No. 20-366

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Appellants,

—v.—

STATE OF NEW YORK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

John A. Freedman
Elisabeth S. Theodore
R. Stanton Jones
Daniel F. Jacobson
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Perry Grossman
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Dale E. Ho
Counsel of Record
Adriel I. Cepeda Derieux
Davin Rosborough
Cecillia D. Wang
Sophia Lin Lakin
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2693
dho@aclu.org

Counsel for Appellees New York Immigration Coalition, et al.

(*Counsel continued on inside cover*)

Andre I. Segura
Edgar Saldivar
Thomas Buser-Clancy
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF TEXAS
P.O. Box 8306
Houston, TX 77288

David D. Cole
Sarah Brannon
Ceridwen Cherry
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Julia A. Gomez
Peter Eliasberg
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017

Counsel for Appellees New York Immigration Coalition, et al.

QUESTION PRESENTED

1. Whether the district court correctly held that the exclusion of undocumented immigrants from the population base used for the apportionment of the House of Representatives violates the statutory requirement to apportion based on the "whole number of persons in each State." 2 U.S.C. § 2a(a); *see also* 13 U.S.C. § 141(b).

2. Whether the district court correctly held that the subtraction of undocumented immigrants from the total population count under the census to create a "second" population tabulation for purposes of apportionment, J.S. 7, violates the statutory requirement to apportion based on the "tabulation of total population by States," "as ascertained under the … decennial census of the population." 13 U.S.C. § 141(b), 2 U.S.C. § 2a(a).

3. Whether, in the alternative, the exclusion of undocumented immigrants violates the constitutional requirements that apportionment be based on the "whole number of persons in each State," U.S. Const., amend. IV, sec. 2, and "the actual Enumeration," U.S. Const., art. I, sec. 2.

4. Whether the district court correctly found that, given "undisputed evidence that the [Presidential] Memorandum is affecting the census count," causing a diversion of Appellees' organizational resources, App.30a, Appellees have standing for declaratory and injunctive relief.

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INTRODUCTION

Every census and every apportionment since 1790 have included all people residing in the United States, regardless of citizenship or immigration status. A recent Presidential Memorandum, however, declares that it is now the "policy of the United States to exclude from the apportionment base" all undocumented individuals, solely on the basis of their immigration status. Presidential Mem., 85 Fed. Reg. 44,680 (the "Memorandum").

That the Memorandum violates federal law is "not particularly close or complicated." App.6a. The district court correctly held that the Memorandum defies "the statutory scheme" governing the Census "in two independent ways." App.93a. It excludes millions of "persons in each state" from the apportionment base, and it mandates apportionment based on figures other than the "tabulation of total population" "as ascertained under the … decennial census." *Id.*

Based on an undisputed record below, the district court correctly found that this unprecedented "policy" was deterring census responses, causing injuries to Appellees that are redressable through declaratory and injunctive relief.

Because Appellants' arguments lack merit, the appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

STATEMENT OF THE CASE

A. The Constitutional and Statutory Framework

Seats in the House of Representatives "shall be apportioned among the several States according to their respective numbers, counting the *whole number of persons* in each State." U.S. Const. amend. XIV, § 2 (emphasis added). The Constitution requires that the "numbers" used for apportionment be those ascertained from the Decennial Census's "actual Enumeration" of the population. U.S. Const. art. I, § 2, cl. 3.

That actual Enumeration must be taken in "such Manner as [Congress] by Law direct[s]." *Id.* Congress has directed the Commerce Secretary to "take a decennial census of *population*" and to report to the President "[t]he tabulation of *total population* by States" that is "required for the apportionment of Representatives in Congress." 13 U.S.C. § 141(a)-(b) (emphasis added). And it has directed the President to transmit to Congress "a statement showing the *whole number of persons* in each State … *as ascertained under the … decennial census of the population*, and the number of Representatives to which each State would be entitled" under the "method of equal proportions." 2 U.S.C. § 2a(a) (emphases added).

These statutes create an "automatic reapportionment" scheme that is "virtually self-executing." *Franklin v. Massachusetts*, 505 U.S. 788, 791-2 (1992). Section 2(a) "expressly require[s] the President to use … the data from the 'decennial census,'" and to apply a strict mathematical formula to that data to determine the apportionment. *Id.* at 797.

B. The Enumeration of Undocumented Immigrants in the Census

"The Census Bureau has always attempted to count every person residing in a state on Census Day, and the population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully within our borders." *Fed'n for Am. Immigration Reform v. Klutznick* ("*FAIR*"), 486 F. Supp. 564, 576 (1980) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980).

The 2020 Census is no different. On February 8, 2018, after notice-and-comment rulemaking, the Census Bureau promulgated its 2020 Census "Residence Rule." 83 Fed. Reg. 5525 (Feb. 8, 2018). The Residence Rule establishes how and where individuals will be enumerated. "Citizens of foreign countries living in the United States" are to be "[c]ounted at the U.S. residence where they live and sleep most of the time." *Id.* at 5533.

Census Bureau public guidance confirms that all noncitizens, including undocumented immigrants, who satisfy the Residence Rule will be counted in the 2020 Census. For example:

> Are undocumented residents included in the apportionment population counts?
>
> Yes, all people (citizens and noncitizens) with a usual residence in the 50 states are included in the resident population

> for the census, which means they are all included in the apportionment counts.[1]

In February 2020, the Census Bureau Director confirmed that the census will "count everyone, wherever they are living," including undocumented immigrants. Hearing Before the H. Comm. on Oversight & Reform, 116th Cong. 12 (Feb. 12, 2020).

Congress and the Executive Branch have always understood that the Constitution and relevant statutes require counting all people living in the United States in the census and apportionment, regardless of immigration status. The current statutes governing the census were first enacted in 1929, when "the Senate and the House both considered and rejected amendments that would have excluded non-citizens from the apportionment." App.88a (citing 71 Cong. Rec. 1907, 2065, 2360-63 (1929)). Congress rejected these amendments on the understanding "that the Constitution mandated inclusion of illegal aliens residing in the United States." App.88a. "Every Congress [has] acted … and every apportionment [has been] made in reliance upon" the same understanding. App.88a-89a (internal quotation marks and citation omitted). And, "until the Presidential Memorandum, the Executive Branch had also always taken the view that the 1929 Act, if not the Constitution, prohibited exclusion of illegal aliens from the apportionment base due to legal status alone." App.90a.

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[1] U.S. Census Bureau, Frequently Asked Questions on Congressional Apportionment, https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html#Q6.

C. Changes to 2020 Census Operations Due to COVID-19

The Commerce Secretary's apportionment report is normally due to the President on December 31, 2020. 13 U.S.C. § 141(b). In response to the COVID-19 pandemic, however, "the President of the United States and Bureau officials publicly stated that meeting the December 31, 2020 deadline would be impossible in any event." *Nat'l Urban League v. Ross*, 20-cv-05799-LHK, ECF No. 208 at 7, 9 (N.D. Cal. Sept. 24, 2020). Accordingly, on April 13, the Census Bureau extended field operations through October 31, with the Commerce Secretary's apportionment report set to be delivered to the President on April 30, 2021, rather than December 31, 2020. *Id.* at 9.

D. The Presidential Memorandum

On July 21, 2020, the President issued a Memorandum, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." 85 Fed. Reg. 44,679. The Memorandum declares, for the first time in history, that "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." *Id.* at 44,680. It asserts that "States adopting policies that encourage illegal aliens to enter this country … should not be rewarded with greater representation in the House of Representatives." *Id.* And it "anticipates that excluding illegal aliens from the apportionment count could reduce the number of representatives in States with large immigrant populations, noting explicitly that in 'one State … home to more than 2.2 million illegal aliens'—apparently, California—the inclusion of illegal aliens could 'result in the allocation of two or

three more congressional seats than would otherwise be allocated.'" App.19a (quoting 85 Fed. Reg. 44,680).

Appellants represented to Congress and to the district court that the Memorandum would *not* affect "the actual census, but an apportionment number that will be chosen by the President *after the census is complete*." Supp.App.110a-11a (emphasis added). *See also* Supp.App.34a, 88a (explaining that the Memorandum "does not purport to change the conduct of the census itself"); Prepared Statement of Dr. Steven Dillingham Before the H. Oversight & Reform Comm. 1 (July 29, 2020)[2] (similar). Under the Memorandum, the Commerce Secretary will report "two sets of numbers" to the President: first, the total population enumerated in the census according to the Census Bureau's "Residence Criteria for counting everyone at their usual residence"—which includes undocumented immigrants—and "a second" number, excluding undocumented immigrants. Supp.App.28a, 79a. Then, the "President will choose [the latter] to plug into the 'method of equal proportions'" to determine the apportionment. *Id.* at 79a.

The Memorandum was issued without any advance notice to the public or the Census Bureau, while "the census was in full swing." App.46a. "[L]ess than two weeks later," Appellants suddenly announced "that they were ending the census" on September 30 instead of October 31, and moved up their planned date for the Commerce Secretary's apportionment report from April 30, 2021 to

[2] Available at https://docs.house.gov/meetings/GO/GO00/20200729/110948/ HHRG-116-GO00-Wstate-DillinghamS-20200729.pdf.

December 31, 2020. *See Nat'l Urban League*, 20-cv-05799-LHK, ECF No. 208 at 7, 12. The Commerce Inspector General concluded that the accelerated deadlines "pose[] a myriad of risks to [the] accuracy and completeness" of the census; that the decision "likely came from the White House"; and that the Memorandum likely "played some role" in the decision.[3]

E. Proceedings Below

On July 24, 2020, Appellees—a group of States, localities, and non-governmental organizations engaged in census outreach—filed complaints raising numerous constitutional and statutory claims. A three-judge panel was convened to hear the case pursuant to 28 U.S.C. § 2284(b). App.21a.

Appellees moved for partial summary judgment on some of their constitutional and statutory claims. Appellees submitted dozens of declarations describing both the ongoing and future injuries caused by the Memorandum. Appellants "did not ask to depose Plaintiffs' declarants or request discovery of any kind; nor did they seek a hearing." App.22a.

After full briefing and oral argument, the three-judge panel issued a *per curiam* opinion granting Appellees summary judgment.

First, the district court found "undisputed evidence that the Memorandum is affecting the census count in

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[3] U.S. Dep't of Commerce, Office of the Inspector General, *The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census*, Final Management Alert No. OIG-20-050-M, at 10, 5, 6-7 (Sept. 18, 2020), available at https://www.oig.doc.gov/OIGPublications/OIG-20-050-M.pdf.

the present," App.44a, by causing "widespread confusion among illegal aliens and others as to whether they should participate in the census," App.35a. That confusion "has obvious deleterious effects on their participation rate." *Id.* The court found that "[t]hese deterrent effects have far-reaching ramifications, including increasing costs for census outreach programs run by NGOs and governments," such as Appellees. App.35a. "[T]he undisputed facts in the record also reflect[ed] that judicial relief … would likely reduce the confusion felt by immigrant communities," thereby enabling Appellees to "conduct more efficient and effective census outreach," and ultimately "alleviat[ing] some of the injuries being felt by Plaintiffs." App.42a (citations omitted).

The district court concluded Appellees therefore had standing to seek declaratory and injunctive relief. App.43a-68a. The court did not resolve whether Appellees also have standing based on injuries arising from the Memorandum's effect on apportionment or on federal funding, as it deemed the Memorandum's chilling effect on census participation and the consequent drain on Appellees' organizational resources sufficient for standing. App.43a.

On the merits, the district court ruled that the Memorandum violated 2 U.S.C. § 2a and 13 U.S.C. § 141 in two distinct respects.

First, it concluded that the Memorandum violates the requirement to base the apportionment on the decennial census. The relevant statutes provide that "the Secretary is required to report a single set of figures to the President—namely, '[t]he tabulation of total population by States' under the 'decennial

census'—and the President is then required to use those same figures to determine apportionment using the method of equal proportions." App.78a. The Memorandum, however, contravenes this dictate. It requires the Secretary of Commerce to alter the total population figures ascertained by the decennial census, by subtracting undocumented persons who were included in the actual Enumeration. The Court held that the President's plan to "choos[e]" a different "apportionment number … after the census is complete" violates "Congress's mandate to use the results of the census — and only the results of the census — in connection with the apportionment process." App.79a, 82a (quoting Supp.App.110a-111a).

Second, the district court found that the Memorandum violates statutory requirements to use the "total population by States," 13 U.S.C. § 141(b), and "the whole number of persons in each State," 2 U.S.C. § 2a, for the apportionment. It does so by categorically excluding undocumented persons living in this country solely due to their immigration status.

The district court reached this holding based on the statute's plain text and the "the ordinary public meaning of [its] terms at the time of [] enactment," *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020). The court observed that "[t]he ordinary meaning of the word 'person' is 'human' or 'individual' and surely includes citizens and non-citizens alike." App.83a. And "look[ing] to 1929, when Section 2a was enacted," App.87a, the court concluded that Congress understood the phrase "whole number of persons in each state" to include all persons who reside in the country regardless of immigration status, based on their understanding "that the Constitution mandated

inclusion of illegal aliens residing in the United States." *Id.* at 88a. The court further observed that, "since 1929 (if not before), the consistent view of both political branches has been that Section 2a, if not the Constitution, requires the inclusion of all residents in the apportionment base, without regard for their legal status." *Id.* at 91a.

Having decided this case on statutory grounds, the district court concluded that it was unnecessary to reach the merits of Appellees' constitutional claims. *Id.* at 102a.

The district court permanently enjoined all Appellants—except the President—from including in the Commerce Secretary's apportionment report "any information concerning the number of aliens in each State 'who are not in a lawful immigration status under the Immigration and Nationality Act.'" *Id.* at 99a. The court ordered that the Secretary's report must include only the results of the 2020 decennial census. *Id.* at 99a. It also clarified that its limited injunction did *not* block Appellants "from continuing to study whether and how it would be feasible to calculate the number of illegal aliens in each State." *Id.* at 100a. Finally, the district court issued "an unambiguous judicial declaration that the Presidential Memorandum is unlawful," which it determined "would help ensure that the chilling effects on participation in the census are mitigated to the maximum extent possible." *Id.* at 102a.

F. Post-Judgment Developments

Since the judgment below, the December 31 statutory deadline for the Commerce Secretary's apportionment report has been stayed. *Nat'l Urban*

League, 20-cv-05799-LHK, ECF No. 208 (N.D. Cal. Sept. 24, 2020). Appellants subsequently notified this Court that they can only "partially implement[]" the Presidential Memorandum before December 31. Appellants' Supp. Br. at 5 (Oct. 2, 2020).

ARGUMENT

Federal law and the Constitution require including all "persons in each State" in the apportionment. 2 U.S.C. § 2a(a); U.S. Const., amend. XIV, sec. 2. The Presidential Memorandum violates that requirement, because it categorically excludes undocumented immigrants from the apportionment base. The words "person" or "in" cannot be plausibly read to exclude undocumented immigrants who reside in this country. And this Court's recent decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) makes clear that the total population—including undocumented immigrants—must be part of the apportionment.

In addition, federal law directs the apportionment to be conducted solely on the basis of the total "population" as "ascertained under the … decennial census." 2 U.S.C. § 2a(a); *see also* 13 U.S.C. § 141(a), U.S. Const., art. I, sec. 2. But the Memorandum—which Appellants asserted "does *not* affect how the Census Bureau" counts the population, Supp.App.35a—directs apportionment to be based on a number *different* from the total population as ascertained under the decennial census. This "second" number (without undocumented immigrants), J.S. 5, will be calculated "following the 2020 census," rather than as a part of it, 85 Fed. Reg. 44,680 (capitalization omitted). That departure from the census violates the "automatic reapportionment" scheme Congress

designed, *Franklin*, 505 U.S. at 792, and constitutes the type of "political chicanery" the Framers sought to prevent. *Utah v. Evans*, 536 U.S. 452, 500 (2002) (Thomas, J. dissenting).

