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 PLAINTIFFS' SECOND AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

U.S. CONSTITUTION

REGULATIONS

INTRODUCTION

The Census Bureau has been researching, testing, evaluating, refining, and planning for over 10 years to conduct the most advanced and comprehensive decennial census in American history. But less than a year from the 2020 Census, Plaintiffs continue to pursue their mooted claim that the Census Bureau is underfunded, and they press baseless APA claims that reach internal workings of the Census Bureau with no legal impact on anyone, let alone the Plaintiffs. The Court should put an end to Plaintiffs' pre-census lawsuit and allow the Census Bureau to prepare unobstructed for "one of the most critical constitutional functions our Federal Government performs." *NAACP v. Bureau of Census*, --- F. Supp. 3d ---, 2019 WL 355743, at *1 (D. Md. Jan. 29, 2019) (citation omitted).

Plaintiffs first seek to preserve their moot underfunding claim by selectively quoting this Court's prior opinion and embracing a declaratory-judgment theory that allows this Court to decide whether Congress unconstitutionally underfunded the census for 10 years. That is not what this Court held. And everyone agrees that the Court cannot order Congress to appropriate more money, which should disprove any notion that the Court could issue an equivalent declaratory judgment. Such a theory—which would profoundly intrude on the funding prerogatives of a co-equal Branch—finds no support in the law. But even if the Court has such sweeping declaratory power, Defendants previously explained that the Court should decline to use it here because Plaintiffs face no "Damoclean threat" of litigation, nor do they need a declaration from this Court before they undertake some arguably illegal conduct. Defs.' Mem. at 10. Plaintiffs do not disagree.

Plaintiffs' arguments in support of their APA challenges to the design of the 2020 Census fare no better. For example, Plaintiffs interpret Defendants' arguments that the Operational Plan does not "determine any rights or obligations," as shielding only the paper on which the Operational Plan is printed, not the census design choices themselves. This and other of Plaintiffs' arguments all miss the inescapable and legally-dispositive point: the Census Bureau's operations do not obligate anyone to do anything, so there is no cognizable "agency action." It only gets worse from there. Plaintiffs cite nothing in their 42-page SAC nor the 220-page Operational Plan to demonstrate its finality, instead relying on material outside their SAC and

some inapposite case law. And despite Plaintiffs' protestation that the minutiae of census operations are not "committed to agency discretion by law," they actually agree that "the Census Act does not set forth precise requirements related to the particular deficiencies that Plaintiffs challenge here." Pls.' Opp'n at 21. This concession is fatal to Plaintiffs' APA claims.

Most telling of all, however, is Plaintiffs' argument that their APA claims are ripe. Plaintiffs do not address the second ripeness inquiry—whether judicial intervention would inappropriately interfere with further administrative action—and have no answer to Defendants' point that "judicial intervention would imperil the Census Bureau's constitutional duty." Defs.' Mem. at 23–24. Nothing justifying the vast Census Bureau resources being diverted to litigate this case. Nothing concerning the disastrous result if the Court actually granted the relief sought. And nothing about any potential benefits to the American people outweighing such grievous harm. As Defendants previously explained, "[t]his case is a study in misguided litigation." Defs.' Mem. at 25. Plaintiffs say nothing to contrary, and the Court should not allow this case to progress any further.

ARGUMENT

I. PLAINTIFFS' UNDERFUNDING CLAIM SHOULD BE DISMISSED

A. Plaintiffs' argument that their underfunding claim is not mooted by the 2019 Appropriation act is unsupported by this Court's prior ruling.

Previously, the Court ruled that "there is a justiciable claim as to sufficiency of funding *given the government shutdown* (the longest in the nation's history, and still looming like a Damoclean sword if the three-week extension of a continuing resolution fails to result in congressional appropriation of lasting funding that is signed into law by the President) and appropriations lapse." *NAACP*, 2019 WL 355743, at *16 (emphasis added). And "given the prediction that, even by Defendants' estimate, current census funding will run out by April 2019 (if not earlier)—a full year before the 2020 Census—, delayed review would cause hardship to the plaintiffs." *Id.* It is difficult to read the Court's opinion without understanding that Plaintiffs' underfunding claim hinged on "the recent acrimonious partial government shutdown, which may yet re-emerge, phoenix-

like, in the event that the three-week hiatus fails to result in more permanent funding." *Id.* at *23. As Defendants explained, this all changed with the 2019 Appropriations Act. Defs.' Mem. at 3–5.

