *more* accurate will do little to alleviate the pharmacies' difficulties" and noting that "the only remedy that could have any hope of redressing the plaintiffs' members' alleged injuries is an order directing the agency to revamp its eligibility notification system. But such an order would exceed the Court's authority."); *Communities for a Great Nw., Ltd. v. Clinton*, 112 F. Supp. 2d 29, 37 (D.D.C. 2000) ("Plaintiffs may not take a 'programmatic' approach to lawsuits, whereby they attempt to invalidate all agency projects with which they disagree by launching an overarching attack on government action at a more general level.") (citing *Defs. of Wildlife*, 504 U.S. at 567).

Here, Plaintiffs challenge an executive branch agency's general approach to undertaking a constitutionally-mandated task: the largest non-military mobilization in our Nation's history. Plaintiffs

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authority to order congressional appropriations, Defs.' Mem. at 16, 21-22, and therefore the Court cannot redress Plaintiffs' purported injury.

have not cited to a single case, and Defendants are aware of none, in which a court has issued an injunction requiring only that an agency perform a task with greater efficiency or efficacy. Indeed, the cases cited by Plaintiffs are inapposite as they involved specific and targeted challenges rather than the broad, vague programmatic challenges to an executive branch program that Plaintiffs raise here**.** *See, e.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162-63 (4th Cir. 2000) (finding standing where an injunction could order defendant to stop unlawfully polluting waterway, which was causing plaintiffs' injury).

For substantially similar reasons, Plaintiffs' claim for declaratory relief is no more successful. The only declaratory relief Plaintiffs seek in their complaint is for the Court to "[d]eclare that the Defendants are obligated to ensure an accurate actual enumeration of the people." Compl. at 21. Defendants note as an initial matter that there is not, and never has been, a dispute over whether such an obligation exists. The gravamen of Plaintiffs' complaint is not that Defendants have repudiated this duty; rather, Plaintiffs disagree with policy decisions Defendants have made about how to conduct the decennial census and fulfill the enumeration duty. This is entirely distinguishable from the *Franklin v. Massachusetts* case cited by Plaintiffs, which involved a discrete Census Bureau decision—challenged after the census had been completed and Representatives apportioned—to count overseas military personnel as residents of their home states. 505 U.S. 788, 801-03 (1992). Unlike that case, Plaintiffs here have offered no explanation as to how the declaratory relief they seek—a mere reiteration of the Census Bureau's enumeration responsibilities—could possibly redress their injuries.

Accordingly, Plaintiffs have failed to identify any injunctive or declaratory relief that would offer them a tangible benefit, and have therefore failed to satisfy the redressability requirement.

B. Plaintiffs' Claim is Not Ripe.

Defendants' motion to dismiss explained that this case—brought some two years before the census—is not ripe, given the many future uncertainties affecting the issues presented, the minimal

hardship to Plaintiffs from postponing judicial review, and the potential interference with Census Bureau operations posed by immediate judicial review. *See* Defs.' Mem. at 16–18.

In response, Plaintiffs do not address the first element at all—the fitness of the issues for judicial review—and instead rely entirely on their standing arguments. Pls.' Opp'n at 18–19. But the standing question is distinct from the ripeness question. Even if Plaintiffs' alleged injuries were not so speculative as to fall below the bare constitutional minimum for standing, it would not follow that the Court could not "benefit from further factual development of the issues presented." *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). That is especially true in this case, where the many issues raised—about funding, staffing, leadership, and operations—are both fluid and interrelated. *See* Defs.' Mem. at 23. Each issue cannot be decided in a factual vacuum, ignoring the others; higher levels of one variable might compensate for lower levels of another. Whether funding for the 2020 Census is constitutionally adequate, for example, likely depends not only on current and future appropriations (an acknowledged unknown, *see* FAC ¶ 53), but also on staffing, leadership, and operations over the next two years (more acknowledged unknowns, *see* FAC ¶¶ 58, 66-67, 80, 82, 91). With all of these interdependent unknown variables, this case is more like a multivariable calculus problem than the kind of "clean-cut and concrete" controversy that the ripeness doctrine is designed to address. *See Miller v. Brown*, 462 F.3d 312, 318-19 (4th Cir. 2006).