There is a live case or controversy between the parties right now. The district court found "undisputed evidence that the Memorandum affects the census count," by dissuading census participation, with attendant "adverse consequences that are likely to flow from that deterrent effect." App.30a. Injuries caused by such a "predictable effect of Government action on the decisions of third parties"—here, deterrence of census responses and diversion of organizational resources to address that chilling effect—establish standing. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019).

Finally, there is no "mismatch" between these injuries and the relief ordered by the district court. The injunction and declaratory relief address injuries caused by the Memorandum *now*. And after census counting is complete, it will be Appellants' burden to show mootness, which they will be unable to do given that the Memorandum will shift congressional seats away from the States in which Appellees' members reside. Indeed, that is the Memorandum's stated purpose and anticipated effect. Where, as here, the President has made his intentions clear, and his plan plainly violates federal statutes and the Constitution, immediate relief is necessary and appropriate.

I. THE PRESIDENTIAL MEMORANDUM VIOLATES THE STATUTORY AND CONSTITUTIONAL REQUIREMENTS TO INCLUDE ALL PERSONS IN EACH STATE IN THE APPORTIONMENT REGARDLESS OF IMMIGRATION STATUS.

The district court correctly concluded that the Memorandum's policy of excluding undocumented immigrants from the apportionment base violates the Census Act. Although the Court did not reach the issue, the Memorandum also violates the Fourteenth Amendment, and should the Court note probable jurisdiction, it should include this constitutional claim as well.

A. The Census Act Requires Including Undocumented Immigrants Residing in this Country in the Apportionment Base

1. This case "involve[s] no more than the straightforward application of legal terms with plain and settled meanings." *Bostock*, 140 S. Ct. at 1743. The governing statutory text directs the Commerce Secretary to report to the President "[t]he tabulation of total population by States," 13 U.S.C. § 141(b), and requires the President to transmit to Congress "a statement showing the whole number of persons in each State." 2 U.S.C. § 2a.

"The ordinary meaning of the word 'person' is 'human' or 'individual' and surely includes citizens and non-citizens alike." App.83a (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)). Congress knows how to distinguish "citizens" from "persons." *See*, *e.g.*, *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 729

(9th Cir. 2011) (phrase "any person" in Electronic Communications Privacy Act includes foreign persons); *O'Rourke v. U.S. Dep't of Justice*, 684 F. Supp. 716, 718 (D.D.C. 1988) (phrase "any person" in Freedom of Information Act includes non-citizens). It certainly knew how to do so in 1929. *See, e.g.*, Pub. L. No. 71-962, § 6(b) (prohibiting "alien" from "being admitted to citizenship" without being "a person of good moral character" as shown by testimony of two "citizens").

The phrase "[i]n each state" also clearly encompasses undocumented immigrants who live in this country. Those persons plainly are "in" a state if they live there on Census Day. That is true even under "the gloss" of "usual residence." *Franklin*, 505 U.S. at 804, as undocumented immigrants who live in the United States maintain their "usual residence" in a state under any possible conception of the phrase. As the district court summarized, "[a] person living in a State but facing future removal is no less 'a person in that State' than someone living in the State without the prospect of removal." App.86a (citations omitted). The plain text of the statutes "should be the end of the analysis." *Bostock*, 140 S. Ct. at 1743 (internal quotation marks omitted).

2. History confirms that the statute means what it says. "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Id.* at 1738. Accordingly, the district court "look[ed] to 1929, when Section 2a was enacted and the words 'whole number of persons in each State' entered the statutory lexicon." App.87a.

The historical record from 1929 is clear. First, "in enacting the 1929 Act … the Senate and the House both considered and rejected amendments that would have excluded non-citizens from the apportionment base." App.88a (citing proposed amendments and respective votes against their inclusion). Senate counsel noted that Congress had "been uniformly in favor of inclusion of aliens," 71 Cong. Rec at 1822 (1929), and that the "whole number of persons" language would continue that practice. And "[t]here is no dispute that the concept of 'illegal aliens' existed in 1929, when Section 2a was enacted." App.88a, n.17. Indeed, Congress enacted the statute over the objection that it would include in the apportionment base several million noncitizens who had entered unlawfully "without the consent of the American people." 71 Cong. Rec. at 1919 (1929) (Sen. Heflin).

Congress has since repeatedly rejected bills to exclude noncitizens from the apportionment base. *See* H.R. Rep. No. 76-1787 at 1 (1940) (showing proposed exclusion of noncitizens in 1940); 1980 Census: Counting Illegal Aliens: Hearing Before the S. Subcomm. on Energy, Nuclear Proliferation & Fed. Services of the Comm. on Governmental Affairs (1980 Census), 96th Cong. 10 (1980). "Congress' unbroken practice" cuts strongly against "petitioner['s] argument" here. *Eldred v. Ashcroft*, 537 U.S. 186, 213-14 (2003).

Second, "until the [] Memorandum, the Executive Branch has also always taken the view that the 1929 Act prohibited exclusion of illegal aliens from the apportionment base due to legal status alone." App.90a. That "long practice amount[s] to a contemporaneous and continuous construction of the statute

by the … executive officers charged with … carrying out its provisions." *United States v. McMillan*, 165 U.S. 504, 515-16 (1897).

For example, in 1980, the Department of Justice argued that "[t]he plain language of [the Act] maintains the Constitutional requirement of counting all inhabitants of the states, *legal and illegal*, for purposes of apportionment." Defs.' Reply Mem. & Opp. Pls.' Mot. Summ. J. at 11, *FAIR v. Klutznick*, No. 79-3269, 1980 WL 683642, at *11 (D.D.C. Jan. 3, 1980) (emphasis added). In 1988 and 1989, the Justice Department reaffirmed in letters "to Congress that excluding illegal aliens from the census and apportionment would be unconstitutional." App.90a-91a (citing Ltr. from Thomas M. Boyd, Acting Ass't. Atty. Gen., to Rep. William D. Ford (June 29, 1988)); Ltr. from Carol T. Crawford, Assistant Attorney Gen., to Sen. Jeff Bingaman (Sept. 22, 1989) (reprinted in 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989)).

The Census Bureau continues to interpret the statutes to require including undocumented immigrants. Under the Residence Rule, foreign citizens including undocumented immigrants who live in the United States will be "counted at the U.S. residence where they live and sleep most of the time." 83 Fed. Reg. 5533. The Rule's stated aim is "to ensure that the concept of usual residence is interpreted and applied, consistent with the intent of the Census Act of 1790, which was authored by a Congress that included many of the framers … ." *Id.* at 5526.

B. The Constitution Requires Including Undocumented Immigrants Residing in this Country in the Apportionment Base

This Court should also summarily affirm because the Constitution requires including the "whole number of persons in each state" in the apportionment. Rarely is a constitutional issue presented to this Court so clear-cut. The Constitution's express terms, the unambiguously expressed intent of the Framers of the Fourteenth Amendment, and this Court's decision in *Evenwel*, 136 S. Ct. 1120, conclusively establish that undocumented immigrants residing in this country must be included in the apportionment.

1. The Fourteenth Amendment requires apportionment to be based on "the whole number of persons in each state," and this Court has held that the term "person" in the Fourteenth Amendment includes undocumented immigrants. *Plyler*, 457 U.S. at 210; *cf. Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) ("the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent"). "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sentence of that term." 457 U.S. at 210. Because undocumented residents "are clearly 'persons'" residing in a state, the Fourteenth Amendment is "not ambiguous" in mandating that undocumented immigrants living in this country must be included for apportionment. *FAIR*, 486 F. Supp. at 576; *accord New York v. Dep't of Commerce*, 351 F. Supp. 3d. 502, 514 (S.D.N.Y. 2019).

2. History confirms that the Fourteenth Amendment means what it says. Its Framers

considered this exact question, and determined the apportionment base should include all persons living in this country, including all foreign citizens.

The Fourteenth Amendment's Framers "considered at length the possibility of allocating House seats to states on the basis of voter population" or citizen population. *Evenwel*, 136 S. Ct. at 1127 (citation omitted). The Joint Committee of Fifteen initially voted to apportion House seats based on "the whole number of *citizens* of the United States in each state." Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867*, 49–52 (emphasis added). After further deliberation, however, Representative Conkling moved to "strik[e] out the words 'citizens of the United States in each state,' and inserting in lieu thereof the words, 'persons in each State." *Id.* at 52. The Joint Committee adopted the amendment. *Id.*

Conkling explained that his amendment specifically ensured that all aliens residing in this country would be counted. Using "citizens" rather than "persons," he clarified, would "cause considerable inequalities …, because the number of aliens in some States is very large, and growing larger now, when emigrants reach our shores at the rate of more than a State a year." Cong. Globe, 39th Cong., 1st Sess. 359 (1866). "[M]any of the large States [held] their representation in part by reason of their aliens," Conkling added, and the Fourteenth Amendment had to "be acceptable to them" to ensure ratification. *Id.*

Other Framers agreed. Representative John Bingham explained that the "*whole immigrant population* should be numbered with the people and

counted as part of them" because "[u]nder the Constitution as it now is and as it always has been, *the entire immigrant population* of this country is included in the basis of representation." *Id.* at 432 (emphases added); *see also, e.g.*, *id.* at 411, 1256, 2987.

The Framers' decision reflected the view that the Constitution demands representation of "the whole population" of each state. Senator Jacob Howard explained when introducing the Fourteenth Amendment's final language: "Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2766–67 (1866).

3. In *Evenwel*, this Court confirmed that the Fourteenth Amendment incorporates this "theory of the constitution." "Texas, like all other States, [drew] legislative districts on the basis of total population"—including all residents counted in the census, without regard to citizenship or immigration status. 136 S. Ct. at 1123 (emphasis added). *Evenwel* rejected the notion that the Fourteenth Amendment precluded Texas from using the same "total population" base to draw districts, on the ground that the Fourteenth Amendment "retained total population as the congressional apportionment base." *Id.* at 1128. As the Court explained, "[i]t cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis." *Id.* at 1128–29.

That resolves this case. The "total population" Texas used for intra-state redistricting included undocumented immigrants living there. *Evenwel* held that the Fourteenth Amendment requires inter-state

apportionment to be based on this same "total population" base including undocumented immigrants.

C. Appellants' Justifications for the Memorandum Are Unavailing

1. Appellants attempt to create uncertainty around the meaning of "inhabitants" at the time of the founding by invoking the Swiss theorist Emmerich de Vattel's definition of "inhabitants" from the 1760 treatise *The Law of Nations*. J.S. 27. But Vattel's definition was never cited in the Constitutional Convention. Nor was it mentioned in the Reconstruction Debates. The best Appellants can do is note that Chief Justice Marshall cited Vattel's definition of "inhabitant" in an 1814 dissenting opinion discussing war prizes. *Id.* at 27-28.

In any event, Appellants' reliance on Vattel proves too much. Vattel defined "inhabitants" as "distinguished from citizens"—*i.e.*, in his lexicon, only *non*-citizens were classified "inhabitants." The Law of Nations, Ch. 19, § 213 (1760). Applying that definition for apportionment purposes would *exclude all citizens* from the population base. *Cf. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided").[4]

[4] While unnecessary to resolve this case given the clear history surrounding the Fourteenth Amendment, "inhabitant" as understood at the Founding may be gleaned by reference to dictionaries from the founding era. These sources all define "inhabitant" broadly to mean one who resides in a place, without regard to notions of government permission. *See* 1 S. Johnson, *A Dictionary of the English Language* 658 (6th rev. ed. 1785) ("Dweller; one that lives or resides in a place."); N. Bailey, *An Etymological*

2. Appellants point to "certain categories of illegal aliens" they claim could be cut from the apportionment base, such "as aliens residing in a detention facility," "aliens who have been detained for illegal entry and paroled into the country pending removal proceedings, or aliens who are subject to final orders of removal." J.S. 29.

But "illegal alien" is not a term of art in the Immigration and Nationality Act. And noncitizens paroled into the country or detained pending removal proceedings are currently residing *in* the United States.[5] "[M]any people in immigration custody or removal proceedings actually have lawful immigration status, and their placement in custody or removal proceedings does not necessarily render them unlawfully present." App.86a. Moreover, many are ultimately permitted "to remain in the United States," and "many people initially designated as 'undocumented'—including many intercepted at the border—ultimately obtain lawful status, such as asylum. App.86a-87a. And while "foreign tourists," J.S. 24, are not part of the census, that is because they are not *residents*, not because of their immigration status. App.84a, n.16. Indeed, under the Residence Rule, even U.S. citizens who usually reside outside this country

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English Dictionary (20th ed. 1763) ("one who dwells or lives in a Place."). None of these definitions imposes any requirement of legal consent of the sovereign.

[5] Indeed, Esther Kaplan of *Kaplan v. Tod*, 267 U.S. 228 (1925), whom Appellants contend never resided in the U.S. because she was denied lawful entry, J.S. 29-30, was in fact counted as an inhabitant in the 1920 census. *See* Dkt. 149-2.

would not be counted here if they were only transiently present. *See* 83 Fed. Reg. 5533.

In any event, the Memorandum does not purport to exclude *some* subcategories of undocumented immigrants from the apportionment. It makes it the categorical "policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status," and directs that those persons must be excluded solely because they are "not in a lawful immigration status." 85 Fed. Reg. 44,680. That is unquestionably unlawful. It is not a "particularly close" question. App.6a.

II. THE PRESIDENTIAL MEMORANDUM VIOLATES THE STATUTORY AND CONSTITUTIONAL REQUIREMENTS TO BASE THE APPORTIONMENT ON THE DECENNIAL CENSUS ALONE.

The district court also correctly found that the Memorandum "violates Congress's mandate to use the results of the census—and *only* the results of the census—in connection with the apportionment process." *Id.* at 79a (emphasis added). Here, too, the Memorandum also violates the Constitution.

A. The Census Act and the Constitution Require Apportionment Based on the Decennial Census Alone

1. The relevant Census Act provisions require that both the Secretary's report to the President, and the President's apportionment statement to Congress, must use the "total population" and "whole number of persons" as "ascertained under the … decennial

census." 13 U.S.C. § 141(a), 2 U.S.C. § 2a(a). As Appellants acknowledge, once the census is complete, the statutes assign a "ministerial" role to the President in calculating apportionment by applying a strict mathematical formula to census data. J.S. at 5; *see also Franklin*, 505 U.S. at 799.

This "automatic reapportionment" scheme, *Franklin*, 505 U.S. at 792, is made clear by "the historical background of the decennial census and the Act that governs it." *Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 335 (1999). In 1920, for the first time, Congress failed to pass a reapportionment act. *See Dep't of Commerce v. Montana*, 503 U.S. 442, 451-52 (1992). Responding to a "10-year stalemate," Congress reshaped the reapportionment scheme in 1929 to "make it virtually self-executing." *Franklin*, 505 U.S. at 792. The result was "an 'automatic connection between the census and the reapportionment'; [] that was '*the* key innovation of the [Census] Act.'" App.75a (quoting *Franklin*, 505 U.S. at 809 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added). As the 1929 Senate Report explained, after that year's census, "*with these figures in hand*, the President would report the census figures, together with a table showing how, *under these figures*, the House would be apportioned." S. Rep. 71-2 at 4 (1920) (emphasis added). The district court correctly relied on this background to "confirm that the Secretary's 'tabulation' … must be based on decennial census data alone." App.75a.

The district court also properly relied on the Executive Branch's longstanding understanding of the statutory framework. "[G]reat weight is attached to the construction consistently given to a statute

by the executive department … ." *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932). Indeed, almost 30 years ago, Chief Justice Roberts, then Deputy Solicitor General, explained to the Court that "[t]he law directs [the President] to apply … a particular mathematical formula to the population figures," and "[i]t would be unlawful … to say, these are the figures, they are right, but I am going to submit a different statement." *Franklin*, 505 U.S. 788 (No. 91-1502), Oral Arg. Tr., 1992 WL 672612, at *12.