Plaintiffs do not dispute that this claim is moot. Instead, they rely upon a conclusory allegation about the new 2019 Appropriations Act, *see* SAC ¶ 55, and broadly argue that "the heart of the underfunding claim is whether the Bureau lacks 'the funding *actually* needed to conduct the census in 2020.'" Pls.' Opp'n at 22 (quoting *NAACP*, 2019 WL 355743, at *22). In quoting the Court's January opinion, however, Plaintiffs' conveniently omit the very next sentence. Had they done so, it would be clear that Plaintiffs must prove their claim by demonstrating "that the *currently appropriated* funds are insufficient to conduct the 2020 census," which would have been easy because "the Census Bureau already has gone on record to project the funds that it will need to complete the 2020 Census, and it will not require Napoleonic insight to determine whether the *current appropriations* meet the Secretary's estimated needs[]."[1] *NAACP*, 2019 WL 355743, at *22 (emphasis added). This made sense in January 2019 because the "current appropriations" twice referenced by the Court were to "run out by April 2019 (if not earlier)." *Id.* at *16, *22. If another funding lapse materialized, it would "require no more than elementary school arithmetic to demonstrate (from the Bureau's existing estimates) what funds are needed to complete the 2020 Census, and the shortfall the funding lapse has caused." *Id.* at *16. So, contrary to Plaintiffs' misreading, the Court's opinion never contemplated a viable underfunding claim "if the three-week extension of a continuing resolution" *did* "result in congressional appropriation of lasting funding that is signed into law by the President." *Id.*

Worse yet, if Plaintiffs are allowed to challenge the adequacy of funding under the 2019 Appropriations Act, then they necessarily have their own constitutional blank check to challenge any duly-

[1] Plaintiffs repeatedly cite the Court's statements from a March 6, 2019 conference to support their chimerical underfunding theory. But the Court's statements on March 6 merely confirm the unremarkable proposition that only two elements are relevant to Plaintiffs' underfunding claim: the Census Bureau's "estimated needs" and "insufficient funding, if that is, in fact, what has happened." *Compare NAACP*, 2019 WL 355743, at *22 *with* March 6 Tr. at 4–5. It is especially odd for Plaintiffs to cite the Court's March 6 statements as proof that their claim is live when the Court had, nine days earlier, expressly allowed Defendants to argue that the 2019 Appropriations Act mooted this claim. Letter Order at 4, ECF No. 76.

enacted census appropriation, at any time, regardless of the circumstances. *See* SAC ¶¶ 36–59. As a legal matter, that is both flatly wrong, *see infra*, Section I.B., and contradicted by the Court's prior opinion. Indeed, if Plaintiffs were correct, then why did the Court formulate a test involving only the "Bureau's existing estimates" and "the shortfall the funding lapse has caused"? *NAACP*, 2019 WL 355743, at *16. This test makes little sense where (as here) no shortfall actually occurred, *id.* at *16, *17, let alone where (as throughout the decade) no funding lapse occurred. And as a practical matter, it would require much more than "elementary school arithmetic" to determine whether any specific appropriation—or, worse, ten years of appropriations—"are insufficient to conduct the 2020 census." *Id.* at *16, *22. This would be so daunting, in fact, that Plaintiffs have disclaimed any desire or ability to do so. *See* Pls.' Resp. to Defs.' Interrog., Ex. A at 6 (Defendants' interrogatory asking Plaintiffs to "[i]dentify the amount of funding that you contend is necessary to conduct a 2020 Census that complies with the Constitution," to which Plaintiffs objected because it "improperly asks Plaintiffs to design an alternative Census, which is outside of Plaintiffs' burden of proof and is immaterial to the claims and defenses at issue in this case").[2] So if Plaintiffs' apocryphal underfunding claim is not moot, it is entirely unclear how the Court would adjudicate such a claim.