Defendants' motion also demonstrated that postponing judicial review would not cause Plaintiffs any significant hardship. Defs.' Mem. at 18. In response, Plaintiffs do not dispute that their claimed injuries lie entirely in the future and will not occur before the 2020 census (if ever). Instead, Plaintiffs contend that they need not wait until the census is over, because by that point their injuries might be irremediable.[4] Pls.' Opp'n at 18. That straw-man response fails to address Defendants'

[4] The case Plaintiffs cite for that proposition was about *standing*, not ripeness. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329-32 (1999) ("[T]he only open justiciability question in this case is whether appellees satisfy the requirements of Article III standing.").

actual ripeness argument: that the case is not ripe *now*, some two years before the census begins. Whether it might *become* ripe at some point much closer to the census is an issue the Court need not decide. Even on its own terms, Plaintiffs' "now or never" dichotomy is not as stark as they suggest: in prior census cases, courts have fashioned equitable relief during and even after the census. *See e.g.*, *Carey v. Klutznick*, 637 F.2d 834, 836 (2d Cir. 1980) (ordering Census Bureau to process certain census forms after census offices had closed).

Plaintiffs also contend that they have shown sufficient hardship by alleging that their claimed injuries are "impending" and that the supposed deficiencies in preparations for the 2020 Census are "compounding" and, if not cured, "will become irremediable." Pls.' Opp'n at 18–19 (quoting FAC ¶¶ 115, 117). Those allegations, however, are entirely conclusory and therefore "not entitled to the assumption of truth" normally applicable on a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

Finally, Defendants' motion explained how immediate judicial review threatens to interfere with the Census Bureau's preparations for the 2020 Census. Defs.' Mem. at 18. A judicial decision that (for example) staffing for the 2020 Census is constitutionally deficient would require the Census Bureau to divert its resources to increasing staffing levels, even if expending those resources on, say, operations would better prepare the Census Bureau for 2020. Plaintiffs do not respond to that argument.

This case is not ripe and should be dismissed.

C. Plaintiffs' Suit is Barred by the Political Question Doctrine.

Plaintiffs' contention that this case is not barred by the political question doctrine misreads governing case law and mischaracterizes indefensible arguments in an attempt to sidestep the central issues presented. Pls.' Opp'n at 19-24. But no amount of obfuscation can cloud the fact that this case has nothing to do with the only judicially-enforceable line drawn by the Enumeration Clause—

impermissible estimation versus lawful enumeration.[5] Instead, Plaintiffs challenge the Secretary's information-gathering decisions that will be used to enumerate inhabitants almost two years from now. That is a challenge to only the "[m]anner" of the census, which the Constitution expressly commits to Congress (and that Congress has expressly delegated to the Secretary). It is therefore a nonjusticiable political question.

Plaintiffs misread Supreme Court precedent and cite other non-binding decisions, but point to no case in which a court has found pre-census information-gathering procedures justiciable. For example, Plaintiffs contend that "the Supreme Court's precedent renders [Defendants'] distinction untenable." *See id.* at 21 (citing *Utah*, 536 U.S. at 474 and *Wisconsin v. City of NY*, 517 U.S. 1, 17 (1996)). But neither *Utah* nor *Wisconsin* casts any doubt on Defendants' argument: both cases focused on calculation methodologies implicating the Enumeration Clause's command of an "actual Enumeration" rather than pre-census information-gathering decisions. In *Utah*, the Supreme Court

[5] Contrary to Plaintiffs' contention, the requirement of a person-by-person headcount derives from the same text, history, and case law that Plaintiffs themselves cite. Prior to the first census in 1790, the Framers settled on an interim number of Representatives allocated to each State. U.S. Const. art. I, § 2, cl. 3 (providing the number of Representatives for each State "until such enumeration shall be made" within "three Years after the first Meeting of the Congress of the United States"). This allocation was based on "estimates" of the population derived from "materials ranging from relatively complete enumerations . . . to fragmentary data such as contemporary local population estimates, militia registrations, tax records, church records, and official vital statistics." U.S. Dep't of Commerce, Historical Statistics of the United States, 1789-1945 (1949).

