No. 19-1863

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Plaintiffs-Appellants,

v.

BUREAU OF THE CENSUS, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR APPELLEES

JOSEPH H. HUNT
Assistant Attorney General

ROBERT K. HUR
United States Attorney

MARK B. STERN
THAIS-LYN TRAYER
Attorneys, Appellate Staff
Civil Division, Room 7712
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-5091

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Legislative Materials:

Rule:

Other Authorities:

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. Their first complaint alleged that Congress had failed to appropriate sufficient funding for the decennial census, and that the government's preparations were so deficient as to violate the Enumeration Clause. *See* U.S. Const. art. I, § 2, cl. 3. In a January 29, 2019 order, the district court dismissed plaintiffs' claim challenging the Bureau's operational plans for conducting the census as unripe. JA 597. Plaintiffs subsequently amended their complaint to additionally allege that the government's operational plans violated the Administrative Procedure Act (APA). In an August 1, 2019 order, the district court dismissed plaintiffs' funding claim as moot, and plaintiffs' APA claims for lack of final agency action. JA 632, 639. Plaintiffs timely appealed. *See* ECF No. 155; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs challenge the Census Bureau's operational plans for conducting the 2020 Census, claiming that the Bureau should take a variety of steps to purportedly improve the count. Plaintiffs premised this claim on the Administrative Procedure Act and the Enumeration Clause. In addition to other relief, plaintiffs sought "an injunction that requires Defendants to propose and implement, subject to [the district court's] approval and monitoring, a plan to ensure that the hard-to-count populations will be actually enumerated in the decennial census." JA 642.

The questions presented are:

1. Whether the district court correctly held that it lacks authority to compel an overhaul of operational plans for the decennial census in response to plaintiffs' claim that the existing operational plan will not achieve a sufficiently accurate enumeration.

2. Whether, for related reasons, plaintiffs have stated an actual injury capable of being redressed by a court order as is required to demonstrate Article III standing.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Constitutional and Statutory Framework

1. The Constitution's Enumeration Clause requires that an "actual Enumeration" of the population be conducted every ten years, the results of which are used to apportion the Members of the House of Representatives among the states. *See* U.S. Const. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers."); U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State."). The Constitution vests Congress with the authority to conduct the decennial census "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3.

2. As required by the Constitution, a census of the U.S. population has been conducted every ten years since 1790. *See Wisconsin v. City of New York*, 517 U.S. 1, 6 & n.2. (1996). "Pursuant to [its] constitutional authority to direct the manner in which

the 'actual Enumeration' of the population shall be made," Congress in the early 1800s required the census to be conducted by "an actual inquiry at every dwelling-house, or of the head of every family within each district, and not otherwise." *U.S. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 321, 335 (1999). In 1964, in enacting the Census Act into positive law, Congress eliminated the requirement of gathering "every item of information" by personal visit. *See* Act of Aug. 31, 1964, Pub. L. No. 88-532, 78 Stat. 737. That amendment permitted the census to be carried out by a questionnaire "form delivered and returned via the Postal Service." *U.S. House of Representatives*, 525 U.S. at 336. For the first time in 1970, approximately 60% of the census was conducted via mailed, paper questionnaires, with in-person visits only to homes that failed to return the forms. *Id.* at 337; *id.* at 364 (Stevens, J., dissenting) ("The 'mailout-mailback' procedure now considered a traditional method of enumeration was itself an innovation of the 1970 census.").

Since 1976, Congress through the Census Act has delegated to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. § 141(a).[1] The Census Act today allows the Secretary to "acquire and use information available from" federal or state administrative records "[t]o the maximum extent possible" "instead of conducting direct inquiries" on the census form. *Id.* § 6(c). The Act also permits "the use of

[1] The Bureau of the Census and its Director assist the Secretary in the performance of his duties under the Census Act. *See* 13 U.S.C. §§ 2, 4.

[statistical] sampling procedures and special surveys," for non-apportionment-related purposes. *See U.S. House of Representatives*, 525 U.S. at 337-38 (quoting 13 U.S.C. §§ 141, 195).

B. The 2020 Census

1. The decennial census is an event of immense national significance that requires years of planning and preparation. The 2020 Census will endeavor to enumerate upwards of 330 million people across 3.8 million square miles. *See* ECF No. 43.1, at 26. The procedures and operations for conducting the census have been designed and developed in an iterative fashion over the course of the decade, across two presidential administrations and at least four separate census directors or acting directors. *See* U.S. Census Bureau, *2020 Census Operational Plan: New Design for the 21st Century* (Dec. 2018), at 1, https://go.usa.gov/xVmCb.