[2] The Court previously permitted "narrowly targeted discovery" on Plaintiffs' underfunding claim to "accomplish whatever factual development is needed of the impact of the lapse of funding." *NAACP*, 2019 WL 355743, at *16. Of course, because no such lapse of funding occurred, the predicate for the Court's limited discovery has evaporated. Nonetheless, despite the Court's admonition that such discovery should "not unduly interfere with the Bureau's preparations," *id.*, and despite having no idea how to actually prove their underfunding claim, *see* Pls.' Resp. to Defs.' Interrog., Ex. A at 6, it is now abundantly clear that Plaintiffs are using the Court's "narrowly targeted discovery" on "the impact of the lapse of funding" to rummage around the Census Bureau for anything they want. *See* Defs.' Resp. and Obj. to Pls.' Doc. Req., ECF 103-2 at 2–4 (explaining that Plaintiffs are seeking more than 3,592,608 potentially responsive documents, totaling over 2.191 Terabytes of data); Defs.' Ltr., ECF No. 101, Ex. A (Plaintiffs' Rule 30(b)(6) notice seeking information unrelated to the "the impact of the lapse of funding," including "[t]he basis for and assumptions underlying each version of the 2020 Census lifecycle cost estimate for the 2015, 2017, and forthcoming 2019 lifecycle cost estimate; the Census Bureau's components of the President's annual budget requests for each fiscal year from FY 2015 to FY 2020; and the 2020 Census spend plans").

The Court should reject Plaintiffs' abstract wish for more census funding—particularly where Plaintiffs themselves refuse to identify a constitutionally-required level of funding—and should hold that the 2019 Appropriations Act moots their only remaining constitutional claim.

B. Plaintiffs advance no colorable argument that the Court may declare a particular level of census funding unconstitutional.

Defendants previously set forth five reasons why, especially in light of the 2019 Appropriations Act, the Court has no power to declare a particular level of census funding unconstitutional. Defs.' Mem. at 6–10. Plaintiffs are silent on many of these arguments, instead choosing to recycle their old misreadings of *Franklin* and *Utah*. But, having conceded Defendants' other points, this issue is easily resolved, and rehashing inapposite *Franklin*-and-*Utah* arguments cannot salvage Plaintiffs' claim for declaratory relief.

Most importantly, the parties agree that "the Court cannot order Congress to adequately fund the 2020 Census." Pls.' Opp'n at 24 (quoting *NAACP*, 2019 WL 355743, at *22). That alone resolves this issue, as the Declaratory Judgment Act merely "enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). If the Court cannot order Plaintiffs' desired relief absent the Declaratory Judgment Act, then it cannot do so with the Declaratory Judgment Act. *Id.* Any other interpretation would mean that courts can "sit as super-legislatures reviewing laws in fact-free vacuums or wandering about prospectively in search of matters to fix." *King v. Shulkin*, 2018 WL 1212422, at *1 (Vet. App. Mar. 8, 2018).

Plaintiffs also do not contest that their desired declaratory judgment has nothing to do with "conform[ing] their conduct to avoid future litigation," *The Hipage Co. v. Access2Go, Inc.*, 589 F. Supp. 2d 602, 615 (E.D. Va. 2008), dodging "a potential suit waiting in the wings," *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998), or otherwise using "the declaratory judgment procedure [a]s an alternative to pursuit of [an] arguably illegal activity," *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). That makes this an easy case under Supreme Court precedent: the Court cannot issue a declaratory judgment where it would not "admit of specific relief through a decree of a conclusive character," *id.* at 127.

Plaintiffs bypass these straightforward reasons to dismiss their claim, instead putting all of their eggs in the *Franklin*-and-*Utah* basket. Pls.' Opp'n at 23–25 (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992) and *Utah v. Evans*, 536 U.S. 452 (2002)). But despite much emphasis on these cases, Plaintiffs miss the Supreme Court's two most salient points.