Given this context, "Article I makes clear that the original allocation of seats in the House was based on a kind of 'conjectur[e],' in contrast to the deliberately taken count that was ordered for the future. What was important was that contrast—rather than the particular phrase used to describe the new process." *Utah*, 536 U.S. at 475 (citations omitted); *see id.* at 493 (Thomas, J., concurring in part and dissenting in part) ("[A]t the time of the founding, 'conjecture' and 'estimation' were often contrasted with the actual enumeration that was to take place pursuant to the Census Clause."); *Dep't of Commerce*, 525 U.S. at 363 (Stevens, J., dissenting) ("The words 'actual Enumeration' require post-1787 apportionments to be based on actual population counts, rather than mere speculation or bare estimate."); Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an "Actual Enumeration"*, 77 Wash. L. Rev. 1, 20 (2002) (providing an in-depth examination of this contrast and its historical context).

analyzed whether "hot-deck imputation"—a calculation methodology that infers characteristics of individuals based upon the characteristics of neighbors, resulting in inclusion of individuals who otherwise would be excluded—violated the Enumeration Clause. *Utah*, 536 U.S. at 457-58. Directly contrary to Plaintiffs' contention, the Court explicitly stated that "Utah's constitutional claim rests upon the words 'actual Enumeration' as those words appear in the Constitution's Census Clause." *Id.* at 473. Similarly, *Wisconsin* is inapposite. In *Wisconsin*, the Supreme Court considered whether the Secretary's refusal to correct a census undercount with data from a post-enumeration survey (*i.e.*, a calculation methodology) violated the Enumeration Clause. *Wisconsin*, 517 U.S. at 10. Plaintiffs point to nothing in *Wisconsin* or any other case that concerns the standards applicable to the "[m]anner" of conducting the census.[6]

Doubling down on the incongruity of *Wisconsin*, Plaintiffs argue that "[t]he Supreme Court has already articulated an Enumeration Clause standard: courts may review census-related decisions to ensure that they bear 'a reasonable relationship to the accomplishment of an actual enumeration of the population.'" Pls.' Opp'n at 22 (citing *Wisconsin*, 517 U.S. at 19-20). But the *Wisconsin* "reasonable relationship" standard does not apply to every aspect of the census, as explained in a recent case cited by Plaintiffs. *See State of New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 805 (S.D.N.Y. 2018). Such a rule would mean that "each and every census—from the Founding through the present—has

[6] *Tucker v. U.S. Dep't of Commerce*, cited by Plaintiffs, directly supports Defendants' argument. 958 F.2d 1411, 1412 (7th Cir. 1992). Although eschewing the so-called political question doctrine, the Seventh Circuit dismissed the case as nonjusticiable, saying:

> [t]he Constitution directs Congress to conduct a decennial census, and the implementing statutes delegate this authority to the Census Bureau. . . [Y]ou might as well turn [this case] over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness.

Id. at 1417–18 (7th Cir. 1992) (citations omitted); *id.* at 1419 (Ripple, J., concurring) (finding that the case presented a nonjusticiable political question).

been conducted in violation of the Enumeration Clause." *Id.* It is thus not surprising that Plaintiffs cannot cite a single case applying the *Wisconsin* "reasonable relationship" standard to pre-census preparations.[7] Instead, the *Wisconsin* "reasonable relationship" standard "applies only to decisions that bear directly on the actual population count," like decisions to statistically adjust the count after the census has been taken. *Id.* No such decisions are challenged here. In sum, once a court ventures beyond the affirmative constitutional command to perform a headcount—into the "[m]anner" of conducting the census—there is simply no law to apply.

Citing other recent cases,[8] Plaintiffs attempt to counter this argument by contending, in essence, that "*every* challenge to the conduct of the census is, in some sense, a challenge to the 'manner' in which the government conducts the 'actual Enumeration.'" *Id* at 792; *see* Pls.' Opp'n at 21. Defendants agree. But, as used in the Enumeration Clause, the umbrella-term "[m]anner" includes both a core set of activities that are justiciable (calculation methodologies) and a broader set of activities that are not (pre-census information-gathering procedures). Nothing in *Utah*, *Wisconsin*, or any other Supreme Court case sets forth a standard applicable to the latter—because there is none.