2. The Constitution likewise instructs that the apportionment be conducted on the basis of the decennial census alone.

Article I, section 2 mandates that House seats be allocated based on the "numbers" determined by the "actual Enumeration" of the decennial census. U.S. Const. art 1, § 2. While the Executive Branch may maintain some discretion over the manner of the census, once the decennial census determines the "actual Enumeration," the Constitution commands Appellants to use those numbers—and only those numbers—to apportion House seats. As this Court has explained, "the results of the census *shall be used* to apportion the Members of the House of Representatives among the States." *Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996) (emphasis added).

The Framers required that apportionment be based solely on the actual enumeration to "limit political chicanery." *Utah*, 536 U.S. at 500 (Thomas, J., concurring in part and dissenting in part). Their "principal concern was that the Constitution establish a standard resistant to manipulation." *Id.* at 503. George Mason described having a "permanent and precise standard as essential to fair representation."

Id. at 502 (quoting The Founders' Constitution 102-03 (P. Kurland & R. Lerner eds. 1987)). Roger Sherman agreed that "the rule of revising the Representation ought to be fixt by the Constitution." *Id.* (quoting The Founders' Constitution 104). And Alexander Hamilton, writing about the Enumeration Clause's apportionment of direct taxes among the States, explained that "*an actual Census or enumeration of the people must furnish the rule*," so as to "shut[] the door to partiality or oppression." The Federalist No. 36 at 220 (emphasis added).

B. The Presidential Memorandum Requires that the Apportionment Be Conducted on the Basis of a Population Count Other than the Decennial Census.

1. The Memorandum flouts this statutory and constitutional requirement. Appellants repeatedly represented in the district court that, notwithstanding the Memorandum, the "complete enumeration" for the 2020 census will include all persons residing in the United States, including undocumented immigrants. Supp.App.120a. Under the Bureau's Residence Rule, undocumented immigrants who "live and sleep most of the time" in the United States are part of the census' enumeration of the population. 83 Fed. Reg. 5533. And the Bureau publicly represents that "undocumented residents . . . with a usual residence in the 50 states are included in the resident population for the census, which means they are all included in the apportionment counts."[6]

[6] *See supra* note 1.

But the Memorandum calls for the use of population numbers that "will necessarily be derived from something *other than* the census itself." App.78a-79a (emphasis added). Appellants will take the enumerated total population, and subtract some estimate of the undocumented immigrants who live in each State, using sources other than the actual Enumeration. *See* 85 Fed. Reg. 44,679-80. Appellants' Jurisdictional Statement clearly explains that the President will use this "second" number, reflecting "the population of each State 'exclud[ing]' undocumented immigrants," for the apportionment. J.S. at 5 (quoting 85 Fed. Reg. 44,680).

The Census Act and the Constitution prohibit Appellants from apportioning this way. The President does not have "discretion" to pencil out persons included in the actual enumeration to create a separate apportionment base of his own liking. The fixed "rule" of the Constitution, The Federalist No. 36 at 220, and statutory text, bar the President from using an apportionment base that differs from the "the whole number of persons in each State … as ascertained under the … decennial census." 2 U.S.C. § 2a(a).

2. Appellants' reliance on *Franklin* is misplaced. *Franklin* did not "suggest, let alone hold, that the President [can] use something other than the census when calculating the reapportionment," App.79a. To the contrary, *Franklin* affirmed that Congress has "expressly required the President to use … the data from the 'decennial census.'" 505 U.S. at 797. It did not recognize any presidential authority to *depart* from the actual enumeration for apportionment.

Although *Franklin* acknowledged the President's authority "to direct the Secretary in making policy judgments that result in 'the decennial census,'" 505 U.S. at 799, "that is not what the President[]'s Memorandum] did … ." App.81a-82a. Appellants repeatedly represented that the Memorandum will *not* affect the actual census count. *See* Supp.App.35a ("Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations or ' … commitment to count each person in their usual place of residence'"); *id.* at 110a-111a ("Plaintiffs are not challenging some procedure that will be used in the actual census, but an apportionment number that will be chosen by the President after the census is complete."). "They cannot now … on appeal—retreat from those admissions." Supp.App.9a.

Franklin, by contrast, involved the "*conduct of* the census—specifically … the Census Bureau's decision to count federal employees serving overseas as residents of the State listed as their home of record." App.79a (emphasis added). There, "[i]n July 1989, nine months *before* the census taking was to begin, then-Secretary of Commerce Robert Mosbacher decided to allocate overseas federal employees to their home states for purposes of congressional apportionment." 505 U.S. at 793 (emphasis added). The result was an "amendment of the 'decennial census' *itself*." *Id.* at 797-98 (emphasis added).

Appellants' assertion that the Census Bureau may use "data other than that collected as part of the questionnaire responses or other field operations," J.S. at 22, is true, but irrelevant. The fact that the Census Bureau may use administrative records to

decide *where* to allocate people who should be *included* in the enumeration is a horse of a different color. Supp.App.7a-9a. Using administrative data to fill "gaps" in self-responses is part and parcel of enumerating total population, as the Constitution and statutes command. *Utah*, 536 U.S. at 457. That is very different from using *non*-census data to subtract persons *already counted* in the enumeration, *post hoc*, in order to alter the apportionment, contrary to both constitutional and statutory mandates.

It does nothing for Appellants that "the 'decennial census'" might "present[] a moving target even after the Secretary reports to the President." *Franklin*, 505 U.S. at 797. The "question" in *Franklin* was "whether the census count is final before the President" sends the apportionment statement to Congress for purposes of Administrative Procedure Act review. *Id.* at 798 n.1. This Court concluded it was not, but only because of the possibility of "correction[s]" to the final census data. *See id.* at 797-99. *Franklin* was clear that the President may exercise "accustomed supervisory powers over his executive officers," *id.* at 800—but nowhere gave the President discretion to alter the final population after-the-fact for apportionment purposes. Thus, while "[a]s enacted, 2 U.S.C. § 2a(a) provides that the Secretary cannot act alone," *id.*, it still "require[s] the President to use … the data from the 'decennial census'" for the apportionment. *Id.* at 797.

Appellants' plan to use something other than the actual Enumeration for apportionment—with the express purpose of punishing "States adopting policies" with which the Administration disagrees and reshaping political representation for the next decade, 85

Fed. Reg. 44,680—constitutes precisely the type of "political chicanery" and "manipulation" that the Framers sought to avoid by requiring the apportionment to be conducted on the basis of the census alone. *Utah*, 536 U.S. at 500, 503 (Thomas, J., concurring in part and dissenting in part). The "actual Enumeration" forming the basis for apportionment must be the "whole number of persons" counted in the census, not whatever the President says it is.

III. PLAINTIFFS HAVE STANDING, THIS CASE IS NOT MOOT, AND THERE IS NO "MISMATCH" BETWEEN PLAINTIFFS' INJURY AND THE RELIEF AWARDED

Appellants assert that the Court should "summarily reverse" because they believe this matter will become moot sometime in the future. It will not.

A. Appellants first object that the Memorandum's "chilling effect" is speculative. J.S. 13-14. But the record below featured "undisputed evidence that the Memorandum [affects] the census count in the present," App.44a, by causing "widespread confusion among illegal aliens and others as to whether they should participate in the census." App.35a. The result is a clear "deterrent effect on participation in the decennial census, particularly among noncitizens, immigrants, and their family members, and, in turn, the adverse consequences that are likely to flow from that deterrent effect." App.30a. *See also* App.29a-68a. These facts are established by dozens of declarations from Appellees, their members, and experts. Appellants did not rebut *any* of them.

The consequences include not only depressed counts, but resource-diversion injuries, App.35a-37a, which Appellants do not even address. Injuries stemming from "the predictable effect of Government action on the decisions of third parties" were sufficient to establish standing in this Court's last Census case, *New York*, 139 S. Ct. at 2566. They are sufficient here.

B. Appellants next assert that the case will become moot when census data collection ends (an as-yet undetermined date given court orders in different litigation). But field data collection remains ongoing *now*. Appellants' ask this Court to summarily reverse a declaratory judgment and injunction that redresses an ongoing injury to Plaintiffs because it may become moot later. That request is baseless. The Court can and should summarily affirm the lower court's decision now, while data collection continues.

Appellants' related argument that there is a "mismatch" between the relief provided and plaintiffs' injury, J.S. 13-14, is equally unpersuasive. First, Appellants failed to raise this argument below. The district court specifically asked the parties to address the proper scope of relief, but Appellants did not assert their "mismatch" argument. The district court therefore held "they waived the argument by not pressing it" until stay briefing. Supp.App.12a-13a. Because the scope of relief "is not an argument about standing but about the merits," *Salazar v. Buono*, 559 U.S. 700, 713 (2010) (plurality opinion), it may be waived, *see Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1215 (9th Cir. 2009) (failure to object to scope of injunction in district court meant argument was waived on appeal).

Second, there is no "mismatch." The government's theory that the injunction will be moot "before" it takes "effect" on December 31, J.S. 14, ignores the fact that the court issued a declaratory judgment that is effective *now*, precisely because the Memorandum is injuring plaintiffs *now*. And the injunction, too, is effective *now*—it enjoins the Memorandum itself, which is what the district court found is chilling the ongoing count.

The fact that relief might be reversed on appeal does not make it an "advisory opinion." J.S. 15. Injunctions and declaratory judgments are always subject to appellate reversal. Appellants purport to distinguish this case on the ground that the district court issued "future relief" to "redress only present injury." J.S. 16. But as just noted, the declaratory judgment and injunction both address the Appellees' *current* injuries by invalidating the Memorandum.

On Appellants' "mismatch" theory, the Department of Justice could announce today that, starting November 10, 2020, it will investigate for campaign finance violations everyone who contributes to Joe Biden, and a court would be powerless to prevent the obvious chill on First Amendment rights. As here, that injunction would be directed at a current announcement of future action, but surely such a threat would create a justiciable controversy—just as the Memorandum does here.

C. Nor will this case become moot once the census count is complete. Appellants' argument on this score "confuse[] mootness with standing." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). "Standing doctrine functions to ensure … that the scarce resources of the federal

courts are devoted to those disputes in which the parties have a concrete stake." *Id.* at 191. "In contrast, by the time mootness is an issue, the case has been brought and litigated," and "[t]o abandon the case at an advanced stage may prove more wasteful than frugal." *Id.* at 191-92.

For these reasons, Appellants bear a "heavy burden" of establishing that this case will become moot when data collection ends. *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983). "A case becomes moot … only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (internal quotation marks omitted). Appellants have not carried their heavy burden here.

First, even after the census concludes, summary affirmance will prevent injury to Appellees in the form of diminished representation in Congress. The Memorandum explicitly anticipates that excluding undocumented immigrants would affect one State that "is home to more than 2.2 million illegal aliens" (California) by reducing "the allocation of two or three more congressional seats than would otherwise be allocated." 85 Fed. Reg. 44,680. Two Plaintiff organizations have members in California, Dkt. 75 ¶¶ 34, 37, 47-48, and face certain and cognizable future injuries due to the Memorandum. Additionally, Appellees' expert concluded, and Appellants did not dispute, that Texas—home to numerous members of the Plaintiff organizations—has a 98.3% chance of losing a congressional seat if Appellants' policy is implemented. Dkt. 76-58 (¶43, Tbl. 7). *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S.

316, 330 (1999) (affirming standing on summary judgment based on expert testimony that "it is a virtual certainty that Indiana will lose a seat … under the Department's Plan").

The district court did not reach this injury because Appellees' other injuries were sufficient to establish standing. App.43a-44a. But there is nothing speculative about what the Memorandum intends to do: reduce the congressional representation of several states and their residents. And because the illegal conduct and its remedy do not turn on the particulars of which states lose seats, or on precisely how many seats are lost, that injury is ripe for review now, and easily establishes Appellees' continued, concrete stake in the legality of the Presidential Memorandum.

Moreover, this Court has explained that "harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (quoting *Friends of the Earth, Inc.*, 528 U.S. at 170). Here, there is no genuine dispute that excluding undocumented immigrants is all but certain to affect the apportionment—that is the very point of the Presidential Memorandum. To carry their burden in establishing mootness on appeal, Appellants would have to establish that excluding undocumented immigrants would *not* achieve the Memorandum's stated goal of causing states to lose congressional seats. They do not even try.

This is the paradigmatic case where "[t]o abandon the case at an advanced stage may prove more wasteful than frugal." *Friends of the Earth, Inc.*, 528 U.S. at 189. If this Court were to deem Appellees' census count injuries moot when the census count is over,

and to apply *Munsingwear* rather than to simply dismiss the appeal, *but see infra* IV.E, the proper course would be a remand to the district court to address Appellants' remaining standing claims. By that time, if it is not already, the apportionment injury will be sufficiently concrete to support standing, Supp.App.14a n.8, so the district court would just reinstate its merits opinion. A mootness finding would do nothing but delay this case's resolution by a few months, and waste the scarce time and resources of the half-dozen three-judge district court panels that have actively presided over the cases challenging the Memorandum. Appellants' request that this case be found moot when it will become live again two months later in no way serves the public interest.

Second, Appellants' most recent representations give rise to an additional basis for a live case and controversy: that the Memorandum will directly reduce census-related appropriations to states and localities with substantial immigrant populations—including to programs on which Appellees' members rely. Appellants argued below that the Memorandum would *not* have such fiscal effects, because it would exclude undocumented immigrants from the apportionment base only—and not from the "actual census." App.84a. But in this Court, they now state that they intend to use administrative records to eliminate undocumented immigrants from the "census tabulation" altogether. J.S. 19; *accord* J.S. 23.

In that event, the Presidential Memorandum would certainly cause financial injury to Appellees. Excluding any undocumented immigrants from the census will necessarily reduce federal funding tied to the census count. *See New York*, 139 S. Ct. at 2565.

That, in turn, will reduce the funding available to Appellees and their members, who provided undisputed evidence of their reliance on census-based appropriations. *See e.g.*, Dkt. 76-14 ¶¶ 5, 12; Dkt. 76-18 ¶¶ 5, 18; Dkt. 76-26 ¶¶ 17-18; Dkt. 76-43 ¶¶ 6, 20; Dkt. 76-47 ¶3. . Such financial injuries independently support standing and prevent mootness. *Cf. Bank of Am. Corp. v. City of Miami*, Fla., 137 S. Ct. 1296, 1303 (2017) (standing based on unquantified "lost tax revenue and extra municipal expenses" due to discriminatory mortgage lending); *Massachusetts v. E.P.A.*, 549 U.S. 497, 523 (2007) (standing based on likely future climate change remediation costs to state, where the amount was uncertain). And again, because the violation (excluding undocumented immigrants in the count) and the remedy (including them) do not turn in any way on the particulars of the downstream effects, this dispute is fully ripe now.

D. Even if this matter were moot, it would satisfy the capable-of-repetition-yet-evading-review exception. First, the census count runs for eight or nine months—"too short" to allow a challenge based on chilling participation "to be fully litigated prior to cessation or expiration." *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 462 (2007); *see Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) ("two years is too short to complete judicial review"). That is especially so given the possibility that an announcement of a policy that chills participation may come well into the counting period, as it did here. App.46a-47a.

Second, "there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC*, 551 U.S. at 462. The NGO

plaintiffs are well-established organizations that intend and reasonably expect to be around for the 2030 census. The New York Immigration Coalition, for example, was founded in 1987. And, of course, the state and local governmental plaintiffs will be subject to the 2030 census and all future censuses. If the judgment below is reversed, the policy of the United States will continue to be to exclude undocumented immigrants from the apportionment, and that policy, unless declared invalid by the courts, will injure the NGO plaintiffs and the states in 2030 in precisely the way it injured them in 2020, by chilling participation in the census. As this dispute and prior census disputes have demonstrated, absent judicial relief clarifying the government's obligations, there is a real risk that similar manipulations will recur next time, and again be too short-lived to be reviewed.