First, both *Franklin* (concerning the counting of Americans overseas) and *Utah* (concerning the use of imputation) involved unequivocal census decisions by the *Secretary*, which is why "[t]he Secretary certainly ha[d] an interest in defending *her policy determinations* concerning the census." *Franklin*, 505 U.S. at 803 (emphasis added); *see Utah*, 536 U.S. at 463–64. But here, Plaintiffs' underfunding challenge has nothing to do with the Secretary's census decisions; it has everything to do with *Congress's* funding decisions. *See* SAC ¶ 34 (explaining that the risk of a differential undercount "*is caused by Congress's* persistent underfunding of the Census Bureau"); ¶ 37 (incorrectly noting that "*Congress* directed that the budget for the 2020 Census not exceed the cost of the 2010 enumeration, which was $12.3 billion"); ¶ 39 (stating that "*Congress* approved only $1.47 billion for the Census Bureau in the 2017 fiscal year"); ¶ 59 (noting "*Congress's* repeated failures to pass new spending bills" and stating that "*Congress* consistently has failed to pass new spending bills for the subsequent fiscal year in a timely way"). Defendants have no interest in defending non-party Congress's funding determinations, in good times or bad. *See* Defs.' Mem. at 7–9.

Second, the Supreme Court was clear in *Franklin* and *Utah* that it could issue declaratory relief only because such relief would prompt the Secretary to "recalculate the numbers and recertify the official result," which would then "translate[] mechanically into a new apportionment of Representatives *without further need for exercise of policy judgment*." *Utah*, 536 U.S. at 460–62 (emphasis added). This is why the Court thought it was "substantially likely that the President . . . and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision." *Franklin*, 505 U.S. at 803. But congressional funding choices are anything but "mechanical," as Plaintiffs themselves admit. *See* SAC ¶ 39 (admitting that Congress does not mechanically follow executive funding recommendations because the 2017 fiscal year appropriation was "10 percent below what the Obama Administration had requested").

Sensing this fatal flaw in their argument, Plaintiffs try to recast their requested relief by contending that "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." Pls.' Opp'n at 24. This fails for two reasons. First, Plaintiffs practically concede that the only effect of a declaratory judgment here is other policy judgments by executive officials and/or Congress—exactly the type of declaratory judgment *Franklin* and *Utah* disavowed. And second, if Plaintiffs are truly concerned with *Defendants'* funding-related actions, then Plaintiffs have no standing to pursue their claim; only Congress's appropriations lead to the type of "concrete and particularized injury in the form of underfunding leading to a disproportionate undercount" recognized by the Court. *NAACP*, 2019 WL 355743, at *19; *cf. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (explaining that "allocation of funds from a lump-sum appropriation" is the type of "agency decision[] that courts have traditionally regarded as unreviewable").

Plaintiffs also try to limit their untenable declaratory-judgment theory, arguing that it does not result in a "freestanding constitutional right to some hypothetical level of funding for [a plaintiff's] favorite agency" because the Constitution *requires* a decennial census. Pls.' Opp'n at 25 (quoting Defs.' Mem. at 9). But the Constitution requires many actions. So having admitted that their claim goes beyond the prior government shutdown to challenge the 2019 Appropriations Act and all other census appropriations, *see* Pls.' Opp'n at 22–25; SAC ¶¶ 54–59, nothing would stop courts from likewise adjudicating whether Congress is too underfunded to meet once every year, U.S. Cons. art. I, § 4, whether the President is too underfunded to perform his duties as commander in chief, *id.* art. II, § 2, whether the Supreme Court is too underfunded to decide a certain number of cases, *id.* art. III, § 1, or whether the federal government is too underfunded to protect the country from invasion, *id.* at art. IV, § 4. Plaintiffs cite to no authority for such an absurd proposition.

C. Plaintiffs fail to identify any valid basis for the Court to address their underfunding claim.

Defendants previously explained that, even if the Court could adjudicate Plaintiffs' underfunding claim, it should decline to do so under the Declaratory Judgment Act. Defs.' Mem. at 10. Plaintiffs did not address that argument, so it is waived and the Court should dismiss Plaintiffs' underfunding claim for that

reason. *See Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 420 (4th Cir. 2005); *O'Neal v. Middletown Twp.*, 2019 WL 77066, at *3 (D.N.J. Jan. 2, 2019); *Sheaffer v. Cty. of Chatham*, 337 F. Supp. 2d 709, 733 (M.D.N.C. 2004).