[7] *See, e.g.*, *Carey*, 637 F.2d at 838 (finding justiciable a post-census challenge to the counting accuracy of a specific city); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 94-95 (D.D.C. 1998) (three-judge court) (specifically noting that the plaintiff had Article III standing and that "a jurisdictional statute permits this plaintiff to bring the case" before holding that the calculation methodology of statistical sampling does not present a political question), *appeal dismissed* 525 U.S. 316 (1999); *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980) (finding justiciable a post-census dispute regarding whether the Secretary must statistically adjust the population count), *rev'd,* 652 F.2d 617 (6th Cir. 1981); *City of Phila. v. Klutznick*, 503 F. Supp. 663, 674 (E.D. Pa. 1980) (finding justiciable a post-census challenge to the counting accuracy of a specific city).

[8] For the reasons set forth herein, Defendants respectfully disagree with the conclusions reached by Judges Furman, Hazel, and Seeborg regarding the political question doctrine. *See also* Notice of Suppl. Authority Supporting Plfs.' Opp'n to Defs.' Mot. to Dismiss, ECF Nos. 47 & 48. In any event, those cases were decided in the discrete context of reinstating a citizenship question on the 2020 Census, not in the context of a wide-ranging, programmatic challenge leveled here. These cases therefore provide little persuasive authority.

To demonstrate this concept, Defendants cited a litany of examples that would be impossible for a court to adjudicate. Defs.' Mem. at 23. In an attempt to distinguish Defendants' examples, Plaintiffs contrast Defendants' "trivial distinctions" (like cancelling one end-to-end census test) with the supposedly egregious allegations of their complaint (like cancelling two end-to-end census tests). Pls.' Opp'n at 24, 28. That is exactly the point. Courts have no judicially manageable standards for recognizing *how many* test cancellations, or enumerators, are too many or too few. If this case is justiciable, then the Court must examine every logistical decision in the 10-year lead up to the census and pass judgment on the constitutionality of each. Such a process clearly was not envisioned by the Framers. The Constitution instead commits these thousands of policy decisions to the sound discretion of Congress, an institution capable of weighing considerations such as cost, testing, training, effectiveness, timing, informational need, and accuracy.[9]

The Court should dispense with the well-recognized fiction that Defendants must achieve a perfect census, Defs.' Mem. at 23, and should decline Plaintiffs' invitation to, in essence, become the Director of the Census Bureau.[10] Every pre-census information-gathering decision is a piece of a much larger puzzle, all of which involve a careful consideration of numerous policy factors that belong

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[9] Plaintiffs' seemingly propose an alternative standard: the Census Bureau has a "constitutional obligation to make its best effort to conduct an accurate census." Pls.' Opp'n at 25 n.12. What is the constitutional definition of "best effort"? Courts would have no easier time utilizing this undefined and undefinable standard than the other "standards" set forth by Plaintiffs.

[10] Plaintiffs argue that their claims do not implicate the Appropriations Clause or the Executive's appointment powers, despite admitting that "decisions to underfund the various necessary components of [Defendants'] census preparations and leave the Census Bureau leaderless" are "two aspects of [Defendants'] overall deficient plans and preparations for the 2020 Census." Pls.' Opp'n at 22 n.9. It is unclear how Plaintiffs could allege the latter—which form the bulk of their allegations—without implicating the concomitant constitutional powers associated with those "deficiencies". Accordingly, Plaintiffs' case presents a political question due to the textual commitments of the Appropriations Clause and the appointment powers of Article II. *See* Defs.' Mem. at 20-22.

in, and should be left to, the Political Branches.[11] The Court should therefore hold that this case presents a nonjusticiable political question.