2. In 2011, Congress directed the Census Bureau to "seriously examine the lessons-learned from [the 2010 census] to create more cost-effective operations." S. Rep. No. 112-78, at 16 (2011). The 2010 Census cost approximately $12.3 billion, and was the most expensive in U.S. history. *See 2020 Census: Actions Needed to Address Key Risks to a Successful Enumeration: Hearing Before S. Comm. on Homeland Sec. and Governmental Affairs*, 116th Cong. 3 (2019) (statement of Robert Goldenkoff, Director, Strategic Issues, and Nick Marinos, Director, Information Technology and Cybersecurity) (GAO Testimony), https://go.usa.gov/xVGvP. The Census Bureau Director testified in 2012 that "[i]f the Census Bureau makes no changes to the design

of the decennial census," its projected rising costs "cannot be sustained." *Census: Planning Ahead for 2020: Hearing Before S. Comm. on Homeland Sec. and Governmental Affairs, Subcomm. on Fed. Fin. Mgmt,. Gov't Info., Fed. Servs., and Int'l Sec.*, 112th Cong. 6 (2012) (statement of Robert M. Groves, Census Bureau Director), (Groves Testimony), https://go.usa.gov/xVvuk.

The Bureau thus "embarked on a research and testing program focused on major innovations to the design of the census oriented around the major cost drivers of the 2010 Census." Groves Testimony at 6. Historically, field operations are the most expensive component of the decennial census. *See 2020 Census: Challenges Facing the Bureau for a Modern, Cost-Effective Survey, Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. 4 (statement of John Thompson, Census Bureau Director) (Thompson Testimony I), https://go.usa.gov/xVvJb. The Bureau has traditionally updated the Master Address File—which contains address and GPS information for all housing units to which census questionnaires are sent—by physically canvassing and verifying housing unit locations in almost 11 million census blocks. *Id.*; JA 81. The Bureau also conducts in-person, "non-response follow-up" operations "to enumerate households that do not initially provide their information" by responding to the questionnaire. Groves Testimony at 7. For the 2010 census, these field operations required "a massive national infrastructure to manage hundreds of thousands of interviewers"—12 regional census centers, almost 500 area census offices, and hiring more than 516,000 enumerators. *See id.*; JA 91.

Following research and testing over the course of 2012-2015, the Bureau explained that it "d[id] not believe that a paper-and-pencil approach to the Census [wa]s sustainable for the 2020 or future Censuses," because it was no longer affordable or adequate to meet the challenges of the 21st century. *See Preparing For The 2020 Census: Will The Technology Be Ready? Joint Hearing Before the Subcomm. on Gov't Operation and Subcomm. on Info. Tech. of Comm. on Oversight and Gov't Reform*, 114th Cong. 7 (statement of John Thompson, Census Bureau Director) (Thompson Testimony II), https://go.usa.gov/xVwq8; JA 97. To "achieve a modern census" that "will cost far less than repeating the outdated processes used in 2010," the Bureau proposed the use of "mobile technology, administrative records, innovations from the geospatial industry, and self-response via the Internet." Thompson Testimony II, at 1. The Bureau introduced its "new design for the 21st century" in 2015, in version 1.0 of its 2020 operational plan. *See 2020 Census Operational Plan: A New Design for the 21st Century*, at 8 (Nov. 2015), https://go.usa.gov/xVmxE. Version 4.0 of the document, published in December 2018, reflects the Bureau's latest approach to all of the operations necessary to execute the census, and is continually updated to incorporate the results of design testing through the summer of 2019. *See* JA 71, 97-121.

3. The Bureau has implemented numerous innovations to modernize the decennial process to increase field efficiencies and to optimally reach and enumerate everyone in the country. The first of the four main innovations is "in-office address canvassing" to update the Master Address File, which will use existing satellite

imagery and administrative records, including U.S. Postal Service, local government, and commercial, third-party data. JA 82. The Bureau will rely on in-field canvassing where address updates cannot be obtained or verified, or in areas that are undergoing rapid changes. JA 157-61. In-office canvassing has allowed the Bureau to update the Master Address File on an ongoing basis since 2015, and to eliminate redundant in-person visits to millions of housing units that the Bureau has determined to be uninhabited by examining the various databases. *See* Thompson Testimony I, at 3, 4.

A second key innovation is that the 2020 Census will shift from paper questionnaires to the Internet and telephone as the primary response mode. JA 84-87, 161, 169-74. Most housing units will receive several short mailings instructing them to complete the census online or by phone. JA 84, 171. If the Bureau does not receive a response following the third mailing, it will send the household a full paper questionnaire. JA 84, 171. Recognizing that Internet self-response is not feasible for the entire population, the Bureau will target areas and populations less likely to have Internet access, or less likely to use the Internet to respond, which populations will receive a full paper questionnaire in the first mailing, as well as information about responding online or by phone. JA 84, 170-73, 276.

As a third critical innovation, the Bureau will leverage existing information in administrative and third-party records to reduce the average number of visits to nonresponding households. JA 74, 87-90, 189-98. Typically, when the Bureau knows that a housing unit is occupied, an enumerator will make up to six or more attempts

across multiple days to contact a household member to complete the questionnaire. *See 2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU)* 20-22, (July 15, 2019) (*Detailed NRFU Operational Plan*) https://go.usa.gov/xVmap. But where, for example, Undeliverable-As-Addressed information from the U.S. Postal Service identifies addresses as vacant or non-existent, the household will receive one in-person visit, and one final mailing encouraging occupants to self-respond. JA 190-91. All households that did not respond through Internet, telephone, or paper, and all households that are not clearly vacant, non-existent, or successfully enumerated with the first visit, will receive the full non-response, follow up treatment including up to six or more visits. JA 191; *see generally Detailed NRFU Operational Plan*.