In any event, Plaintiffs did not (and cannot) raise a colorable argument that the relief sought (i) will serve a useful purpose in settling the legal relations in issue or (ii) will afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Daimler Tr. v. Prestige Anapolis*, LLC, 2017 WL 3085680, at *11 (D. Md. July 20, 2017). Plaintiffs face no "Damoclean threat" of being sued because the Census Bureau is purportedly underfunded. *See Glenn v. Thomas Fortune Fay*, 222 F. Supp. 3d 31, 36 (D.D.C. 2016). And Plaintiffs need no declaration from this Court before they engage in some arguably illegal census-related conduct. *See MedImmune*, 549 U.S. at 129. Deciding this issue would help no one; it would simply force the Court to parse an abstract policy dispute over census funding—a dispute that Congress already settled. *See Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 590 n.16 (D.C. Cir. 1977) (quoting *Hetfield v. United States*, 78 Ct. Cl. 419, 422 (1933)) ("[T]he matter of whether or not an appropriation will be made rests wholly upon the determination of Congress, and with that determination this court has nothing to do."). The Court should therefore decline to address Plaintiffs' underfunding claim and concomitantly dismiss it.

II. PLAINTIFFS' APA CLAIMS SHOULD BE DISMISSED

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

1. Plaintiffs level a programmatic attack on the 2020 Census by advancing "cumulative" challenges to the Operational Plan.

Defendants previously argued that Plaintiffs' APA claims should be barred because they improperly launch a programmatic attack on the design of the 2020 Census by challenging various operational decisions "individually and cumulatively." Defs.' Mem. at 11–14; *see* SAC ¶ 68 ("Individually and collectively, these decisions amount to an abandonment of the Census Bureau's designated goal of reaching Hard-to-Count communities in the 2020 Census."); ¶ 206 (arguing that the challenged decisions in the Operational Plan "individually and cumulatively, constitute agency action that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law"); ¶¶ 209–14 (alleging that various aspects of the census's design

"individually and cumulatively, constitute agency action that is 'contrary to constitutional right'"). Although Plaintiffs are correct that they challenge six operational decisions, Pls.' Opp'n at 16, nowhere do they explain how the Court could examine these design choices "collectively" or "cumulatively" *without* passing judgment on the entire Operational Plan. *See* SAC ¶¶ 68, 206, 209–14. For example, Plaintiffs take issue with the number of planned enumerators and Census Bureau field offices. *See* SAC ¶ 67. But Plaintiffs recognize that these operational choices crucially relate to other supposedly-unchallenged aspects of the Operational Plan, like the Census Bureau's use of new technology that makes enumerators more efficient and costly field offices unnecessary. *See* SAC ¶ 76. So any dispute about Plaintiffs' challenged operations "individually and cumulatively" will necessarily involve an assessment of nearly the entire Operational Plan.

Plaintiffs do not respond to these arguments and they conveniently make no mention of these paragraphs in the SAC, instead attempting (and failing) to distinguish the Fourth Circuit's decision in *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423 (4th Cir. 2019). *See* Pls.' Opp'n at 15–17. But setting aside the facts of *City of New York*—which are practically identical for the reasons explained by Defendants, Defs.' Mem. at 11–14—the Fourth Circuit's point is clear: courts are "woefully ill-suited [ ] to adjudicate generalized grievances asking [them] to improve an agency's performance or operations." *City of New York*, 913 F.3d at 431. The Census Bureau has an obligation to conduct the 2020 Census; Plaintiffs wrongly seek to "improve" its general "operations" before "perform[ing]" this obligation. *See* Defs.' Mem. at 13 (citing the sweeping injunctive relief requested by Plaintiffs, SAC at 40). The issue is that simple.

To grant Plaintiffs' requested relief, the Court would be "forced either to enter a disfavored 'obey the law' injunction, or to engage in day-to-day oversight of the executive's administrative practices." *City of New York*, 913 F.3d at 431. These are the exact alternatives foreclosed by the APA's bar on programmatic challenges, "and rightly so." *Id.* (citations omitted).

2. Plaintiffs identify no rights or obligations determined by the 2020 Census's design.

How does a detailed strategy guide for enumerating 330 million people have an "immediate and practical impact" or "alter the legal regime in which it operates"? It does not. *See* Defs.' Mem. at 14–18.

Plaintiffs tie themselves in knots attempting to escape this conclusion, advancing contradictory theories and obfuscating the relevant inquiry. But no amount of pretzel logic can hide the obvious: the Census Bureau's operations do not obligate anyone to do anything.