E. Finally, if the Court were to decide that the appeal had become moot, the proper course would be to dismiss the appeal for lack of jurisdiction, not to vacate the decision below. A losing party is not automatically entitled to vacatur when the Court loses jurisdiction on appeal; *Munsingwear* is an equitable remedy to which a "suitor's conduct in relation to the matter at hand may disentitle him." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). Appellants have not even tried to "demonstrate … equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26.

Nor could they. Here, any mootness would be entirely attributable to the Government. Appellants were asked specifically whether an injunction would redress the chilling effect on the census count, *see* Dkt. 158, and waived any argument that it would not,

Supp.App.12a-13a. The Court declined to reach Appellants' apportionment theory of injury—which indisputably would *not* be moot—at Appellants' urging. App.43a. And, as the district court found, "it is *Defendants' own conduct* that has put Plaintiffs in such a precarious position." App.67a. Appellants inexplicably chose to announce their policy change belatedly, in the middle of the census count, rather than sufficiently in advance to allow a full course of judicial review. It would be "perverse" to allow them to benefit from that decision. *Cf. id.*

CONCLUSION

For the reasons stated above, the motion to dismiss or affirm should be granted.

In the alternative, if this Court notes probable jurisdiction, the Court should include the constitutional challenges asserted below, and Appellants' motion to expedite plenary consideration should be denied in light of their repeated representations that errors in the apportionment can be remedied after the fact, and their recently-acknowledged inability under any circumstances to implement the Presidential Memorandum prior to the December 31 statutory deadline for the Commerce Secretary's apportionment report.

Respectfully submitted,

Dale E. Ho
Counsel of Record
Adriel I. Cepeda Derieux
Davin Rosborough
Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2693
dho@aclu.org

David D. Cole
Sarah Brannon
Ceridwen Cherry
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
WASHINGTON, DC 20005

Julia A. Gomez
Peter Eliasberg
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West 8th Street
LOS ANGELES, CA 90017

John A. Freedman
Elisabeth S. Theodore
R. Stanton Jones
Daniel F. Jacobson
ARNOLD & PORTER KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001

Perry Grossman
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Andre I. Segura
Edgar Saldivar
Thomas Buser-Clancy
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS
P.O. Box 8306
Houston, TX 77288

Counsel for Appellees New York Immigration Coalition, et al.

Date: October 7, 2020

SUPPLEMENTAL
APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CV-5770 (RCW) (PWH) (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS,

-v-

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS.

FILED: September 29, 2020

OPINION AND ORDER

Before: RICHARD C. WESLEY, United States Circuit Judge; PETER W. HALL, United States Circuit Judge; JESSE M. FURMAN, United States District Judge

PER CURIAM

On July 21, 2020, the President of the United States issued a Memorandum declaring that, "[f]or the purpose of the reapportionment of Representatives following the 2020 census" —which is still ongoing — "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census § 2, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (ECF No. 1-1) (the "Presidential Memorandum"). Within days, Plaintiffs filed these consolidated cases, familiarity with which is assumed, alleging that the

Presidential Memorandum violates the Constitution, statutes governing the census and apportionment, and other laws. In an Opinion and Order entered September 10, 2020, we granted summary judgment to Plaintiffs on the ground that the Presidential Memorandum constituted an "*ultra vires* violation of Congress's delegation of its constitutional responsibility to count the whole number of persons in each State and to apportion members of the House of Representatives among the States according to their respective numbers under 2 U.S.C. § 2a and 13 U.S.C. § 141." *New York v. Trump*, — F. Supp. 3d —, No. 20-CV-5770 (RCW) (PWH) (JMF), 2020 WL 5422959, at *36 (S.D.N.Y. Sept. 10, 2020) (ECF No. 164); *see* ECF No. 165 ("Judgment").We declared the Presidential Memorandum to be unlawful. And we also entered an injunction barring the Secretary of Commerce (the "Secretary") and other Defendants from "including in the Secretary's report to the President pursuant to Section 141(b) [of the Census Act] . . . any information concerning the number of aliens in each State who are not in a lawful immigration status under the Immigration and Nationality Act." *New York*, 2020 WL 5422959, at *35 (internal quotation marks and citation omitted). We confirmed, however, that Defendants were "*not* enjoin[ed] . . . from continuing to study whether and how it would be feasible to calculate the number of illegal aliens in each State." *Id.*

On September 16, 2020, Defendants filed a notice of appeal of our judgment to the Supreme Court and, the same day, moved for a stay of judgment pending appeal. *See* ECF Nos. 170-71; *see also* ECF No. 172 ("Defs.' Mem."). Plaintiffs filed their opposition on September 23. *See* ECF No. 176. Upon

review of the parties' submissions, and for the reasons that follow, we DENY Defendants' motion as meritless.

LEGAL STANDARD

In deciding whether to issue a stay pending appeal, a court must consider four factors: (1) whether the movant has "made a strong showing" that it "is likely to succeed on the merits"; (2) whether the movant "will be irreparably injured absent a stay"; (3) whether a stay "will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors — the likelihood of success and irreparable harm — "are the most critical," *id.*, and "have typically been evaluated on a sliding scale, so that a strong showing that the applicant is likely to succeed excuses a weaker showing of irreparable injury," *Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 884 F. Supp. 2d 108, 122 (S.D.N.Y. 2012); *accord Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006). Nevertheless, as the Supreme Court has emphasized (in the parallel context of issuing a preliminary injunction), "the applicant must demonstrate that both factors are satisfied, so that even if a party makes a robust showing that it is likely to succeed on appeal, it *must* also show that 'irreparable injury is likely.'" *Nat. Res. Def. Council*, 884 F. Supp. 2d at 122 & n.12 (emphasis added) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). Notably, "[a] stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken*,

556 U.S. at 433 (internal quotation marks and citations omitted). Ultimately, the party or parties seeking the stay bear "the heavy burden of demonstrating that a stay is warranted." *U.S. Commodity Futures Trading Comm'n v. eFloorTrade, LLC*, No. 16-CV-7544 (PGG), 2020 WL 2216660, at *2 (S.D.N.Y. May 7, 2020) (internal quotation marks omitted); *accord Nken*, 556 U.S. at 433-44. Defendants fall well short of carrying their burden. In fact, they satisfy none of the four factors relevant to the analysis.

IRREPARABLE HARM

First and foremost, Defendants fail to show that they will suffer any irreparable injury absent a stay. In fact, they do not even purport to make the necessary showing. They say only that they "*may* suffer irreparable injury without a stay of the judgment." Defs.' Mem. 6 (emphasis added) (capitalization altered). But that is not the relevant standard. *See Nken*, 556 U.S. at 434 ("*will* be irreparably injured" (emphasis added)); *see also, e.g.*, *Rubin v. United States*, 524 U.S. 1301, 1301 (1998) (Rehnquist, C.J., in chambers) ("An applicant for stay first *must* show irreparable harm if a stay is denied." (emphasis added)).

By itself, that failure is enough to deny Defendants' motion. But even if Defendants were correct about the applicable standard, their arguments about irreparable harm are frivolous. First, by their own admission, our injunction will not "actually constrain[] Defendants' actions" until at least December 31, 2020 — the statutory deadline for

the Secretary's Section 141(b) report. Defs.' Mem. 3.[1] At a minimum, therefore, Defendants would have to show that they could not obtain appellate relief by that date. Yet they make no such showing.[2]

Even if Defendants could not obtain appellate relief by the statutory deadline for the Section 141(b) report, their own prior representations and arguments make plain that they would not face *any* harm, let alone irreparable harm, absent a stay. Defendants have repeatedly maintained (in service of their arguments that resolution of these cases was not urgent and that Plaintiffs could not show apportionment-based irreparable harm) that "an erroneous or invalid apportionment number can be remedied *after the fact*." ECF No. 118 ("Defs.' Original Mem."), at 48 (emphasis added); *see also* ECF No. 79 ("Aug. 5, 2020 Tr."), at 16 ("[T]he case could be decided after the president submits the numbers to Congress."); Defs.' Original Mem. 9-10 ("[Plaintiffs'] challenge should await the actual apportionment . . .

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[1] Due to events since Defendants' motion, the injunction may not constrain Defendants' actions until later. On September 24, 2020, the United States District Court for the Northern District of California granted a preliminary injunction staying the "U.S. Census Bureau's . . . September 30, 2020 deadline for the completion of data collection and December 31, 2020 deadline for reporting the tabulation of total population to the President" and enjoining the Secretary, the Department of Commerce, the Director of the U.S. Census Bureau, and the U.S. Census Bureau "from implementing these two deadlines." *Nat'l Urban League v. Ross*, — F. Supp. 3d —, No. 5:20-CV-5799 (LHK), 2020 WL 5739144, at *48 (N.D. Cal. Sept. 24, 2020).

[2] Notably, we entered final judgment only 48 days after these lawsuits were filed (and 51 days after the Presidential Memorandum was issued), at which time there were 112 days remaining until the statutory deadline.

."); ECF No. 154 ("Defs.' Original Reply"), at 2 ("[A]pportionment challenges have historically been decided postapportionment without spurring the 'chaos' that Plaintiffs allege (without factual support) will occur here if the Court waits."). "[T]here is no need," they asserted, "to resolve this lawsuit before the submission of the enumeration numbers to the President" — so long as it was resolved in time for "the *2022 elections*." ECF No. 37 ("Joint Pre-Conf. Ltr."), at 5 (emphasis added).

That position is surely correct, *see, e.g.*, *Utah v. Evans*, 536 U.S. 452, 462 (2002); *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), and, regardless, is binding on Defendants here, *see, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." (brackets and internal quotation marks omitted)). And it is fatal to any claim of irreparable harm. As Defendants admit, there is no magic to the deadline for the Secretary's Section 141(b) report; in the event Defendants obtain appellate relief thereafter, they can implement the Presidential Memorandum.

LIKELIHOOD OF SUCCESS ON THE MERITS

Defendants also fail to make a showing, let alone a "strong showing," that they are "likely to succeed on the merits." *Nken*, 556 U.S. at 434. Defendants make three arguments: (1) that, in holding that "the Presidential Memorandum violates Congress's mandate to use the results of the census — and only the results of the census — in connection with the apportionment process," *New York*, 2020 WL

5422959, at *27, we failed to consider that *Franklin* approved the use of "administrative records when conducting the enumeration," Defs.' Mem. 4-5; (2) that, in holding that "[t]he statutory command to use the 'whole number of persons in each State' as the apportionment base does not give the President discretion to exclude illegal aliens on the basis of their legal status, without regard for their residency," *New York*, 2020 WL 5422959, at *32, we "mistakenly suggested that the meaning of 2 U.S.C. § 2a is different from the substantive standard under the Constitution," and that the Constitution leaves room for the President to exclude illegal aliens from the "whole number of persons in each State," Defs.' Mem. 5-6 (citation omitted); and (3) that there is "a mismatch between the asserted injury on which the Court relied (the chilling effect [on the census count]) and the relief that it ordered (an injunction of conduct after census field operations end)," *id.* at 3.

We will address each argument in turn.

A. Apportionment Must Be Based on the Results of the Census Alone

Defendants' first argument rests on either a mischaracterization or a serious misunderstanding of our Opinion and Order, as well as additional disregard of their own prior concessions. We did not overlook that the census count in *Franklin* was based in part on administrative records, let alone suggest that the Secretary, in exercising his discretion with respect to the census under Section 141(a), could not use administrative records "to subtract people" in reaching a final census count even though they were enumerated. Defs.' Mem. 5 (emphasis omitted). To the contrary, we explicitly acknowledged Defendants'

argument that the overseas personnel at issue in *Franklin* "were counted using administrative records rather than a questionnaire" and explained that that fact "was of no moment" because there, unlike here, "[t]he overseas personnel were counted as part of the census itself, resulting in a single 'tabulation of total population by States' under the 'decennial census.'" *New York*, 2020 WL 5422959, at *28 n.15 (quoting 13 U.S.C. §§ 141(a)-(b)).

The Secretary might have discretion under the Census Act to use administrative records as a method of not counting people in the census. But for whatever strategic reason, that is not what the Presidential Memorandum does. Instead, the Presidential Memorandum directs the Secretary to report "[t]he tabulation of total population by States" under the previously adopted "Residence Rule" that governs the "decennial census" *and* a second set of numbers based on something other than the census.[3] Indeed, during this litigation, Defendants themselves repeatedly admitted as much. *See, e.g.*, Joint Pre-Conf. Ltr. 5 ("Plaintiffs are not challenging some procedure that will be used in the actual census, but an apportionment number that will be chosen by the

[3] *See* Presidential Memorandum, 85 Fed. Reg. at 44,679 (titled "Excluding Illegal Aliens From the Apportionment Base *Following* the 2020 Census" (emphasis added); *id.* at 44,680 § 3 (requiring the Secretary "to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary *shall also* include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations*, 83 [Fed. Reg.] 5525 (Feb. 8, 2018)." (emphasis added)).

President after the census is complete.").[4] They cannot now — or on appeal —retreat from those admissions. And for the reasons we have already explained, those admissions render the Presidential Memorandum an *ultra vires* violation of the statutes governing the census and apportionment. *See New York*, 2020 WL 5422959, at *25-29.

B. The Apportionment Base Must Include Illegal Aliens Who Reside in a State

Defendants' second claim — that we erred in finding that illegal aliens who reside in the United States qualify as "persons in" a "State" under Section 2a — fares no better. For one thing, the argument assumes that Defendants have the better of the constitutional argument —that the same language in the Constitution might carry a different meaning. Although we did not reach the constitutional question in our Opinion and Order — and need not do so here — that proposition is certainly debatable. By their own admission, Defendants cannot cite a *single* example in the historical record where any branch of the Government adopted the interpretation of the Constitution that they now advance. *See* Oral Arg. Tr.

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[4] *See also, e.g.*, ECF No. 120 ¶ 12 ("The Presidential Memorandum . . . has had no impact on . . . the Census Bureau's commitment to count each person in their usual place of residence, as defined in the [Residence Rule]."); ECF No. 118, at 4 ("The Presidential Memorandum directs the Secretary of Commerce to submit to the President two tabulations."); *id.* at 12 ("[T]he Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations . . . ." (emphasis in original)); Defs.' Original Reply 2 "([T]he Memorandum itself [does] not in any way affect the conduct of the actual census . . . .").

46; *New York*, 2020 WL 5422959, at *32; *see also, e.g.*, *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 524 (2014) (holding that "*historical practice*" was entitled to "*significant weight*" in interpreting the Recess Appointments Clause); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (observing that "[p]erhaps the most telling indication of the severe constitutional problem with" the structure of the independent agency at issue was its "lack of historical precedent" (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting))).

In any event, Justice Frankfurter's axiom that "if a word is obviously transplanted from another legal source . . . it brings the old soil with it," Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) (cited at Defs.' Mem 5), does not get Defendants very far, for at least two reasons. First, as we noted in our Opinion and Order, a court's principal task in interpreting a statute is to apply its terms "in accord with the ordinary public meaning . . . at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); *accord Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362-63 (2019) (citing cases). The "old soil" axiom is a means to that end; at bottom, it is an application of the well-established principle that when Congress adopts the language of an earlier legal source, it is presumed to have also adopted the settled understanding given to such language "and made it a part of the enactment." *United States v. Kwai Fun Wong*, 575 U.S. 402, 425 (2015) (Alito, J., dissenting) (citation omitted); *see Stokeling v. United States*, 139 S. Ct. 544, 551 (2019). As we previously

demonstrated, to the extent that there was a settled understanding of the constitutional language in 1929, when the precursor to Section 2a was enacted, it was that the "whole number of persons in each State" used for apportionment included all persons residing in a State, without regard for legal status. *See New York*, 2020 WL 5422959, at *30-32.[5] At best, Defendants maintain that the constitutional question was unsettled in 1929 (and, indeed, that it remains unsettled today). If so, the old soil does not answer the relevant question.