Finally, the Bureau will take advantage of major technological innovations "to reduce the staffing, infrastructure, and brick and mortar footprint required for the 2020 Census." JA 91. As part of eliminating paper-based follow-up enumeration—which includes eliminating paper maps, case assignments, response forms, and daily payroll forms—enumerators and their supervisors will now work remotely, and communicate, receive case assignments, report payroll, and collect and transmit census data entirely using mobile devices with optimized GPS. *See* JA 91; *see generally Detailed NRFU Operational Plan*. These reengineered field operations will allow the Bureau to streamline staffing structures and conduct the 2020 Census with approximately half the number of field offices as required in 2010, and to hire and

train approximately 400,000 field and staff supervisors for non-response follow-up operations. *U.S. Census Bureau's Budget Fiscal Year 2020* (March 2019) CEN-3 (*FY2020 Budget*), https://go.usa.gov/xVGvV.

4. "Despite consistent efforts to improve the quality of the [census] count," the "census data are not perfect" and inevitably, "errors persist." *See Wisconsin*, 517 U.S. at 6; *id.* ("Persons who should have been counted are not counted at all or are counted at the wrong location."). Each year the Bureau "devote[s] substantial effort" towards minimizing any "undercount" of the population, including any "differential undercount"—*i.e.* an undercount affecting some segments of the population more than others, traditionally racial and ethnic minorities. *See id.* at 7.

For the 2020 Census, the Bureau has developed an extensive Integrated Partnership and Communications Operation "hyper-focused on reaching [hard-to-count] populations." *2020 Census Partnership Plan* 9 (March 21, 2019), https://go.usa.gov/xVwcw. The Bureau will use a variety of strategies and partnerships to engage audiences that are highly mobile, face language barriers, lack Internet access, or are distrustful of government for a variety of reasons. *See id.*; *see also* JA 210, 274 (describing Census Barriers, Attitudes, and Motivator study conducted in 2018 to better understand response barriers among demographic subgroups).

To promote a robust self-response rate among these groups, the Bureau plans, among other efforts, to employ at least 1,500 partnership specialists through a

Community Partnership and Engagement Program, to make its online questionnaire available in twelve languages, and to encourage response by telephone among individuals with low Internet connectivity. *See* JA 84 (describing multilingual Questionnaire Assistance call center), JA 267-80 (*Operational Plan v.4, Appendix B, 2020 Census Operational Design: An Integrated Design for Hard-to-Count Populations*); *see generally 2020 Census Partnership Plan*. The Bureau will employ enumerators who are "familiar with the neighborhoods where they work" and "speak the languages of the local community." JA. 272. And apart from its specialized plans to target the hard to count, the Bureau has released a detailed operational plan for its Count Review Operation, which provides for post-census data review and correction. *See 2020 Census Detailed Operational Plan for: 23. Count Review Operation (CRO)*, https://go.usa.gov/xVmC3.

C. Factual Background and Prior Proceedings

1. Plaintiffs' First Amended Complaint

a. Plaintiffs are Prince George's County, Maryland, a county with a majority African-American population, the National Association for the Advancement of Colored People (NAACP), its Prince George's County affiliate, and two individuals who are NAACP members and residents of Prince George's County. ECF No. 91, at 5-6. Plaintiffs brought this action in 2018, alleging that the Bureau's preparations for the 2020 Census to date violated the Enumeration Clause. JA 553. Plaintiffs asserted a "conspicuous neglect of a constitutional duty, through underfunding, understaffing,

and under-planning[] inadequacies." JA 541. Plaintiffs challenged in particular Congress's "direct[ion] that the budget for the 2020 Census not exceed the cost of the 2010 enumeration," JA 542; a federal hiring freeze in early 2017, JA 545; the resignation of the then-Census Director in 2017, JA 546; and "serious design defects" related to the Bureau's planned design innovations for the 2020 Census that, "if unresolved, will exacerbate the undercount" of racial and ethnic minorities, JA 547. Plaintiffs requested declaratory and injunctive relief, including "an injunction that requires Defendants to propose and implement, subject to [the district court's] approval and monitoring, a plan to ensure that the hard-to-count populations will be actually enumerated in the decennial census." JA 554-55.[2]

b. In January 2019, the district court granted the government's motion to dismiss in all respects except one. The district court dismissed plaintiffs' challenge to the "methods and means the Bureau plans to employ in the 2020 Census" as unripe. JA 597. The court remarked that plaintiffs had brought suit "in the midst of the [census] planning process," in contrast to "challeng[ing] . . . a discrete agency action

[2] Plaintiffs have not alleged that the Bureau's "decisions were pretextual" or bad faith on the part of the agency. Br. 2. Plaintiffs at one point argued to the district court that "underfunding has been used by Defendants to justify the scaling back and cancellation of critical tests," ECF No. 46, at 5, but as plaintiffs also explained in their second amended complaint, the Bureau "scale[d] back critical planning activities due to budgetary uncertainty and shortfalls," *see* ECF No. 91, at 12; *see id.* at 11 ("Congress approved only $1.47 billion for the Census Bureau in the 2017 fiscal year, which was approximately 10 percent below what the Obama Administration had requested.").

that *already* was finalized." JA 585-87; JA 586 (clarifying that "the only claim brought by Plaintiffs is an Enumeration Clause claim—not an APA claim"). The court emphasized the lack of precedent for the "sweeping relief that [plaintiffs] seek here . . . speak[ing] volumes about the authority (not to mention ability) of courts to second-guess the Secretary's planning of the decennial census as it is taking place, or the standards under which they might attempt to do so." JA 597. The court thus declined to "interject itself into the Bureau's process." JA 596.