Plaintiffs first create a strawman by reframing Defendants' argument as shielding the literal paper on which the Operational Plan is printed, rather than the census operations themselves. Pls.' Opp'n at 14. They then argue that Defendants "miss the point" because we "cannot shield from review critical final decisions based on the nature of the document in which they are announced." *Id.* It is Plaintiffs that "miss the point": the Census Bureau's planned operations do not "determine any rights or obligations," regardless of how they are announced. *City of New York*, 913 F.3d at 431. It is irrelevant whether the Operational Plan is chiseled into a stone tablet, scribbled on a cocktail napkin, or memorized by the Census Bureau's Chief Scientist; none of the Census Bureau's planned operations obligate private parties to do anything they were not already required to do. *See* Defs.' Mem. at 14–18.

Plaintiffs then badly misconstrue *Franklin*, trying in vain to avoid its inevitable holding. As Defendants explained, if the Secretary's tabulation of final census results (at issue in *Franklin*) is not "final agency action" under the APA, then certainly the Census Bureau's plan for executing the census cannot constitute "final agency action" either. Defs.' Mem. at 16 (citing *Franklin*, 505 U.S. at 797). "But unlike the Secretary's tabulation," Plaintiffs say, "the [Operational Plan] sets forth the challenged decisions concerning how the census *will* be conducted." Pls.' Opp'n at 15. This argument, however, confuses the requirement of finality with the separate requirement that agency action must "determine rights or obligations." *City of New York*, 913 F.3d at 431. Even if the Operational Plan were "final" (it is not), it has neither "an immediate and practical impact," nor does it "alter[] the legal regime in which it operates." *Id.* Only "the President's statement to Congress" does that; "not the Secretary's report to the President," *Franklin*, 505 U.S. at 797, not the Secretary's census taking, and certainly not the Census Bureau's *plan* for executing the census almost two years prior to the final results. Therefore, *Franklin* easily bars Plaintiffs' APA claims.

Lastly, Plaintiffs take aim at the overwhelming weight of controlling Fourth Circuit case law, dismissing those cases as dealing with "an agency's mere publication of informational or guidance materials." Pls.' Opp'n at 15. But those "informational or guidance materials" were much closer to "agency action" than the Operational Plan, as they advised private parties about agencies' enforcement efforts or warned of regulatory violations. *See* G*olden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010) (no "agency action" where the agency published a Reference Guide that "inform[ed] the regulated community of what violates the law," but did "not itself determine the law or the consequences of not following it"); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 460 (4th Cir. 2004) (holding that the Patent and Trademark Office's advertising campaign to alert the public about "invention promotion scams" was not "final agency action" because it "was not the consummation of any decisionmaking process that determined rights or obligations or from which legal consequences flowed"); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 861 (4th Cir. 2002) (holding that publication of an EPA report that classified environmental tobacco smoke as a potentially harmful human carcinogen was not an "agency action" reviewable under the APA). The Operational Plan here advises only the agency itself, not regulated parties, and it does not even do so decisively.

Plaintiffs' citation to *Bald Head Island* for support is particularly fatuous. 714 F.3d 186, 188–93 (4th Cir. 2013). There, the Fourth Circuit found no "agency action" where plaintiffs "commenced [the] action to challenge the adequacy of [a project's] performance and to require the [Army Corps of Engineers] to do what it had undertaken to do when approving the project," which was not a "determination of rights and obligations." *Id.* at 188–93. Plaintiffs use this holding to argue that, "[b]ecause [they] challenge specific decisions set forth in the [Operational Plan], and not the performance of the [Operation Plan] itself, the Court should reject Defendants' argument." Pls.' Opp'n at 15. But if Plaintiffs are *not* challenging the way in which the census will be performed, then they have no standing to pursue their APA claims. Under this Court's prior ruling, Plaintiffs are only injured by a representational or funding injury that arises from the final census results after the census is taken, not the mere publication of a plan for doing so. *NAACP*, 2019 WL 355743, at *19–20. That is probably why Plaintiffs elsewhere admit that they *are* challenging the Census Bureau's

performance. *See* Pls.' Opp'n at 14 ("The decisions Plaintiffs are challenging . . . have an undeniable impact on how Defendants will carry out their constitutional obligations to conduct the census"); Pls.' Opp'n at 21 ("The decisions that Plaintiffs challenge are directly related to the Bureau's ability to discharge its constitutional and statutory obligations."). The *Bald Head Island* case thus counsels dismissal.