Moreover, as we explained in our Opinion and Order, there was a good reason not to plow the "old soil" in this case: Doing so would run contrary to the equally well-established principle that courts should not "pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *New York*, 2020 WL 5422959, at *25 (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).[6] The Supreme Court has

[5] Defendants argue that, in our Opinion and Order, we "appeared to rely on statements suggesting a view only that *aliens* (writ large) cannot be excluded from the enumeration count for apportionment," which "does not answer the question whether a smaller subset — some or all aliens *who are here unlawfully* — may be excluded." Defs.' Mem. 6 (citation omitted). But Defendants do not identify a single statement or source in 1929 that differentiated between legal and illegal aliens with respect to the statutory phrase "whole number of persons in each State." That silence is fatal to Defendants' argument.

[6] Thus, Defendants' assertion in the Jurisdictional Statement they filed in the Supreme Court, that we "gave no reason for departing from the presumption that when 'a word is obviously transplanted from another legal source,' it 'brings the old soil with it,'" is wrong. Jurisdictional Statement 32, *Trump v. New York*, No. 20-366 (Sept. 22, 2020) ("Jurisdictional Statement")

never followed the "old soil" axiom in interpreting a statute where, as here, the "old soil" was the Constitution itself, let alone where, as here also, doing so would entail passing upon a constitutional question for the first time. Doing so would be inconsistent with "the fundamental principle of judicial restraint." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008). And doing so *here* would have unnecessarily complicated our task, as the meaning of the phrase "whole number of persons in each State" in 1929 was and is clear without the need to delve into Founding and Reconstruction era sources. *See Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring) ("It is not the habit of the [C]ourt to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." (citation omitted)).

C. Defendants' Mismatch Argument Was Waived and Does Not Justify a Stay

Finally, Defendants' mismatch argument does not merit a stay for several reasons. First, they waived the argument by not pressing it earlier. *See, e.g.*, *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1215 (9th Cir. 2009) ("[The defendant] did not object to the scope of the injunction before the district court and, therefore, has waived the objection."); *In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003) ("[Defendant] objects to the injunction's breadth. But having failed to suggest alternative language either in the district court or in this court, it

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(quoting *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018)). Likely because it flies in the face of our Opinion and Order, Defendants do not make the same assertion in their brief seeking relief from us here.

has waived the objection.").[7] Defendants try to evade the consequences of their earlier silence by suggesting (and arguing more explicitly in their Jurisdictional Statement in the Supreme Court) that the issue relates to standing or mootness and, thus, jurisdiction. *See* Defs.' Mem. 2-3; *see also* Jurisdictional Statement 12-16. But that suggestion is meritless. It is black letter law that "the standing inquiry" is "focused on . . . when the suit was filed," *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008), and census operations were in full swing when these suits were filed. And there is certainly no mootness issue now (let alone at the time we issued our Opinion and Order), as census operations are ongoing as of today and may continue for at least a month. *See Nat'l Urban League*, 2020 WL 5739144, at *48; *see also, e.g.*, 2020 Census Deadline Extensions Act, S. 4571, 116th Cong. (2020) (bipartisan bill introduced in the Senate on September 15, 2020 that would extend census operations to October 31, 2020).

Second, to the extent that Defendants are correct that, upon the end of census operations, our injunction would no longer be needed to prevent census-related harms, they seek the wrong form of relief and at the wrong time. Instead, Defendants must move to modify or dissolve the injunctive portion

[7] This issue was foreseeable well before our decision. The prospect that, in finding standing and granting relief, we might rely solely on the harms caused by the Presidential Memorandum to the census count was apparent as early as the initial conference on August 5, 2020. *See* Aug. 5, 2020 Tr. 25-35. That we had multiple avenues available through which we could find a violation and craft relief does not excuse Defendants' failure to recognize and address the issue in their brief or during oral argument.

of our judgment at the end of census operations, pursuant to Rules 60(b)(5) and 62(d) of the Federal Rules of Civil Procedure. *See, e.g.*, Fed. R. Civ. P. 62(d) ("While an appeal is pending from . . . [a] final judgment that grants . . . an injunction, the court may suspend, modify, restore, or grant an injunction . . . ."); *Horne v. Flores*, 557 U.S. 433, 447 (2009) ("Rule [60(b)(5)] provides a means by which a party can ask a court to modify or vacate a judgment or order if a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest." (internal quotation marks and citation omitted)); *see also* Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the district court for . . . an order suspending, modifying, restoring, or granting an injunction while an appeal is pending."). Staying the injunction now would be inappropriate in this respect, because the factual circumstances could be materially different at the end of census operations — and not necessarily in Defendants' favor.[8] Put differently, Defendants' confident assertion that there will be no factual basis for an injunction following the end of census operations is entirely speculative and thus can't serve as the basis for a stay at this point.

Finally, the real "mismatch" here is between Defendants' arguments and the relief they seek, namely a stay of our judgment *in its entirety*. Injunction aside, Defendants' argument on appeal provides absolutely no basis to disturb the declaratory

[8] For example, if the Census Bureau and the Secretary have determined by that time the methodology they will use to count the number of "aliens who are not in a lawful immigration status" as directed in the Presidential Memorandum, Plaintiffs' asserted apportionment harms might no longer be speculative and could well justify maintaining the injunction.

judgment (thus undermining Defendants' assertion that our Opinion and Order constitutes an impermissible "advisory opinion"). *See, e.g.*, *Richardson v. Ramirez*, 418 U.S. 24, 34-40 (1974) (holding that a case was not moot based in part on the fact that the lower court had granted declaratory relief); *cf. Brockington v. Rhodes*, 396 U.S. 41, 42 (1969) ("[*I*]*n view of the limited nature of the relief sought*, we think the case is moot because the congressional election is over. The appellant did not allege that he intended to run for office in any future elections. . . . *He did not seek a declaratory judgment, although that avenue too was open to him*." (emphases added)). We assume — just as the Supreme Court did in *Utah* and *Franklin* — that it is "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute . . . by the District Court . . . ." *Franklin*, 505 U.S. at 803 (plurality opinion), *quoted with approval in Utah*, 536 U.S. at 463-64 (majority opinion). To the extent that this assumption is valid, there is no basis for a stay because, so long as the declaratory judgment stands, the Secretary will not include the second set of numbers in his Section 141(b) report anyway. And to the extent that this assumption is invalid, there is no basis for a stay because the injunction is needed to prevent Defendants from acting unlawfully.

HARM TO PLAINTIFFS AND THE PUBLIC INTEREST

Finally, the third and fourth stay factors — whether a stay "will substantially injure" Plaintiffs and "where the public interest lies," *Nken*, 556 U.S. at 434; *see, e.g.*, *Sierra Club v. Trump*, 929 F.3d 670, 704-

05 (9th Cir. 2019) (holding that where, as here, the government seeks a stay, the third and fourth factors merge) — also weigh heavily against a stay. Defendants' argument on the third prong is limited to two sentences, *see* Defs.' Mem 7, and barely merits commentary. Defendants would not suffer any harm in the absence of a stay. But if a stay were granted, Plaintiffs would suffer the irreparable injuries detailed at length in our Opinion and Order: the "massive and lasting consequences" of an inaccurate census count, which occurs only once a decade, with no possibility of a do-over if it turns out to be flawed." *New York*, 2020 WL 5422959, at *16 (citation omitted); *see also id.* at *9-23. Moreover, we fail to see how, as Defendants argue, "a stay serves the public interest by promoting clarity for the public (and for the parties) as to exactly what will happen in the upcoming census process," Defs.' Mem. 8 —given that Defendants have not articulated how, if at all, the Secretary plans to fulfill his directive under the Presidential Memorandum. *See* Defs.' Original Mem. 7 ("The extent to which it will be feasible for the Census Bureau to provide the Secretary of Commerce a second tabulation is, at this point, unknown."); *see also id.* at 4, 8; Joint Pre-Conf. Ltr. 5; Defs.' Original Reply 1-2, 6-7; Sept. 3, 2020 Oral Arg. Tr. 36. And, of course, "[t]here is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (internal quotation marks and citations omitted).

CONCLUSION

In sum, Defendants have not come close to carrying "the[ir] burden of showing that the circumstances justify an exercise" of our discretion to grant a stay. *Nken*, 556 U.S. at 433-34. They fail to show that they are likely to succeed on the merits or that a stay would be in the public interest. And more significantly, in the face of their own prior admissions that a final resolution of these cases in 2021 would cause no harm because the President could revise his apportionment statement to Congress, Defendants' arguments about irreparable harm and urgency are frivolous. Accordingly, Defendants' motion for a stay is DENIED.

The Clerk of Court is directed to terminate ECF No. 171.

SO ORDERED.

Dated: September 29, 2020
New York, New York

_____/s/_____
RICHARD C. WESLEY
United States Circuit Judge

_____/s/_____
PETER W. HALL
United States Circuit Judge

_____/s/_____
JESSE M. FURMAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CV-5770 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS,

-v-

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS.

20-CV-5871 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS,

-v-

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS.

FILED: August 19, 2020

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT OR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs—a group of states and localities ("Government Plaintiffs") and a group of non- profit organizations ("NGO Plaintiffs")—bring constitutional and statutory challenges to a memorandum that the President issued on July 21, 2020, entitled Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census (the "Presidential Memorandum" or "Memorandum"), 85 Fed. Reg. 44,679 (July 23, 2020). That Memorandum provides that for purposes of reapportionment of Representatives in Congress following the 2020 census, "it is the policy of the United States to exclude" illegal aliens from the apportionment base "to the extent feasible and to the maximum extent of the President's discretion under the law." *Id*. at 44,680. It directs the Secretary of Commerce to submit to the President two tabulations in connection with the apportionment—one tabulation includes an enumeration according to the methodology set forth in the Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5,525 (Feb. 8, 2018) ("Residence Criteria"), and the second, "to the extent practicable," requires the Secretary to provide information permitting the President to exclude illegal aliens from the apportionment base. Because Plaintiffs' various challenges to this Memorandum fail as a matter of law, they should be dismissed.

As a threshold matter, this Court lacks subject-matter jurisdiction over Plaintiffs' claims both because the claims are not ripe and because Plaintiffs lack standing to challenge the Presidential Memorandum. Plaintiffs' alleged injuries, including lost representation in Congress, decreased federal funding, and diversion of resources, are speculative.

At this point it is unknown what numbers the Secretary of Commerce will provide the President. Accordingly, any allegation as to the impact of the President's apportionment decision on matters such as congressional representation or federal funding is wholly theoretical and legally insufficient to meet the ripeness and standing requirements.

Plaintiffs' allegations that the Presidential Memorandum will have a significant chilling effect on immigrant communities' participation in the census likewise are speculative and conclusory. They are also based on hearsay. Plaintiffs rely on affidavits from fact and expert witnesses that contain only generalized, second- or third-hand accounts of alleged harm and unsubstantiated conjectures. The Court should therefore dismiss all of Plaintiffs' claims pursuant to Rule 12(b)(1) for lack of ripeness and standing.

In addition to these jurisdictional defects, Plaintiffs' claims are subject to dismissal for failure to state a claim pursuant to Rule 12(b)(6). Plaintiffs assert that the Presidential Memorandum violates the Administrative Procedure Act ("APA"), the constitutional separation of powers, the Tenth Amendment, principles of equal protection under the Fifth and Fourteenth Amendments, the Apportionment Clauses of Article I and the Fourteenth Amendment, 13 U.S.C. § 141, and 2 U.S.C. § 2a. Each of these claims fails as a matter of law.

First, there is no viable basis for APA review of the Presidential Memorandum—both because the President is not an "agency" under the APA and because Plaintiffs fail to allege any "final agency action" by the Secretary of Commerce. Second, to the

extent the NGO Plaintiffs allege that the Presidential Memorandum contravenes the separation of powers, that claim fails because the Supreme Court in *Franklin v. Massachusetts* expressly recognized the broad scope of congressional delegation of authority to the President in relation to apportionment. 505 U.S. 788, 799 (1992). Third, the claim that the Presidential Memorandum amounts to "coercion" or "punish[ment]" in violation of the Tenth Amendment must be dismissed because Plaintiffs have offered only conclusory allegations as to the Memorandum's supposedly invidious purpose and have not alleged any commandeering of state resources. Fourth, Plaintiffs' equal protection claims fail because they rely on misleading characterizations of the Presidential Memorandum and because Plaintiffs fail to plausibly allege "animus" or "discriminatory intent." Fifth, Plaintiffs' claims under the Apportionment Clauses, 13 U.S.C. § 141, and 2 U.S.C. § 2a, are legally deficient, because they are inconsistent with the Executive Branch's longstanding discretion to define who qualifies as "inhabitants" (or "persons in each State") for purposes of apportionment. Finally, insofar as Plaintiffs seek an injunction against the President, such relief is precluded by Supreme Court precedents barring judicial intrusion on the President's exercise of policy-making discretion.

For the same reasons that their Complaints must be dismissed, Plaintiffs are not entitled to either partial summary judgment or a preliminary injunction. Plaintiffs cannot succeed on their claims both because of threshold jurisdictional flaws, but also because their claims are meritless. And even if Plaintiffs had standing to bring these actions, which

they do not, they have failed to plausibly assert a threat of imminent irreparable harm from the Memorandum. Accordingly, if the Court declines to grant Defendants' Motion to Dismiss, it should deny Plaintiffs' Motion for Partial Summary Judgment or Preliminary Injunction.

BACKGROUND

I. The Census and Apportionment Generally

The Constitution provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. To make apportionment possible, the Constitution requires that the federal government conduct a census every ten years in such a manner as directed by Congress. *Id.* art. I, § 2, cl. 3. Each State's number of Representatives, together with its two Senators, also determines the number of electors for President and Vice President in the Electoral College. *See id.* art. II, § 1, cl. 2.

Congress, in turn, has by law directed the Secretary of Commerce to conduct a census of the "total population" every 10 years "in such form and content as he may determine." 13 U.S.C. § 141(a) and (b). The Census Bureau assists the Secretary of Commerce in the performance of this responsibility. *See* 13 U.S.C. §§ 2, 4. For purposes of the 2020 census, the Census Bureau has announced that field data collection will end on September 30, 2020. *See* August 3, 2020, Statement from U.S. Census Bureau Director Steven Dillingham ("Director Dillingham"): Delivering a Complete and Accurate 2020 Census

Count, https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html. According to Director Dillingham, the Census Bureau will take various actions, such as increasing training and providing awards to census takers who maximize the hours worked, to "improve the speed of [the] count without sacrificing completeness." *Id.* The Census Bureau "intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities." *Id.*

The Census Bureau has promulgated criteria to count most people for census purposes "at their usual residence, which is the place where they live and sleep most of the time." Residence Criteria, 83 Fed. Reg. at 5,533. Following completion of the 2020 census, by December 31, 2020, the Secretary of Commerce must submit to the President "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). "On the first day, or within one week thereafter, of the first regular session of the [117th Congress]," the President must "transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled . . . by the method known as equal proportions." 2 U.S.C. § 2a(a).