The district court did not dismiss plaintiffs' claim for declaratory relief related to the purported "underfunding" of the census. ECF No. 38, at 9. The court found a "justiciable claim as to sufficiency of funding," citing the extraordinary circumstances of a "35-day lapse in appropriations" and "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." JA 599, 601. The district court recognized that it was without power to "order Congress to adequately fund the 2020 Census," but allowed the underfunding claim to proceed under the assumption that it "could issue a declaratory judgment that Congress has failed to appropriate sufficient funds." JA 597, 611. Following the court's January 29, 2019 memorandum opinion and order, on February 15, 2019, Congress appropriated over $3.5 billion to the Bureau for use through 2021. *See* ECF No. 95, at 2, 5 & n.4 (Gov't Second Mot. Dismiss).

2. Plaintiffs' Second Amended Complaint

One week after the district court's order, plaintiffs sought to reintroduce their dismissed constitutional claim for injunctive relief. *See* ECF No. 76, at 1 (Letter Order). The district court declined that request, but allowed plaintiffs to amend their complaint to challenge the Bureau's plans to conduct the census under the Administrative Procedure Act. *Id.* Plaintiffs' second amended complaint asserted that the 2020 Census's four innovations areas, as reflected in Version 4.0 of its 2020 Operational Plan, were arbitrary and capricious. *See* ECF No. 91, at 17 (Second Amend. Compl.). Plaintiffs subsequently sought emergency relief from the district court, including "a preliminary injunction directing the Bureau to allocate and spend immediately money." JA 560.

The district court granted the government's second motion to dismiss and declined to grant plaintiffs' requested injunctive relief. In rejecting plaintiffs' "underfunding claim," the court concluded that the 2019 Appropriations Act rendered plaintiffs' claim that the 2020 Census is underfunded no longer justiciable, and that any other alleged injury based on future appropriations was speculative. *See* JA 629-30. "Simply put," the court explained, "the Bureau now has the funding it previously lacked." JA 629. The district court also declined to allow plaintiffs to "question whether the appropriated funding is sufficient," an inquiry which would "take [the court] into the area reserved for Congress and the Executive Branch." JA 635, 637.

In dismissing plaintiffs' APA claims, the district court explained that plaintiffs did not challenge "discrete 'agency actions,'" but instead sought a "sweeping overhaul" and nothing "less than court-ordered modification to the Bureau's overall plan for the 2020 Census." JA 642-43. The court further explained that the Bureau's 2020 operational plans for conducting the census was not final agency action within the meaning of the APA, and, to the extent plaintiffs effectively sought to compel agency action "unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), the "specific number of enumerators," or "specific number of Census Bureau field offices" was plainly not "required by law." JA 644.

SUMMARY OF ARGUMENT

In planning the 2020 Census, the Census Bureau sought to modernize the census-taking process while accommodating Congress's direction to limit mounting costs. The Bureau will make use of new technologies and enhanced databases to increase field efficiencies and optimally reach and enumerate everyone in the country. The 2020 Census will be the first to allow households to respond by Internet and phone. The Bureau will continue to mail questionnaires and conduct follow-up visits when responses are not received.

Plaintiffs challenge the Bureau's "departure from" an exclusively "paper and in-person method[] used in all previous censuses." JA 641. They assert that the new procedures for 2020 will prove inadequate to accurately count the population and will result in a differential undercount of "hard-to-count" communities, including those

with large populations of racial and ethnic minorities. As relief, plaintiffs seek, among other things, "an injunction that requires [the Bureau] to propose and implement, subject to [the district court's] approval and monitoring, a plan to ensure that hard-to-count populations will be actually enumerated in the decennial census." JA 642.

The district court correctly held that it had no authority to enter "a sweeping overhaul" of the Bureau's conduct of the 2020 Census. Plaintiffs ask the courts to review not a discrete final agency action, but a complex operational plan for use of a variety of technologies, and the deployment of hundreds of thousands of personnel, including follow-on strategies. Plaintiffs' attempt to characterize their suit as a challenge to final agency action fails in all respects. And, assuming that the operational plan could be regarded as final agency action, it would plainly be the type of agency action committed to agency discretion by law. 5 U.S.C. § 701(a)(2). A court attempting such a task would wade into an area outside its expertise without the benefit of applicable legal standards.