II. PLAINTIFFS FAIL TO STATE AN ENUMERATION CLAUSE CLAIM

Plaintiffs' Opposition spends multiple pages advocating for the inapposite *Wisconsin* standard to apply under the Enumeration Clause,[12] strenuously arguing against the standard of a person-by-person headcount. But Defendants are not advancing a "standard" by which to judge Plaintiffs' Enumeration Clause claim; as set forth above, there is no judicially manageable standard for reviewing a pre-census challenge to funding, staffing, leadership, and operational decisions. If the Court finds this case justiciable, however, Plaintiffs' Enumeration Clause claim fails regardless of the metric that is applied—including that of a person-by-person headcount—because their FAC is contradictory and facially implausible. Much like census enumerators passing in the night, Plaintiffs fail to meet Defendants arguments head on, dodging the obvious deficiencies set forth by Defendants and simply reiterating the faulty allegations of the FAC. This claim, and therefore this case, should be dismissed.

[11] Plaintiffs argue that dire consequences would follow from deferential judicial review of Census Bureau decisions about the manner of conducting the census. Pls.' Opp'n at 26–27. Even if those naked policy arguments could negate clear constitutional text and precedent, Plaintiffs' concerns have never come to fruition, despite nearly 230 years of census taking.

[12] Plaintiffs' primary response to Defendants' motion is to dispute what the Enumeration Clause requires. Plaintiffs contend that their allegations show a violation of "the 'constitutional interest in accuracy.'" Pls.' Opp'n at 24 (quoting *Utah*, 536 U.S. at 455-56). But that is a general *purpose* of the Enumeration Clause, not the *legal standard* for determining whether the Clause has been violated. As the Supreme Court has explained, those kinds of "matters of general principle . . . do not directly help determine . . . issue[s] of detailed methodology." *Utah*, 536 U.S. at 478. If the Enumeration Clause were violated any time the census failed to achieve perfect accuracy, every census ever conducted would have been unconstitutional, since "there has never been a perfect count." *Carey v. Klutznick*, 653 F.2d 732, 735 (2d Cir. 1981). Similarly, Plaintiffs contend that, even if the Enumeration Clause requires only a person-by-person headcount, they have nevertheless stated a claim because they have alleged that existing pre-census procedures will not count everyone. Pls.' Opp'n at 27–28. That argument is no different than their arguments for an amorphous "accuracy" standard or the *Wisconsin* "reasonable relationship" standard, and would imply that every census to date has been unconstitutional.

After opining on inapposite legal standards, Plaintiffs set up and knock down arguments never advanced by Defendants. For example, as Defendants explained, Plaintiffs contradictorily allege both that "[a] largely online census will likely have a devastating impact on communities that have low or little access to reliable broadband internet", FAC ¶ 75; *see also* FAC ¶¶ 72-78, and that anyone who fails to respond by phone or online will receive a paper questionnaire, FAC ¶¶ 73-74. Defs.' Mem. at 28. Plaintiffs inexplicably respond that "[t]here is nothing implausible, much less 'contradictory,' about alleging that the 2020 Census will be both on-line and understaffed." Pls.' Mem. at 28 (citation omitted). That may be. But Plaintiffs entirely miss the point: their own allegations demonstrate that any household that fails to respond online will receive a *paper* questionnaire, thus negating any issue with a "largely online census". FAC ¶¶ 73-75.

Not stopping there, Plaintiffs go on to say that "Defendants ignore the aggregate effect of *many* households refusing to submit sensitive personal data through an on-line form" due to cybersecurity concerns. Pls.' Mem. at 28. Not true. Again, Defendants already defeated that argument, explaining that Plaintiffs' own allegations render it implausible—any household that fails to respond online will receive a *paper* questionnaire. FAC ¶¶ 73-74. Plaintiffs' remaining attempts to distinguish Defendants' arguments proceed along the same lines. *Compare* Defs.' Mem. at 27 (noting that Plaintiffs make no allegations regarding Acting Director Jarmin's inadequacies compared to a hypothetical permanent Director) *with* Pls.' Mem. at 29 (noting that "an agency without permanent leadership will suffer uncertainty and dislocation, undermining its ability to take swift action to fix constitutional deficiencies," but failing to explain why there would be "constitutional deficiencies" if the Acting Director was fully qualified and capable).

If the Court finds this case justiciable and reaches Plaintiffs' Enumeration Clause claim, it should also find Plaintiffs' allegations plainly inadequate and dismiss this case.

CONCLUSION

Defendants' motion to dismiss should be granted for the reasons set forth herein.

Respectfully submitted,

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