II. The July 21, 2020, Presidential Memorandum

On July 21, 2020, the President issued a Memorandum to the Secretary of Commerce regarding the exclusion of illegal aliens from the apportionment base following the 2020 census. *See* 85

Fed. Reg. at 44,679-81. The Presidential Memorandum states that "it is the policy of the United States to exclude" such aliens from the apportionment base "to the extent feasible and to the maximum extent of the President's discretion under the law." *Id.* at 44,680. The Presidential Memorandum directs the Secretary of Commerce to submit to the President two tabulations. One is an enumeration "tabulated according to the methodology set forth in" the Residence Criteria. *Id.* The second calls for "information permitting the President, to the extent practicable," to carry out the stated policy, *i.e.*, an apportionment excluding illegal aliens. *Id.*

To date, the Census Bureau is still evaluating the usability of administrative records pertaining to citizenship status in connection with the decennial census, *see* Exec. Order 13880, 84 Fed. Reg. 33,821-25 (July 16, 2019), and formulating a methodology for potentially excluding illegal aliens. *See* August 3, 2020, Dillingham Statement, https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html ("The Census Bureau continues its work on meeting the requirements of Executive Order 13,880 issued July 11, 2019 and the Presidential Memorandum issued July 21, 2020. A team of experts [is] examining methodologies and options to be employed for this purpose. The collection and use of pertinent administrative data continues.").

III. Plaintiffs' Challenge

On July 24, 2020, the Government Plaintiffs and NGO Plaintiffs filed complaints challenging the Presidential Memorandum; they amended their complaints on August 3 and August 6, respectively. *See* ECF Nos. 34 ("Gov't Pls.' Am. Compl."), 62 ("NGO

Pls.' Am. Compl."). Plaintiffs allege, among other things, that the Presidential Memorandum violates requirements contained in Article I, the Fourteenth Amendment, 13 U.S.C. § 141, and 2 U.S.C. § 2a to base apportionment on the "whole number of persons in each State"; the Fifth and Fourteenth Amendment's Due Process Clause's prohibition against unlawful discrimination; the Tenth Amendment by punishing states that refuse to assist in enforcement of federal immigration law; the Administrative Procedure Act ("APA"), 5 U.S.C. § 706; separation of powers; and 13 U.S.C. §§ 141 and 195 with respect to the use of statistical sampling. Gov't Pls.' Am. Compl. ¶¶ 4-5, 142-74; NGO Pls.' Am. Compl. ¶¶ 1, 8, 11, 182-262.

Plaintiffs further allege that if the President excludes illegal aliens from the apportionment base, some Plaintiffs will be injured by losing one or more Representatives (and corresponding electors in the Electoral College), undermining their ability to conduct congressional and state-level redistricting, depriving them of federal funding, and degrading the quality of the census data on which Plaintiffs rely to perform government functions; the NGO Plaintiffs further allege loss of political power and diversion of resources to census outreach efforts "to combat fear and disinformation resulting from the Presidential Memorandum." Gov't Pls.' Am. Compl. ¶¶ 6, 117-127, 135-36; NGO Pls.' Am. Compl. ¶¶ 8, 21-83, 161-69. Plaintiffs assert that the Presidential Memorandum will reduce the number of aliens who participate in the census by making them think that their responses are less valuable and causing "fears . . . that their data will not be safe." Gov't Pls.' Am. Compl. ¶¶ 130, 132-34; NGO Pls.' Am. Compl. ¶¶ 9, 170-74. Plaintiffs seek declaratory and injunctive relief. Gov't Pls.' Am.

Compl. ¶¶ 7 & Prayer for Relief ¶¶ 1-9; NGO Pls.' Am. Compl. Request for Relief ¶¶ i-ix.

In support of their motion for partial summary judgment or a preliminary injunction (ECF No. 77), Plaintiffs submitted a declaration from Matthew Colangelo, an attorney representing the State of New York, which attached over 900 pages of documents, including three expert declarations and 51 fact witness declarations (ECF No. 76, "Colangelo Decl."). The expert reports come from (1) Mathew A. Barreto, Ph.D., a political science professor, Colangelo Decl. Ex. 56 ("Barreto Decl."); (2) John Thompson, a former Director of the Census Bureau, Colangelo Decl. Ex. 57 ("Thompson Decl."); and (3) Christopher Warshaw, Ph.D., an assistant professor of political science, Colangelo Decl. Ex. 58. The 51 fact declarations, from various state and local governmental and non-governmental sources, forecast purported injuries that the Presidential Memorandum could inflict on aliens' participation in the remaining portion of the 2020 census. Colangelo Decl. Exs. 1-51.

ARGUMENT

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 94 (2d Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Plaintiffs fail this straightforward standard, so summary judgment should be denied and this case should be dismissed.

I. The Court Lacks Jurisdiction Because Plaintiffs' Claims Are Unripe

"To be justiciable, a cause of action must be

ripe—it must present 'a real, substantial controversy, not a mere hypothetical question.' A claim is not ripe if it depends upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013); *see also Texas v. United States*, 523 U.S. 296, 300 (1998). Ripeness incorporates both a constitutional requirement and a prudential requirement. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010); *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). The ripeness doctrine "is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Laboratories*, 387 U.S. at 148-49).

The constitutional requirement "overlaps with the standing doctrine, 'most notably in the shared requirement that the plaintiff's injury be imminent rather than conjectural or hypothetical.'" *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.,* 725 F.3d 65, 110 (2d Cir. 2013) (quoting *Ross v. Bank of Am., NA.,* 524 F.3d 217, 226 (2d Cir. 2008)). Under the ripeness doctrine, the Court also considers: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 733; *see also*

Nat'l Org. for Marriage, 714 F.3d at 691 ("To determine whether to abstain from a case on prudential ripeness grounds, we proceed with a two-step inquiry, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." (citation and internal quotation marks omitted)).

Here, Plaintiffs' claims do not meet the constitutional requirement for ripeness because the claims are, at bottom, about apportionment, rather than census procedures—and any alleged apportionment injury that States may, or may not, suffer is at this point "conjectural or hypothetical" rather than "imminent."

A. It Is Currently Unknown What Numbers the Secretary May Report to the President

The Presidential Memorandum states that "it is the policy of the United States to exclude" illegal aliens from the apportionment base "*to the extent feasible* and to the maximum extent of the President's discretion under the law." 85 Fed. Reg. at 44,680 (emphasis added). It directs the Secretary of Commerce to provide two sets of numbers—one tabulated "according to the methodology set forth in" the Residence Criteria for counting everyone at their usual residence, and a second "permitting the President, *to the extent practicable*," to carry out the stated policy of excluding illegal aliens from the apportionment base. *Id.* at 44,680 (emphasis added).

The extent to which it will be feasible for the Census Bureau to provide the Secretary of Commerce a second tabulation is, at this point, unknown. *See* Decl. of Dr. John M. Abowd ¶ 15. As Director

Dillingham recently publicly stated, the Census Bureau is still evaluating the usability of administrative records pertaining to citizenship status in connection with the decennial census and formulating a methodology for potentially excluding illegal aliens. *See* August 3, 2020, Statement from Director Steven Dillingham, available https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html. Indeed, Plaintiffs themselves repeatedlyallege that the Census Bureau is currently unable to comply with the Presidential Memorandum's directive for an enumeration excluding illegal aliens. *See, e.g.*, NGO Pl s.' Am. Compl. ¶ 176 ("The Census Bureau . . . does not currently have a means to individually enumerate undocumented immigrants separate and apart from the rest of the population in each jurisdiction."); Gov't Pls.' Am. Compl. Sec. VI & ¶ 137 ("Defendants have not identified any reliable method to accurately enumerate the population of undocumented immigrants," noting that "[j]ust months ago, the Federal Government represented . . . that there is a 'lack of accurate estimates of the resident undocumented population' on a state-by-state basis."), ¶ 138 (administrative records do not provide accurate information about the number of undocumented immigrants), ¶ 140 ("[T]he Census Bureau has not yet 'formulated a methodology' to estimate the undocumented population"); *see also generally* Gov't Pls.' Am. Compl. Sec. ¶¶ 137-41 & NGO Pls.' Am. Compl. ¶¶ 175-79 (containing similar allegations and citing statements by the federal government in support).[1]

[1] The specific claim brought by the NGO Plaintiffs pursuant to 13 U.S.C. §§ 141, 195—alleging that the Census Bureau will

Because it is not known what the Secretary may ultimately transmit to the President, it is necessarily not yet known whether the President will be able to exclude some or all illegal aliens from the apportionment base. As a result, Plaintiffs' apportionment claims are unripe as they depend upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *See Nat'l Org. for Marriage, Inc.*, 714 F.3d at 687. Put simply, until the Census Bureau and Secretary of Commerce transmit the information specified in the Presidential Memorandum, and until the President acts on the information, any claim of apportionment injury is speculative.

B. Other Considerations Underscore that Plaintiffs' Claims Are Not Ripe

Given that the effects of the Presidential Memorandum and any apportionment injuries to Plaintiffs are at this point unknown, other considerations, such as the hardship to the parties and the fitness of the issues for judicial consideration, also counsel against the Court's exercise of jurisdiction. *Nat'l Org. for Marriage, Inc.*, 714 F.3d at 691. For example, given the above-discussed uncertainties with respect to the effects of the Presidential Memorandum, delayed review would not cause undue hardship to Plaintiffs. *See, e.g.*, *Ohio Forestry Ass'n*, 523 U.S. at 733-34 (challenge to agency action unripe where there is no "significant practical

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impermissibly rely on sampling to enumerate the illegal alien population (NGO Pls.' Am. Compl. ¶¶ 251-62)—is similarly unripe because it is conjectural and hypothetical. Plaintiffs have provided nothing other than speculation that the Census Bureau will rely on sampling. Gov't Pls.' Am. Compl. Sec. ¶¶ 137-41; NGO Pls.' Am. Compl. ¶¶ 175-79.

harm" at the present time because a number of future actions would need to occur to make the harm more "imminent" and "certain"); *Texas*, 523 U.S. at 300, 302 (claim unripe where a number of actions would need to occur to cause the alleged harm, rendering it "too speculative whether the problem . . . will ever need solving"); *Simmonds v. INS*, 326 F.3d 351, 360 (2d Cir. 2003) ("The mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship."). Further, judicial review would improperly interfere with the census, which is currently in progress, and could impede the apportionment, which has not yet occurred. *See, e.g.*, *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 735 (action unripe where judicial review "could hinder agency efforts to refine its policies"). Finally, the Court would benefit from further real-world factual development. *See, e.g.*, *id.* at 736 (action was unripe where it would require court to engage in "time- consuming judicial consideration . . . of an elaborate, technically based plan, which predicts consequences that may affect many different parcels of land in a variety of ways," involved issues that could change in the future, and "depending upon the agency's future actions . . . review now may turn out to have been unnecessary"). The actual tabulations that are called for by the Memorandum must be reported by no later than the end of this year, assuming the statutory deadlines in § 141 and § 2a are not extended by Congress.

Perhaps unsurprisingly, census and apportionment cases generally are decided post-apportionment, when census enumeration procedures are no longer at issue and the actual apportionment figures are known. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 79-91 (1992)

(challenging allocation of Department of Defense's overseas employees to particular states following census); *Dep't of Commerce v. Montana*, 503 U.S. at 445-46 (challenging method of equal proportions to determine representatives); *Utah v. Evans*, 536 U.S. 452, 458-59 (2002) (challenging sampling method known as "hot-deck imputation" used by Census Bureau after analyzing census figures); *Wisconsin v. City of New York*, 517 U.S. 1, 4 (1996) (challenging decision not to use particular statistical adjustment to correct an undercount). Here, Plaintiffs are not challenging the enumeration procedures themselves, but only the hypothetical apportionment that might result from actions that might be taken pursuant to the Presidential Memorandum. *See, e.g.*, Gov't Pls.' Am. Compl. ¶¶ 142-46; NGO Pls.' Am. Compl. ¶¶ 184-93. Consistent with this long line of Supreme Court precedent, such a challenge should await the actual apportionment.

II. This Court Lacks Jurisdiction Because Plaintiffs Lack Standing

For similar reasons, Plaintiffs lack standing to pursue their claims. The doctrine of standing requires a plaintiff to establish three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent; (2) a causal connection between the injury and defendants' challenged conduct, such that the injury is "fairly traceable to the challenged action of the defendant"; and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Defs. of Wildlife*, 504 U.S. at 560-61. The standing inquiry is "'especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two

branches of the Federal Government was unconstitutional.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). Plaintiffs bear the burden of establishing the required elements of standing. *Defs. of Wildlife*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," *id.*, but "a plaintiff cannot rely solely on conclusory allegations of injury." *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003). Here, none of the injuries Plaintiffs allege satisfy these requirements.

A. Plaintiffs' Alleged Apportionment Injuries Are Too Speculative to Confer Standing

The standing requirement of "injury in fact" requires an allegation that "the plaintiff 'has sustained or is immediately in danger of sustaining a direct injury'" as a result of the challenged action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (citations omitted). The injury or threat of injury must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical." *Defs. of Wildlife*, 504 U.S. at 560. Thus, an alleged future injury must be "'certainly impending,' *or* there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 409 n.5). "'Allegations of possible future injury' are not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). As discussed above, *see supra* at 7-10, Plaintiffs' alleged apportionment injuries are speculative and conclusory, and at this point in time, there is no "substantial risk" that harm will occur. *See Susan B. Anthony List*, 573 U.S. at 158. In fact,

Plaintiffs' own allegations that the Census Bureau has not yet "formulated a methodology" for excluding all illegal aliens contradicts their alleged harm. *See supra* at 8. Therefore, any injury to Plaintiffs—be it in the form of loss of a Representative, loss of funding, or otherwise— is conjectural or hypothetical. *Defs. of Wildlife*, 504 U.S. at 560.

B. Plaintiffs' Allegations That the Presidential Memorandum Will Reduce Participation in the 2020 Census Are Also Speculative, Not Traceable to the Memorandum, and Not Redressable by a Favorable Ruling

Plaintiffs alternatively allege that they will suffer injury because the Presidential Memorandum will purportedly reduce the number of aliens who participate in the census by making them think that their responses are less valuable and causing "fears . . . that their data will not be safe," thereby affecting the distribution of federal funds and degrading the quality of census data. Gov't Pls.' Am. Compl. ¶¶ 130, 132-36; NGO Pls.' Am. Compl. ¶¶ 9, 170-74. However, these alleged injuries are far too speculative to establish standing. In addition, those injuries are neither traceable to the Memorandum nor redressable by a favorable ruling from this Court.

1. Plaintiffs' Alleged Enumeration Injuries Are Too Speculative to Confer Standing

As this Court noted in requesting the appointment of a three-judge panel pursuant to 28 U.S.C. § 2284, "the Presidential Memorandum does not purport to change the conduct of the census

itself[;] [i]nstead, it relates to the calculation of the apportionment base used to determine the number of representatives to which each state is entitled." ECF No. 68 at 2. There is, facially, no reason why such a Memorandum should have any effect on census response rates. To the contrary, as explained by the Census Bureau's Associate Director for Decennial Census Programs, Albert E. Fontenot, Jr., the Census Bureau's enumeration is almost complete, and the Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations or "the Census Bureau's commitment to count each person in their usual place of residence." Decl. of Albert E. Fontenot, Jr. ¶¶ 7, 12. And although Plaintiffs submit a variety of declarations to purportedly bolster their claims that the Memorandum has a chilling effect on respondents,[2] those declarations are impermissibly conjectural, conclusory, and hearsay.