As the district court recognized, plaintiffs' suit, in essence, seeks to compel agency action that they believe has been unlawfully withheld. 5 U.S.C. § 706(1). But the Supreme Court has made clear that under the APA, as under principles of mandamus incorporated by the APA, a court may order only "discrete agency action that [an agency] is *required to take*." *Norton v. Southern Utah Wilderness All.,* 542 U.S. 55, 64 (2004) (SUWA). The Supreme Court has emphasized that the limitation "precludes . . . broad programmatic attack[s]" "seek[ing] *wholesale* improvement of [a]

program by court decree." *Id.* And as this Court has instructed, collapsing the "vital" "distinction between discrete acts, which are reviewable, and programmatic challenges, which are not," would contravene "the APA's conception of the separation of powers" and inject the courts "into the internal workings of the government." *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 431 (4th Cir. 2019).

The limitations on judicial authority to order broad organizational relief apply equally to plaintiffs' attempt to command agency action by asserting a violation of the Enumeration Clause. The Supreme Court has never invalidated a census on the basis of the Enumeration Clause, but, more important for the present case, it has considered such claims only with respect to discrete actions otherwise susceptible to judicial review. It has never suggested that a plaintiff could invoke the Enumeration Clause based on a series of disagreements with operational plans and then demand that a court order and oversee a better census.

For similar reasons, plaintiffs have also failed to demonstrate the basic elements of Article III standing. Their assertion of harm rests on a series of conjectures. But even assuming that these were sufficient to allege concrete injury, plaintiffs could not obtain an order that would redress their asserted injury. As the decisions of the Supreme Court and this Court make clear, the relief they seek is outside the proper limits of the judicial sphere.

STANDARD OF REVIEW

The district court's decisions is reviewed de novo. *See Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006) ("We review a district court's dismissal for lack of standing and ripeness de novo."); *West Virginia Dep't of Health & Human Res. v. Sebelius*, 649 F.3d 217, 222 (4th Cir. 2011) ("We review de novo a district court's evaluation of agency action.").

ARGUMENT

I. The District Court Properly Recognized that It Could Not Enter the Sweeping Programmatic Relief Plaintiffs Seek

A.1. The Administrative Procedure Act reflects the long-established principles regarding the judicial role in relation to the political branches. "Under the terms of the APA, [a plaintiff] must direct its attack against some particular 'agency action' that causes it harm." *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (*SUWA*). "Agency action" is defined within the APA 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. § 551(13). "All of th[e]se categories involve circumscribed, discrete" actions, *SUWA*, 542 U.S. at 62, as opposed to a "broad programmatic attack" on the government's operations. *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 431 (4th Cir. 2019). "The principal purpose" of this limitation "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid

judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *SUWA*, 542 U.S. at 66.

Plaintiffs' request for "a sweeping overhaul to the [Bureau's] Operational Plan" is not a challenge to reviewable "agency action." JA 643. As the district court explained, plaintiffs challenge the Bureau's "departure from" an exclusively "paper and in-person method[] used in all previous censuses." JA 641; *see also* Br. 51 ("Plaintiffs ask that the Bureau conduct the same activities it has conducted in previous censuses."). They do not challenge a discrete act "determin[ing] rights and obligations," JA 645, "such as [a] rulemaking[], order[], or denial[]." *City of New York v. U.S. Dep't of Def.*, 913 F.3d at 431.[3]

Plaintiffs argue (Br. 50-51) that they "challenge six discrete decisions" because "the Bureau could," for example, "increase in-field address canvassing without more field offices."[4] As the district court explained, these individual operations are part of

[3] Plaintiffs incorrectly state that the district court "did not reach" the question of finality. Br. 25 n.6. The court held, correctly, that the Bureau's operational plans also fail to amount to reviewable final agency action because they "do not determin[e] rights and obligations." JA 645; *see Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 858 (4th Cir. 2002) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) ("First, the action must mark the 'consummation' of the agency's decisionmaking process . . . And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"). The court did not address whether the operational plans "mark the consummation of the agency's decisionmaking process." *Id.*

[4] Plaintiffs alleged that the "arbitrary and irrational design choices include (a) a plan to hire an unreasonably small number of enumerators; (b) a drastic reduction in

the larger programmatic design to conduct the census, and are "inextricably intertwined with [the Bureau's] decision to use new technology and new protocols." JA 641 (quotation marks omitted); *see also* JA 74 (detailing the 2020 Census's four design innovations). The "six discrete decisions" are not separate final agency actions; they are relevant only insofar as they would inform the proposed standardless inquiry into the adequacy of the operational plan, and the content of the proposed court-approved "plan to ensure that hard-to-count populations will be actually enumerated in the decennial census." JA 642. And, even taken individually, the "decisions" are parts of the complex deployment of resources that are plainly committed to agency discretion.

In this respect, plaintiffs' claims are not meaningful distinguishable from those considered by this Court in *City of New York,* in which plaintiffs sought to compel the Defense Department to report information to the National Instant Criminal Background Check System. This Court rejected plaintiffs' attempt to characterize their request to "supervise an agency's compliance with [a] broad statutory mandate" "as simply an aggregation of many small claims." 913 F.3d at 433. As the Court explained, "[a]ll government programs are the aggregation of individual decisions."

---

the number of Census Bureau field offices; (c) cancellation of crucial field tests; (d) a decision to replace most in-field address canvassing with in-office address canvassing; (e) a decision to make only extremely limited efforts to count inhabitants of housing units that appear vacant or nonexistent based on unreliable administrative records; and (f) a significant reduction in the staffing of the Bureau's partnership program." ECF No. 91, at 15.