Plaintiffs do not even attempt to identify any rights or obligations determined by the Operational Plan. This is fatal to their APA claims. The Court should follow controlling precedent and dismiss Plaintiffs' claims for lack of "agency action."

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

Plaintiffs strenuously argue that the Operational Plan is "final" within the meaning of the APA. Pls.' Opp'n at 11–13. Remarkably, however, Plaintiffs cite no allegation in their 42-page SAC nor any statement in the 220-page Operational Plan to demonstrate its finality. Instead, they cite only a February 2019 Program Management Review presentation by a Census Bureau official. *See* Pls.' Opp'n at 11–13 & n.6–7. This is an intriguing strategy, as Defendants previously cited Program Management Review presentations in support of their prior motion to dismiss, *see* ECF No. 61 at A-2–17 (appendix citing Program Management Review presentations), Plaintiffs railed against these citations as improper, ECF No. 63 at 14–15, and the Court agreed with Plaintiffs. *See NAACP*, 2019 WL 355743, at *16. To now argue against dismissal by relying on identical material outside their own SAC is ironic indeed. *See King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998) ("[C]ourts apply judicial estoppel to prevent a party from benefiting itself by maintaining mutually inconsistent positions regarding a particular situation.").

In any event, the Supreme Court's decision in *Franklin* again resolves this issue, straightforwardly explaining that "the 'decennial census' still presents a moving target, even after the Secretary reports to the President." Defs.' Mem. at 18–19 (citing 505 U.S. at 797). With no defensible way to sidestep *Franklin*, Plaintiffs bizarrely attempt to distinguish it by claiming that *Franklin*, unlike this case, "was a reapportionment case." Pls.' Opp'n at 13. Defendants are forced to ask: what kind of case is this? Plaintiffs themselves seem to think this is a "reapportionment case." *See* SAC ¶¶ 188–89 (claiming that "Defendants' failure to conduct

a constitutionally sufficient census . . . increases the risk of Maryland losing seats in Congress"); ¶ 194 (speculating that "[t]he differential undercount of African-American residents will injure NAACP members . . . by depriving them of federal funding and political power"); ¶ 199 (hypothesizing that "Branch members face impending political underrepresentation"). And the Court thought so too, as it found standing on that basis. *NAACP*, 2019 WL 355743, at *19 ("Plaintiffs allege a concrete and particularized injury in the form of underfunding leading to a disproportionate undercount, which in turn would result in reduced funding and representation."); *id.* ("The Enumeration Clause is intended to ensure equal representation, and Plaintiffs allege that Defendants' approach to the 2020 Census may leave them with less representation and funding than an accurate tally would provide." (citations omitted)). Either this case is about reapportionment and *Franklin*'s holding bars Plaintiffs' APA claims, or it is about "certain critical decisions the Bureau has made about how it will conduct the 2020 Census," Pls.' Opp'n at 13, and Plaintiffs have no standing.

Plaintiffs' attempts to liken this case to *Hawkes* and *Sackett* are equally unavailing. Pls.'s Opp'n at 12–13. In *Hawkes*, the Supreme Court found "final" agency action only because the agency's jurisdictional determination under the Clean Water Act "is typically not revisited if the permitting process moves forward," and the agency's own regulations described such jurisdictional determinations as "final agency action." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016) (citing 33 C.F.R. § 320.1(a)(6)). Here, in contrast, it is undisputed that the agency explicitly plans to revisit the Operational Plan, *see* Defs.' Mem. at 19, and no Census Bureau regulation proclaims it final. Similarly, in *Sackett*, the Supreme Court held that an EPA compliance order was "final agency action" because "the 'Findings and Conclusions' that the compliance order contained were not subject to further agency review," and it therefore "mark[ed] the 'consummation' of the agency's decisionmaking process." *Sackett v. EPA*, 566 U.S. 120, 127 (2012). Again, it is undisputed that the Operational Plan itself intends changes and refinements to the census design. *See* Defs.' Mem. at 19.