For example, Dr. Barreto's declaration provides an opinion regarding the so-called "chilling effect" of the Memorandum on individuals' participation in the 2020 Census that is based on multiple levels of conjecture. Dr. Barreto cites several Spanish-language news sources as providing hearsay statements that activists and organizations are

[2] A court "'may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but [the Court] may not rely on conclusory or hearsay statements contained in the affidavits.'" *New York v. Dep't of Commerce*, 315 F. Supp. 3d 766, 780 (S.D.N.Y. 2018) (Furman, J.) (alteration in original) (quoting *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004)); *see also Broidy Capital Mgmt., LLC v. Benomar*, 944 F.3d 436, 441 (2d Cir. 2019) ("The district court can refer to evidence outside the pleadings when resolving a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)."

concerned about the Memorandum causing fear in Hispanic and immigrant communities; that several studies have found that immigrant communities will rely on Spanish-language news sources; and that various studies, many of them from decades ago, suggest that response rates are affected by the overall socio-political environment. Barreto Decl. ¶¶ 15-16, 32-38. This "evidence" is insufficient to support Plaintiffs' allegations that the Memorandum will significantly reduce the number of aliens who participate in the census so as to materially affect federal funding and degrade the quality of census data. Although Dr. Barreto discusses studies reflecting concerns among aliens about citizenship information in the census generally and a citizenship question on the census specifically (*see, e.g.*, Barreto Decl. ¶¶ 24-25, 54-55, 61, 68), this is far attenuated from the issues in this case, which involves the Presidential Memorandum. This case does not involve a citizenship question on the census questionnaire or a change to the Census Bureau's enumeration under the Residence Criteria.

Tellingly, Dr. Barreto cites no study actually addressing the Presidential Memorandum's effect on the 2020 Census. And Dr. Barreto's discussion of citizenship-question studies is grounded in inaccuracies. Notably, Dr. Barreto fails to address, or even acknowledge, the shortcomings that this Court identified in the very study Dr. Barreto now cites for the proposition that the placement of a citizenship question on a census questionnaire would depress response rates. *Compare* Barreto Decl. ¶ 68 *with New York v. Department of Commerce*, 351 F. Supp. 3d 502, 581 n.36 (S.D.N.Y. 2019) (noting that the Court would place "only limited weight on Dr. Barreto's study"

because it had a flawed design, and did not weigh the resulting data "to match the population totals").

Further, Dr. Barreto fails to consider the results of the randomized controlled trial published by the Census Bureau after the Supreme Court issued its opinion in the citizenship question litigation, which found *no* statistically-significant depression of response rates for households that received a test questionnaire containing a citizenship question. *See* Abowd Decl. ¶ 13; *see also 2019 Census Test Report,* Census Bureau (Jan. 3, 2020), https://www2.census.gov/programs-surveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf (Census Test Report). That study contained a sample of 480,000 housing units, and was "capable of detecting response differences as small as 0.5 percentage points." *See* Abowd Decl. ¶ 13. Overall, "[t]he test questionnaire with the citizenship question had a self-response rate of 51.5 percent; [while] the test questionnaire without the citizenship question had a self-response rate of 52.0 percent." Census Test Report at ix. And while some narrow subgroups exhibited statistically-significant lower self-response rates, *id.* at x, the Census Bureau concluded that "[c]urrent plans for staffing for Nonresponse Followup would have sufficiently accounted for subgroup differences seen in this test." *Id. See generally* Abowd Decl. ¶ 13. As Dr. Abowd reports, this new finding illustrates the benefit of a "randomized controlled design," which properly isolates the independent variable (there, the citizenship question) and measures its effects. Abowd Decl. ¶ 13.

Mr. Thompson's expert declaration—expressing the subjective opinion that he is "extremely

concerned" that the Presidential Memorandum will significantly increase the risk of undercounting immigrant communities—also cannot establish standing. Mr. Thompson's citation of studies conducted in planning for the 2020 Census that generally indicate immigrants' fear of the government and their concern about responses being used against them, and a 2018 study that he claims supports that a citizenship question would reduce response rates, again, have little bearing on this case. Despite discussing these studies, Mr. Thompson's declaration likewise does not address the June 2019 randomized controlled trial showing no statistically significant difference in response rates with and without a citizenship question. *See* Abowd Decl. ¶ 13. Nor do the studies Mr. Thompson cites— which have nothing to do with the Presidential Memorandum—support a significant chilling effect from the Presidential Memorandum.

Likewise, the statements contained in various fact witness declarations that the Presidential Memorandum will have a chilling effect on participation of immigrants in the 2020 census also offer nothing more than speculative, conclusory statements and hearsay. For example, many of the declarations provide no support whatsoever for their assertions. *See, e.g.*, Colangelo Decl. Exs. 9 ¶ 9- 12; Ex. 11 ¶ 11; Ex. 12 ¶ 8-9; Ex. 16 ¶¶ 8-12; Ex. 22 ¶ 8; Ex. 26 ¶¶ 11-13; Ex. 33 ¶¶ 7-8; Ex. 38 ¶¶ 7-9; Ex. 41 ¶¶ 8-12; Ex. 47 ¶¶ 2, 13, 20. Other declarations vaguely reference that they heard from "community partners," "Census advocates," and the like that the Presidential Memorandum was decreasing participation among immigrants. *See, e.g.*, Colangelo Decl. Exs. 1 ¶ 10; Ex. 4 ¶¶ 8-9; Ex. 5 ¶ 5; Ex. 10 ¶ 6; Ex. 14 ¶¶ 15-19; Ex. 30

¶¶ 9-10; Ex. 35 ¶¶ 5-7; Ex. 36 ¶¶ 10-14; Ex. 42 ¶¶ 5, 7; Ex. 43 ¶¶ 12-16; Ex. 44 ¶¶ 13, 17, 21-22; Ex. 51 ¶ 7. Very few of these declarations provide any examples to support their allegations, and the few that do, are vague and based on hearsay. *See, e.g.*, Colangelo Decl. Exs. 17 ¶¶ 6-9; Ex. 18 ¶¶ 10-13; Ex. 34 ¶¶ 8-10; Ex. 45 ¶¶ 11-12. They certainly do not provide sufficient support that the Presidential Memorandum would have an appreciable effect on the participation of illegal aliens in the remaining months of the 2020 census—for which field operations are to be completed by September 30, 2020.

Simply put, Plaintiffs' alleged injuries all depend on (i) the assumption that a significant percentage of illegal aliens who otherwise would have participated in the census will be deterred from doing so despite outreach by the Census Bureau, and that (ii) the belief this lack of participation will materially degrade the census data which will (iii) result in an appreciable effect on apportionment, redistricting, and funding. Plaintiffs fail to allege sufficient facts that the above sequence of events will occur with any likelihood. *See supra* at 12-14.

2. The Alleged Chilling Effect Is Not Traceable to the Memorandum

Separate from the question of injury, the materials submitted by Plaintiffs fail to show that any diminution in census response rates is fairly traceable to the Memorandum. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 03 (1998) (for plaintiff to establish standing "there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"). To satisfy

the "'traceability'" or "'causation'" prong of the Article III standing test, allegations must provide more than "'unadorned speculation'" to "'connect their injury to the challenged actions.'" *CREW v. Trump*, 953 F.3d 178, 191 (2d Cir. 2020) (quoting *Simon v. Eastern Kentucky Welf. Rights. Org.*, 426 U.S. 26, 44-45 (1976)), *reh'g en banc denied*, 2020 WL 4745067 (Aug. 17, 2020). The allegations of fact must plausibly support a "substantial likelihood" that the plaintiff's injury was the consequence of the defendant's allegedly unlawful actions (and that prospective relief could mitigate the harm). *Id.* Where a theory of injury rests on a "highly attenuated chain of possibilities," *Clapper v. Amnesty Int'l*, 568 U.S. 398, 410 (2013), "speculation regarding the future actions of third parties is not sufficient to establish an imminent injury, *Lower East Side People's Credit Union v. Trump*, 289 F. Supp. 3d 568, 580 (S.D.N.Y 2018); *see also Taylor v. Bernanke*, No. 13-CV-1013 (ARR), 2013 WL 4811222, at *6 (E.D.N.Y. Sept. 9, 2013) ("Where the occurrence of the future injury depends on the actions of a third party not included in the plaintiff's suit, the Supreme Court has shown particular reluctance to conclude that the 'imminence' requirement is met."); *Himber v. Intuit, Inc.*, No. 10-CV-2511 (JFB), 2012 WL 4442796, at *7 (E.D.N.Y. Sept. 25, 2012) ("As the jurisprudence of the Supreme Court and Second Circuit has clearly articulated, claims of harm based upon speculation regarding decisions by third parties is insufficient to confer Article III standing.").

Here, as noted above, the primary basis for linking the Memorandum to response rates comes from Plaintiffs' expert Dr. Barreto. He opines that immigrant communities are less likely to respond to

the census after the Memorandum because (1) immigrant communities' trust in the government and willingness to share information was undermined, Barreto Decl. ¶¶ 14, 19, by; (2) third-party reports featuring "immigrants, as well as individuals who worked with community-based organizations that serve immigrants, and even journalists, all stat[ing] that they believed the July 21 Memorandum was an effort to sow confusion and distrust, and to reduce the count of Latinos and immigrants on the 2020 Census," Barreto Decl. ¶¶ 33, 15; carried on (3) various media sources, particularly Spanish- language ones, which are highly influential in the immigrant and Latino communities, Barreto Decl. ¶¶ 16, 32. Dr. Barreto posits this chain as an unbroken line. But the media, and the community activists they feature, are independent actors; those entities' messages about the Memorandum are the product of their own interpretations and views, many of which are at odds with the plain terms of the Memorandum. *See, e.g.*, Torres Decl. ¶ 18, ECF No. 76.47 (stating that CASA de Maryland, Inc. "was approached by a number of media outlets, including CNN, to represent the reaction of our community . . . [and] conveyed how harmful the action is and our commitment to ensuring that our members are fully counted."); Barreto Decl. ¶ 33 (listing media messages characterizing the Memorandum as something "intended to promote fear").

It makes little sense for Plaintiffs to attribute whatever harm is caused by those independent actors to the Memorandum itself, particularly if their messages convey the incorrect impression that the Memorandum increases the "risk of [individuals'] information being linked to immigration records and

[those individuals] facing immigration enforcement." Barreto Decl. ¶ 62, Pls.' Br. at 43 (citing various declarations speculating that the Memorandum is likely to create fear of immigration enforcement). Simply put, any contention or concern that the Secretary's compliance with the Memorandum will somehow facilitate immigration enforcement is contrary to established statutory provisions mandating strict confidentiality for census responses. *See generally* 13 U.S.C. § 9 (providing that personal information collected by the Census Bureau cannot be used against respondents by any government agency or court); *id.* § 214 (setting forth penalty for wrongful disclosure of information). Indeed, the Census Bureau devotes resources to educating the public about the privacy and confidentiality of census responses specifically to allay such fears of adverse use. *See, e.g.*, *Data Protection and Privacy Program*, Census Bureau, available at https://www.census.gov/about/policies/privacy.html (last visited August 17, 2020); Fontenot Decl. ¶ 10. Because nothing in the Memorandum undermines these statutory protections, it is unreasonable to trace fear of immigration enforcement to the Memorandum itself, rather than to the messages conveyed by other actors in Plaintiffs' chain of causation. *See, e.g.*, Barreto Decl. ¶ 46 (noting that immigrants "may not do the full research to realize they can still fill out the Census safely, *because they hear the news which is connecting* the July 21 [Memorandum] to Trump's longstanding desire to increase deportation of undocumented immigrants" (emphasis added)); *see also supra* at 4.

The presence of such independent sources distinguishes this case from the litigation over the placement of a citizenship question on the census

form, in which both this Court and the Supreme Court found that the placement of such a question could predictably cause lower self-response rates among certain communities. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). That case presented a situation not found here: namely, the direct collection of information from respondents. The Memorandum is not itself directed at census respondents and appears, even in Plaintiffs' telling, to be filtered to them through third-party intermediary sources. How those sources interpret the Memorandum should not be dispositive of the Memorandum's effects. Put another way, the alleged injuries here depend on "a chain of causation" with multiple "discrete links, each of which 'rest[s] on [the plaintiffs'] highly speculative fear that governmental actors" would exercise their "discretion in a [] way" that would adversely affect Plaintiffs. *See Dep't of Commerce*, 315 F. Supp. 3d at 787 (summarizing *Clapper*, 568 U.S. at 410-14, and distinguishing citizenship question case from *Clapper* partly on this basis). Such a speculative chain of causation is insufficient to establish standing.

3. A Favorable Ruling Would Not Redress Plaintiffs' Alleged Enumeration Injuries

Finally, even if Plaintiffs could establish the existence of a "chilling" effect traceable to the Memorandum, they still fail to establish the last prong of standing: namely, that the effect would be cured by a favorable ruling from this Court. The redressability requirement "lies at the core of the standing doctrine" because "[a]n abstract decision without remedial consequence seems merely advisory, an unnecessary expenditure of judicial resources that burdens the adversary and carries all the traditional risks of

making bad law and trespassing on the provinces of the executive and legislature." *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014); *see also Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Where a plaintiff requests prospective relief in the form of a declaratory judgment or injunction, the plaintiff must show that "prospective relief will remove the harm" and the plaintiff "personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin,* 422 U.S. 490, 505, 508 (1975). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107.

Here, it is entirely speculative that there are enough aliens who, while currently deterred from participating in the census, would *decide* to participate if this Court granted Plaintiffs relief. Indeed, nothing that Plaintiffs have submitted speaks to this issue with any particularity. The closest Plaintiffs come to attempting this showing is Dr. Barreto's report discussing research studies from 2018 that endeavored to predict how the removal of a citizenship question from the census questionnaire would affect response rates. Barreto Decl. ¶¶ 68–69. But, as noted above, those studies are inconsistent with the large, and statistically rigorous, study published in 2020 by the Census Bureau, which showed no statistically-significant diminution of response rates in the first instance. Abowd Decl. ¶¶ 13, 17. Further, there is no reason to expect the Memorandum, which asks nothing of respondents, to have a significant effect on response rates—and even less reason to expect that any people deterred from responding to the census would change their mind if

the Memorandum were enjoined, especially since the census would conclude long before any such injunction would become final on appeal. *See supra* at 4.

If anything, the declarations proffered by Plaintiffs tend to paint the opposite picture. The declarations repeatedly lament an alleged "macro environment" of mistrust around immigration. Thompson Decl. ¶¶ 19–20; *see also* Barreto Decl. ¶ 46. It is hard to imagine that precluding the Secretary from complying with a Memorandum that does not implicate immigration enforcement or change census operations would alter the kind of mistrust that Plaintiffs allege to be in effect currently.

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The Supreme Court has emphasized that standing is not an "ingenious academic exercise in the conceivable." *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009). Plaintiffs cannot "establish standing simply by claiming that they experienced a 'chilling effect' that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part." *Clapper*, 568 U.S. at 419. Rather, Plaintiffs can establish standing only by shouldering the substantial burden of establishing that the Court, in a real way, can remedy an injury Plaintiffs have suffered as a result of some action Defendants took. *Id.* Because Plaintiffs have failed to make that showing here, their complaint should be dismissed for lack of subject matter jurisdiction.

III. Plaintiffs Fail to State a Claim

Even if the Court concludes that it has subject-matter jurisdiction over Plaintiffs' claims, Plaintiffs' failure to adequately plead any claim serves as an

independent additional basis for the Court to dismiss these consolidated actions.