Id. The Court further concluded that the Defense Department's failure to report information, while systematic, was not required by law and presented "the sort of public policy problem that often requires reallocating resources, developing new administrative systems, and working closely with partners across government." *Id.* That is clearly the case here. *See* S. Rep. No. 112-78, at 16 (directing Bureau to "create more cost effective operations"); JA 132 (describing Systems Engineering and Integration Operation); *2020 Census Partnership Plan* at 2 (emphasizing tribal, state, and local government partnerships through the Community Partnership Engagement Program).

A.2. As the district court observed, the gravamen of plaintiffs' suit is not a challenge to final agency action, but a request, "both directly and indirectly, to compel agency action." JA 643 (citing 5 U.S.C. § 706(1)); *e.g.*, Br. 51 ("Plaintiffs ask that the Bureau conduct the same activities it has conducted in previous censuses."). The court explained that the nature of plaintiffs' suit is underscored by their request for "an injunction that requires [the Bureau] to propose and implement, subject to [the district court's] approval and monitoring, a plan to ensure that hard-to-count populations will be actually enumerated in the decennial census." ECF No. 91, at 21-22. Rather than challenge specific final agency action, plaintiffs seek to "compel [the Bureau] to go back to the drawing board" in its entire design approach to conducting the census. *See* JA 642-43.

The district court properly declined plaintiffs' invitation to "enter[] [the] quagmire" of "day-to-day agency management." *City of New York*, 913 F.3d at 431. This Court has instructed that the judiciary is "woefully ill-suited" to "adjudicate generalized grievances asking [it] to improve an agency's performance or operations." *Id.* To hold otherwise and collapse the "vital" "distinction between discrete acts, which are reviewable, and programmatic challenges, which are not," would contravene "the APA's conception of the separation of powers" and inject the courts "into the internal workings of the government." *Id.*

The Supreme Court emphasized in *SUWA* that the only agency action that can be compelled under 5 U.S.C. § 706(1) is "action legally *required*." 542 U.S. at 63. "Just like the traditional mandamus remedy from which this provision is derived, claims to compel agency action are limited to enforcement of a specific, unequivocal command, over which an official has no discretion." *City of New York*, 913 F.3d at 432 (quotation marks omitted). That limitation on "*discrete* agency action that [an agency] is *required to take*" rules out " broad programmatic attack[s]," and sweeping intrusion into an agency's exercise of its lawful discretion via "general orders compelling compliance with broad statutory mandates." *SUWA*, 542 U.S. at 64, 66-67.

The district court also explained that "the Bureau's challenged actions," *i.e.* its operational plans to conduct the census, "are not 'required by law.'" JA 644 (quoting *City of New York*, 913 F.3d at 432). As the court noted, "[p]laintiffs can point to no legal requirement that the Census Bureau conduct certain field tests, hire a specific

number of enumerators, open a specific number of Census Bureau field offices, or take any other action [p]laintiffs would prefer." JA 643-44. Neither the Enumeration Clause nor the Census Act require the Bureau, for example, to engage in any community partnership activities. *See, e.g.*, Br. 1 (complaining of "drastic[] reduc[tion] [to] the resources devoted to the[] community partnership program"). And, as noted, the Bureau in fact has extensive plans to engage in an Integrated Partnership and Communications Operation "hyper-focused on reaching [hard-to-count] populations." *See 2020 Census Partnership Plan* at 9.

So "nondirective" are the Census Act and Constitution about the particular operations required "to conduct a census . . . that you might as well turn it 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." *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417-1418 (1992). Nothing in the Census Act mandates any specific action in conducting the census, or provides standards for evaluating particular operational choices. On the contrary, the Census Act delegates authority to the Secretary to "take a decennial census of population . . . . in such form and content as he may determine." 13 U.S.C. § 141(a). The Supreme Court has never found a generalized challenge to how the census will be conducted to be "amenable for review." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019); *see infra* pp. 26-27. Rather, the Enumeration Clause "suggest[s] the breadth of congressional

methodological authority, rather than its limitation." *See Utah v. Evans*, 536 U.S. 452, 455 (2002).

In implementing its statutory responsibilities in planning the 2020 Census, the Bureau responded to Congress's suggestion "to create more cost-effective operations." S. Rep. No. 112-78, at 16 (2011); Cong. Research Serv., R44788, *The Decennial Census: Issues for 2020* 3-5 (2017). The Bureau's decision to shift to a largely online census leveraging 21st century technology, and reducing the need for expensive follow-up operations, reflected expert judgments within the framework of available appropriations. Although plaintiffs may believe that Congress should have appropriated additional funds, or that the Bureau should have made different choices, they may not seek "*wholesale* improvement of th[e] [census design] program by court decree, rather than in the offices of the [Bureau] or the halls of Congress, where programmatic improvements are normally made." *SUWA*, 542 U.S. at 64.