Despite Plaintiffs' claim that they "challenge several discrete [Operation Plan] decisions that have *already* been made and will cause Plaintiffs irreparable harm," Pls.' Mem. at 12, the Operational Plan itself begs to differ. *Compare* SAC ¶¶ 66–139, 156–75 (complaining about Nonresponse Followup Operations and

communications strategies) *with* Operational Plan at 51 (noting further testing for "the Nonresponse Followup Operation and communications strategies for the 2020 Census"). In light of both governing case law and the Operational Plan's unequivocal statements, Plaintiffs fail to challenge any "final" agency action.

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

The focus of the committed-to-agency-discretion inquiry is whether "statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Pres. Overton Park, Inc., v. Volpe*, 401 U.S. 402, 410 (1971) (internal citation omitted). All parties seem to agree that this condition is satisfied. *See* Defs.' Mem. at 20–21; Pls.' Opp'n at 21 (admitting that "the Census Act does not set forth precise requirements related to the particular deficiencies that Plaintiffs challenge here"). This makes sense because the census statutes simply "specify a timetable, and a procedure for translating fractional into whole seats" but "they say nothing about *how to conduct a census* or what to do about undercounts." *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417 (7th Cir. 1992) (emphasis added); *see id.* at 1419 (Ripple, J., concurring) (stating that the census decision at issue was "committed to agency discretion"). That should end the inquiry.

Plaintiffs make no mention of *Tucker* or Defendants' other cited cases. Instead, they counter with the inapplicable *Wisconsin* reasonable-relationship test, amorphous and non-binding Census Bureau regulations, and the APA's own arbitrary-or-capricious standard. Pls.' Opp'n at 19–21. But these "standards" provide no standard at all. *See Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 317 (4th Cir. 2008) (recognizing that non-binding guidelines do not form a workable standard); *Lunney v. United States*, 319 F.3d 550, 559 n.5 (2d Cir. 2003) ("If agency actions could be challenged as 'arbitrary and capricious,' without reference to *any* other standard, then § 701(a)(2)'s limitation on APA review would amount to no limitation at all."); *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 805 (S.D.N.Y. 2018) (concluding "that the *Wisconsin* standard applies only to decisions that bear directly on the actual population count" like the Secretary's decision not to adjust the final census results). Thus, Plaintiffs' APA claims should be dismissed as committed to agency discretion by law. *See NAACP*, 2019 WL 355743, at *15.

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

Less than four months ago, this Court dismissed as unripe nearly all of Plaintiffs' Enumeration Clause claims—repackaged as APA claims here—and foretold that, "even if they were to seek amendment of the complaint to assert an APA challenge, it is hard to imagine that it would be ripe at the present time, since the Secretary is in the process of making his decisions about how to conduct the 2020 census, and therefore there is no final agency action to examine." *NAACP*, 2019 WL 355743, at *11. That is exactly what happened. *See* Defs.' Mem. at 22–25. The Court's prediction was prophetic and dictates dismissal on ripeness grounds.

Plaintiffs myopically reiterate their misguided final-agency-action arguments and emphasize their own purported hardship to argue that their APA claims are ripe. Pls.' Opp'n at 17–19. In doing so, they conspicuously avoid Defendants' argument that Plaintiffs' potential harm (if it ever occurs) could be redressed during or after the census. Defs.' Mem. at 23. Indeed, the Court previously admonished that "the nearly universal characteristic shared by [ ] challenges to previous censuses is that they were brought *after* the Census Bureau had made its final determinations regarding how the decennial census should be taken, and *after* the census already had been taken and preliminary population counts announced." *NAACP*, 2019 WL 355743, at *14 (emphasis added). And Plaintiffs do little to counter Defendants' argument that the Court would also benefit from further real-world factual development.

But most problematic of all, Plaintiffs practically concede that their own lawsuit could doom the census, advancing only silence in response to Defendants' contention that "judicial intervention would imperil the Census Bureau's constitutional duty." Defs.' Mem. at 23–24. With such little regard for the endeavor they purportedly seek to improve, it is no wonder Plaintiffs doggedly pursue a meritless case.

CONCLUSION

Plaintiffs brazenly attempt to hamper the Census Bureau through legally-barred APA claims and oppressive discovery on a mooted underfunding claim. *See*, *supra* Note 2. The Court should not allow this to continue any longer, and should concomitantly dismiss this case.

DATED: May 13, 2019

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