As discussed, if a court were to disregard the Supreme Court's directive and wade into the "quagmire" of undertaking broad programmatic review, *SUWA*, 542 U.S. at 66-67, it would do so without the benefit of any governing legal standards to guide its inquiry. Designing the procedures to gather the census data involves a "complicated balancing of a number of factors," *Heckler v. Chaney*, 470 U.S. 820, 831 (1985), including how best to verify the Master Address List, the advantages and disadvantages of moving to an online platform, and the most cost-effective way to follow up with non-responsive households. *See* JA 61-280. These judgments are

precisely the sort of decisions that the APA commits to agency discretion and makes immune from judicial second-guessing. *See* 5 U.S.C. 701(a)(2); *Chaney*, 470 U.S. at 831; *Tucker*, 958 F.2d at 1417.[5]

A.3. Plaintiffs contend (Br. 52) that "asking for injunctive relief" does not "convert[] this case into a 'programmatic attack.'" The critical point, however, is not that plaintiffs seek injunctive relief, but that they seek "[no]thing less than court-ordered modification to the Bureau's overall plan for the 2020 Census." JA 642; *see also City of New York*, 913 F.3d at 434 ("If there were any doubt about the nature of the cities' claim, the requested remedy tells the real story.").

Plaintiffs do not advance their argument by asserting (Br. 44) that they seek to compel the Bureau to spend certain funds on different or additional operations. In stating that the Bureau is "sitting on over $1 billion in appropriated funds that it has refused to spend," Br. 36, plaintiffs apparently refer to appropriated funds that the Bureau plans to spend on fiscal year 2020 activities. *See FY2020 Budget* at CEN-49; *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 402

[5] Section 6(c) of the Census Act provides that "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from [federal or state administrative records] instead of conducting direct inquiries." 13 U.S.C. § 6(c). The Supreme Court has stated that it is unclear whether the provision applies beyond "the Secretary's choices with respect to 'statistics required,'" *Department of Commerce v. New York*, 139 S. Ct. 2551, 2572 (2019), but assuming it applies here, the provision only underscores the proprietary of the Secretary's choice, in his broad discretion, to supplement in-person information gathering methods with administrative records. *See supra* pp. 21-24; *infra* pp. 25-27.

(2018) (ensuring funds "remain available until September 30, 2020"). Plaintiffs demand that the Bureau spend these sums on their preferred conduct of the census, and on their preferred timeline. But the allocation of funds from a lump-sum appropriation is generally committed to agency discretion. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). As the district court summarized, "[a]pparently, it no longer is sufficient for the Court to declare that Congress should appropriate funds, or even that they should appropriate a certain amount of funds; Plaintiffs want the Court to tell the Bureau when and how to spend the funds and, in effect, take supervisory control over the execution of the 2020 Census." JA 632.

Plaintiffs cast no doubt on the district court's conclusion that they "can point to no legal requirement that the Census Bureau conduct certain field tests, hire a specific number of enumerators, open a specific number of Census Bureau field offices, or take any other action [p]laintiffs would prefer." JA 643-44. Before the district court, plaintiffs admitted that "the Census Act does not set forth precise requirements related to the particular deficiencies that Plaintiffs challenge here." ECF No. 98, at 21 (Pls' Opp'n Mot. to Dismiss). Though plaintiffs now argue that "the Census Act requires these actions," Br. 51, they identify no provision of the Census Act requiring any such action, and, as noted, the Census Act provides that the "decennial census of population," shall be taken "in such form and content," as the Secretary "may determine." 13 U.S.C. § 141(a).

The Census Act also does not, as plaintiffs suggest (Br. 51), require "that the Bureau conduct the same activities as it has conducted in previous censuses." Plaintiffs' argument would prevent any innovation over the years, and is particularly wide of the mark because the Bureau will be undertaking many of the activities that plaintiffs deem essential, such as mailed questionnaires and follow-up visits. The current plan allows the Bureau to scale down these operations by first taking advantage of improvements in technology and available databases. Plaintiffs do not explain how a court could properly review the Bureau's continuous assessment of the efficacy of these procedures over the past nine years, which included considerations of feasibility, cost constraints, and resource allocation. *See* 13 U.S.C. § 141(a).

Plaintiffs fail to appreciate (Br. 56-57) the significant distinctions between their challenge and that presented in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). Plaintiffs in that case asserted that the Secretary's decision to "reinstate a citizenship question" on the census questionnaire violated the Enumeration Clause, and was unsupported by the administrative record and pretextual. *Id.* at 2569. The Court found no constitutional basis to set aside the Secretary's decision, in view of the government's "long practice" of inquiring about citizenship through the census dating back to the early days of the Republic. *Id.* at 2567. And although discerning a "disconnect between the decision" to include the citizenship question "and the explanation given," the Court remanded to the agency rather than hold that the agency decision was "substantively invalid" under the APA. *Id.* at 2576.

Plaintiffs' broad programmatic attack bears no resemblance to the *New York* plaintiffs' targeted challenge to a specific census question. There was no dispute in that case that the inclusion of the citizenship question constituted a discrete, final agency action. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 627 (S.D.N.Y. 2019). The Court ultimately found that a "significant mismatch" between the Secretary's decision and stated rationale prevented meaningful judicial review of the reasonableness of the agency's decisionmaking. *New York*, 139 S. Ct. at 2575. That holding does not translate to a judicially manageable standard by which to measure the Bureau's plans to shift from a wholly paper-and-pencil enumeration to an online census. *See* Br. 56-57.

B. Plaintiffs' reliance on the Enumeration Clause further underscores the extent to which they would embroil the courts in a standardless inquiry into complex operational matters. "The text of that clause 'vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and Congress 'has delegated its broad authority over the census to the Secretary.'" *New York*, 139 S. Ct. at 2566 (quoting *Wisconsin*, 517 U.S. at 19). "Given that expansive grant of authority," the Supreme Court has "rejected challenges to the conduct of the census where the Secretary's decisions bore a 'reasonable relationship to the accomplishment of an actual enumeration.'" *Id.* (quoting *Wisconsin*, 517 U.S. at 19).

The Supreme Court has never found a violation of the Enumeration Clause. More important, the cases that considered such claims, unlike the present case,

involved specific decisions potentially amenable to review. The district court noted that "the challenge in *U.S. House of Representatives* (like the citizenship question challenges in the 2020 Census cases) was to a discrete decision of the Census Bureau . . . as opposed to launching (as Plaintiffs do here) a sweeping challenge to the staffing, leadership, funding, design, and security of the 2020 Census." JA 588; *see U.S. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 326 (1999) (noting final agency action); *New York*, 351 F. Supp. 3d at 627 (same). Plaintiffs' argument would necessarily be that the operational plan for conducting the census does not bear a reasonable relationship to the accomplishment of an actual enumeration. Plaintiffs believe that Congress should have provided additional funding and that the Bureau should have made different choices in allocating its resource (although they do not know what these different allocations might be). But a quarrel regarding the appropriation of resources and their subsequent allocation does not remotely suggest that the good faith efforts to carry out the census are not an attempt to carry out an actual enumeration. The district court's reasoning with respect to plaintiffs' other claims applies with at least equal force to their Enumeration Clause claim.

Rather than address the fundamental problems with their claim, plaintiffs urge (Br. 29-38) that the court should have deemed it ripe for review. Even assuming, however, that the claim would now satisfy standards of ripeness, that would not transform the suit into a controversy susceptible of judicial resolution. The district court explained at length why it could not properly grant the overhaul of the census

operational plans that plaintiffs demand, and that reasoning applies with full force to plaintiffs' assertions under the Enumeration Clause.

II. Plaintiffs Have Also Failed to Meet the Basic Requirements of Standing

The central flaws in plaintiffs' suit would also compel dismissal on standing grounds, although, as the Supreme Court and this Court have explained, "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 232 (4th Cir. 2008) (quoting *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422, 431 (2007)).

To establish Article III standing, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The injury must be "fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Plaintiffs' theory of injury rests on a "highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410. Plaintiffs maintain (Br. 10-19) the Bureau's operational plan will result in a greater undercount than would have occurred under the Bureau's past practices. Plaintiffs' theory rests on speculation that in-office address canvassing will produce worse results than in-person visits; that adding Internet and phone options in

addition to paper questionnaires will produce lower response rates than using paper questionnaires alone; and that planned follow-up operations will produce substantially worse results than they have in the past. Plaintiffs moreover assume that the Bureau's targeted efforts to engage hard-to-count populations through its Integrated Partnership and Communications Operation, among other strategies, will fail to perform as well as they have historically. *See 2020 Census Partnership Plan.* And plaintiffs disregard the host of decisions that have yet to be made, as the Bureau continues to improve upon program risks identified from internal testing, and from sources outside the agency, including the Office of the Inspector General. *See* JA 301-05. The Bureau is also finalizing a Count Review Operation for post-census data review and correction. *See 2020 Census Detailed Operational Plan for: 23. Count Review Operation (CRO).* Plaintiffs' reliance on that "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, presents a critical difference between this case and *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), where low noncitizen response was the "predictable effect" of the Secretary's single, discrete decision. *See id.* at 2566.[6]

Even assuming that plaintiffs' speculative chain were sufficient to establish concrete, imminent injury, the district court's analysis makes clear that plaintiffs

[6] The district court's standing analysis related to plaintiffs' underfunding claim, later dismissed as moot (and not challenged on appeal), has no bearing on the standing analysis here. *See* JA 629 ("On that narrow ground, with the government shutdown and no appropriations bill in place, I concluded that [p]laintiffs' underfunding claim was justiciable.").

cannot obtain an order that would redress their asserted injuries. The court cannot order Congress to appropriate additional funds, and it cannot order a "sweeping overhaul" that would constitute nothing "less than court-ordered modification to the Bureau's overall plan for the 2020 Census." JA 642-43. These limitations reflect fundamental principles of separation of powers which preclude a district court from ordering and monitoring "a plan to ensure that hard-to-count populations will be actually enumerated in the decennial census." JA 642.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT K. HUR
United States Attorney

MARK B. STERN
s/ Thais-Lyn Trayer
THAIS-LYN TRAYER
Attorneys, Appellate Staff
Civil Division, Room 7712
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-5091

September 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,761 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Thais-Lyn Trayer
Thais-Lyn Trayer

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Thais-Lyn Trayer
Thais-Lyn Trayer

ADDENDUM

TABLE OF CONTENTS

U.S. Const. art. I, § 2, cl. 3

. . . .

The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

13 U.S.C. § 141

§ 141. Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.