A. *Franklin* Mandates Dismissal of Plaintiffs' APA Claims

Plaintiffs seek APA review of both the President's policy directives in the Presidential Memorandum and steps that the Secretary of Commerce may have taken to prepare and transmit a set of "total population numbers for each state that exclude undocumented immigrants . . . to the President" in accordance with the Presidential Memorandum. *See* NGO Pls.' Am. Compl. ¶¶ 237-250 (asserting APA claim against "Defendants"); Gov't Pls.' Am. Compl. ¶¶ 159-163 (same). Their pleadings, however, challenge conduct by the President that is not subject to review under the APA and, in any event, fail to identify any act that satisfies the "final agency action" standard set forth in *Franklin*, 505 U.S. at 796-801 (applying the definition of final agency action in 5 U.S.C. § 704 to the apportionment context); *see also State of Cal. v. Dep't of Justice*, 114 F.3d 1222, 1225 (D.C. Cir. 1997) ("No final administrative action, no judicial review"). Accordingly, Plaintiffs' APA claims should be dismissed.[3]

First, insofar as Plaintiffs seek review of the President's action under the APA, the law is clear that

[3] The Second Circuit has left open the question whether a plaintiff's threshold failure to identify a "final agency action" requires dismissal under Rule 12(b)(6) or Rule 12(b)(1). *Compare Air Espana v. Brien*, 165 F.3d 148, 152 (2d Cir. 1999) ("The APA . . . requirement of finality is jurisdictional"); *with Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008) (suggesting that whether the "threshold requirements" of APA review are satisfied may be analyzed under Rule 12(b)(6) instead of 12(b)(1)).

the APA does not provide a basis for such review. In *Franklin*, for example, the Supreme Court held that because "the APA does not expressly allow review of the President's actions," such "actions are not subject to [the APA's] requirements." 505 U.S. at 800; *accord Dalton*, *v. Specter*, 511 U.S. 462, 468 (1994); *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003) (recognizing that under *Franklin* and *Dalton*, "the APA does not allow courts to review the President's actions"). Accordingly, Plaintiffs' APA challenges to the Presidential Memorandum should be dismissed under Rule 12(b)(6).

Second, to the extent that Plaintiffs also seek APA review of a "directive" that they believe the Secretary of Commerce has given to "the Census Bureau to effectuate the [Memorandum's] policy of excluding undocumented immigrants from the census" as well as the report the Secretary of Commerce is expected to submit to the President in January 2021, *see* NGO Pls.' Am. Compl. ¶ 242, that claim fails as well because there is no final agency action. In *Franklin*, the Supreme Court directly confronted the question whether a "statutory basis [existed] … under the APA" for judicial review of the Secretary of Commerce's report to the President regarding the decennial census data under 13 U.S.C. § 141(b). *See* 505 U.S. at 796-800. The Court concluded that the Secretary's report to the President is "not final and therefore not subject to [APA] review" because it "serves more like a tentative recommendation than a final and binding determination." *Id.* at 798. More specifically, the Court identified two prerequisites for an agency action to be deemed "final" for APA purposes — *one*, that "the agency has completed its decisionmaking process,"

and, *two*, that "the result of that process is one that will directly affect the parties." *Id.* at 797.

Here, both the alleged directive from the Secretary of Commerce and his submission of a report to the President are the acts "of a subordinate official" preceding "the final action" to be taken the President. *See Franklin*, 505 U.S. at 796-97. Neither type of action by the Secretary of Commerce, therefore, is "final agency action" subject to review under the APA. *See id.* at 797.[4]

B. The Government Plaintiffs Have Failed to Plausibly Plead That the Presidential Memorandum Amounts to "Coercion" in Violation of the Tenth Amendment

The Government Plaintiffs also have failed to plead a viable Tenth Amendment Claim. The Tenth Amendment "reserve[s] to the states [] or to the people" those "powers not delegated to the [federal government] by the Constitution" or "prohibited by it to the states." The Government Plaintiffs conclusorily assert that Defendants have violated the Tenth

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[4] *See also Dalton*, 511 U.S. at 470 (holding the Secretary of Defense's implementation of the President's decision to close a naval yard is not a "final agency action" reviewable under the APA); *Public Citizen v. U.S. Trade Rep.*, 5 F.3d 549, 551-52 (D.C. Cir. 1994) (holding that the NAFTA trade agreement negotiated by the Trade Representative is not a "final agency action" subject to APA review because it was up to the President to decide whether to submit the agreement to Congress); *see also Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852, 860-61 (4th Cir. 2003) ("even when agency action significantly impacts the choices available to the final decisionmaker, this distinction does not transfer [a] challenged action into reviewable agency action under the APA").

Amendment because the Presidential Memorandum "punishes" Plaintiffs "for refusing to assist in the enforcement of federal immigration laws, in an attempt to coerce plaintiffs to change their policies." Gov't Pls.' Am. Compl. ¶ 155.

Plaintiffs' Tenth Amendment claim appears to derive from the "anti-commandeering" doctrine articulated by the Supreme Court. *See generally New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"); *Printz v. United States*, 521 U.S. 898, 925 (1997) ("the Federal Government may not compel the States to implement ... federal regulatory programs"). But nothing in the Memorandum requires States to do *anything*, and this claim should therefore be dismissed.

While Plaintiffs allege that the federal government is attempting to coerce them to "assist the enforcement of federal immigration laws" or to "change their policies," Gov't Pls.' Am. Compl. ¶ 155, the Presidential Memorandum does not demand or require any specific effort that the Government Plaintiffs should devote toward immigration enforcement, let alone offer any "inducement [that is] impermissibly coercive," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012). Instead, to the extent that the Memorandum refers to immigrant populations at all, it does so only in the context of setting forth the President's views on the scope of his delegated authority under 2 U.S.C. § 2a and on "principles of representative democracy." 85 Fed. Reg. at 44,679-80.

Indeed, the Memorandum does not incentivize or pressure the States to cooperate in enforcing federal immigration law in any way. Rather, the apportionment policy set forth in the Memorandum is wholly divorced from immigration enforcement, and its implementation is not conditioned on some unspecified degree of enforcement cooperation from the States. Even if the Plaintiff States here were to begin cooperating with federal immigration enforcement, the Memorandum, if implemented to its maximal extent, would (crediting Plaintiffs' allegations) nonetheless reduce their apportionment population base (just as it would for States which *have* rendered such cooperation). And the converse is also true: Plaintiff States may continue not to assist in federal immigration efforts, but the Memorandum would operate without regard to that independent stance.

Beyond the text of the Presidential Memorandum, Plaintiffs also have not proffered "sufficient factual matter" that supports a reasonable inference about the existence of an unstated, improper, and "coercive" purpose. Conclusory allegations as to the Memorandum's "coercive" purpose are clearly not enough under *Iqbal*. *See Hayden v. Patterson*, 594 F.3d 150, 161 (2d Cir. 2010) (under *Iqbal*, "allegations that are conclusory … are not entitled to the assumption of truth").[5]

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[5] As the courts have long recognized, the Government's stated reason for its policy decision is entitled to a "presumption of legitimacy." *See Nat'l Archives & Record Admin. v. Favish*, 541 U.S. 157, 174 (2006) (recognizing that "a presumption of legitimacy [is] accorded to the Government's official conduct"); *United States v. Armstrong*, 517 U.S. 456, 464687 (1996) ("in the absence of clear evidence to the contrary, courts presume that

Further, insofar as Plaintiffs seek to ascribe a hidden, improper, coercive motive to the Presidential Memorandum because, in their view, this is of a piece with Defendants' immigration policies writ large, this also would not satisfy *Iqbal's* plausibility requirement. *See* 556 U.S. at 678 ("Where a complaint pleads facts that are *merely consistent with* a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") (emphasis added and internal quotation marks omitted). Indeed, as another court in this District recently recognized in dismissing a Tenth Amendment coercion claim, it is well-established that courts "will not typically inquire into the hidden motives" for federal legislations and policies. *New York v. Mnuchin*, 408 F. Supp. 3d 399, 420 (S.D.N.Y. 2019) (internal quotation marks omitted) (dismissing Tenth Amendment challenge to federal tax law).

Similarly, courts have routinely held that directives and statutes do not violate the Tenth Amendment if they do not commandeer the states. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396–97 (2d Cir. 2008) (the "critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states," and holding that "[t]he PLCAA 'does not violate the Tenth Amendment as it does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them.'") (quoting *Connecticut v. Physicians Health Servs. of Connecticut, Inc.*, 287 F.3d 110, 122 (2d Cir. 2002)). Here, the Presidential Memorandum does not implicate the Tenth

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[Government agents] have properly discharged their official duties").

Amendment because it does not command or compel state actors to take any action at all. Indeed, the Government Plaintiffs' Complaint does not allege that state actors were compelled to take specific action or refrain from taking specific action as a result of the Memorandum. Therefore, the Memorandum raises no commandeering issues, and the Court should dismiss the Tenth Amendment claim.

C. Plaintiffs Have Failed to Sufficiently Allege an Equal Protection Claim Under the Fifth Amendment

Plaintiffs allege that the Presidential Memorandum was impermissibly motivated by discriminatory animus based on race, ethnicity, and national origin. *See* Gov't Pls. Am. Compl. ¶¶ 147- 52; NGO Pls.' Am. Compl. ¶¶ 208-21. To make these claims, however, Plaintiffs rely on two faulty pleading devices—*first*, they improperly equate the Memorandum's scrutiny of illegal aliens' status as "inhabitants of a state" with defining those individuals as non-persons; and, *second*, they inaccurately conflate the Memorandum's facially neutral distinction between lawful and unlawful aliens with racial or ethnicity-based disparate treatment. Shorn of these devices, Plaintiffs fail to allege the unlawful "animus" or "racially discriminatory intent" required to plead an equal protection violation. *See Dep't of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) ("*Regents*") ("To plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision.").

At the outset, and citing *Dred Scott*, the NGO Plaintiffs allege that the Presidential Memorandum is "denying the *personhood* of people living in the United States." NGO Pls.' Am. Compl.¶ 214 (emphasis in original). This hyperbolic claim, however, cannot be squared with the text of the Memorandum, which specifically explains that "[d]etermining *which persons* should be considered *'inhabitants'* for the purpose of apportionment requires the exercise of judgment." 85 Fed. Reg. at 44,679 (emphasis added). Plaintiffs' unfounded inference of animus also fails to acknowledge that the Memorandum treats foreign business and tourist visitors just as it treats illegal aliens—that is, as "persons" who should be excluded from apportionment, *id.*—yet no one, including Plaintiffs, contends the former category need be included in apportionment. In short, the Presidential Memorandum expressly acknowledges the "personhood" of illegal aliens, but seeks to "examine" their status, *vel non*, as "inhabitants of each state." *Id.* at 44,679-80.

Further, Plaintiffs inaccurately conflate the distinction drawn in the Presidential Memorandum between lawful and illegal aliens with racial or ethnicity-based disparate treatment. Notwithstanding Plaintiffs' suggestion to the contrary, there can be no dispute that the Memorandum is facially neutral with respect to race, ethnicity, or national origin. To the extent that it makes any distinction between persons, the Presidential Memorandum is focused on the distinction between illegal aliens and citizens and other lawful residents. *See* 85 Fed. Reg. at 44,680. As the Supreme Court and the Second Circuit have both recognized, relying on this distinction does not require

heightened scrutiny for equal protection purposes because non-citizens—much less illegal aliens—do not constitute a protected class. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67 (1976) (limitation on eligibility for a federal medical insurance program to citizens and long-term permanent residents did not violate Equal Protection Clause); *Lewis v. Thompson*, 252 F.3d 567, 583-84 (2d Cir. 2001) (upholding Welfare Reform Act's denial of prenatal care coverage to unqualified noncitizens against Equal Protection challenge).

Without the benefits of these two artifices, Plaintiffs are left with only conclusory allegations of animus, *see* Gov't Pls.' Am. Compl. ¶ 149; NGO Pls.' Am. Compl. ¶ 215, which are not sufficient to state an equal protection claim. Specifically, insofar as Plaintiffs rest their claim on a supposedly "disproportionate burden on Hispanics and immigrant communities of color," Gov't Pls.' Am. Compl. ¶ 150, this argument is foreclosed by the Supreme Court's recent *Regents* decision. As the Court recognized there, if the fact that an immigration policy would have "an outsized" impact on "Latinos" "because [they] make up a large share of the unauthorized alien population" by itself "were sufficient to a state a claim," then "'virtually any generally applicable immigration policy could be challenged on equal protection grounds." *Regents*, 140 S. Ct. at 1916. Instead, as *Regents* concluded, an allegation of disproportionate burden on a specific racial or ethnic group is, in this context, inadequate to "establish[] a plausible equal protection claim." *Id*. at 1915.

Further, to the extent that Plaintiffs seek to base their equal protection claim on a purported link to the Commerce Secretary's decision to add a citizenship question to the 2020 Census, *see* Gov't Pls.'

Am. Compl. ¶¶ 98, 150; NGO Pls.' Am. Compl. ¶ 132, the claim is implausible because these two actions involve separate decisions made by different decisionmakers that are distinct in terms of timing and implementation. In any event, Plaintiffs cannot bootstrap their equal protection claim here to the earlier decision because they "failed to prove, by a preponderance of the evidence, that a discriminatory purpose motivated Defendants' decision to reinstate the citizenship question on the 2020 census questionnaire."[6] *New York*, 351 F. Supp. 3d at 671; *see also Kravitz v. Dep't of Commerce*, 366 F. Supp. 3d 681, 712 (D. Md. 2019).[7]

Finally, Plaintiffs cite a number of alleged statements by the President and other individuals.

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[6] Merely alleging that the Presidential Memorandum is a continuation of the attempt to add a citizenship question is insufficient to plausibly assert discriminatory intent. Indeed, Plaintiffs' allegations on this score are circular—they want to rely on the earlier decision to bolster their claim of animus here, without acknowledging their own failure to prove animus as to the earlier decision. Further, Plaintiffs have not identified any basis for imputing the motivation of the earlier decision by Secretary Ross to the President's decision-making here—even though that is a flaw the Court specifically identified in the earlier proceeding. *See New York*, 351 F. Supp. 3d at 670 ("Plaintiffs failed to prove a sufficient nexus between President Trump and Secretary Ross's decision to make the President's statements or policies relevant to the equal protection analysis.").

[7] In a decision that later became moot, a district court in the citizenship-question context concluded that "newly discovered evidence" raised a "substantial issue" because it suggested "that Dr. Hofeller was motivated to recommend the addition of a citizenship question to the 2020 Census to advantage Republicans by diminishing Hispanics' political power." *Kravitz v. Dept' of Commerce*, No. 18-cv-1041 (D. Md. June 3, 2019), ECF No. 162-1 at 1.

See NGO Pls.' Am. Compl. ¶¶ 130-31, 138-39 (citing statements by Richard Hofeller, Kris Kobach, and Matt Schlapp). At the outset, because the President is the only decision-maker with respect to issuance of the Presidential Memorandum, statements of other individuals are immaterial. *See Regents*, 140 S. Ct. at 1916 (statements by non-decisionmakers "remote in time and made in unrelated contexts" are "unilluminating"). Moreover, to the extent that Plaintiffs discuss the President's statements, *see, e.g.*, Gov't Pls.' Am. Compl. ¶¶ 114-15; NGO Pls.' Am. Compl. ¶ 141, they fail to draw any specific link between those statements and the specific policy announced in the Presidential Memorandum. Thus, they cannot plausibly serve as evidence for his subjective motivations in issuing that discrete policy.

The face of the Presidential Memorandum plainly states that the policy's purpose was to promote "the principles of representative democracy underpinning our system of Government." 85 Fed. Reg. at 44,630. Plaintiffs have failed to plausibly allege that, notwithstanding this permissible purpose, it was merely a pretext for a "real reason" to discriminate against Hispanics, *St Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993), or that it was motivated by such animus, *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Accordingly, the Equal Protection claim should be dismissed.

D. Plaintiffs Have Failed to State an Apportionment Clause Claim

The operative Apportionment Clause mandates that Representatives shall be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State,

excluding Indians not taxed." U.S. Const. amend. XIV, § 2. But, after accounting for the express exclusion of "Indians not taxed," neither this Clause nor its predecessor in Article I was ever understood to mandate the inclusion of every person present within the boundaries of each State at the time of the census. *See id.* art. I, § 2, cl. 3. To the contrary, from the time of the Founding through the ratification of the Fourteenth Amendment and continuing to the present day, the Apportionment Clause has been understood to require counting "inhabitants." In other words, only usual residents—those with a fixed and enduring tie to a State, as recognized by the Executive— need be deemed "persons *in [that] State*," *id.* amend. XIV, § 2 (emphasis added). And because the word "inhabitants" is sufficiently indeterminate, the Supreme Court has recognized that the term confers significant discretion on the Executive to make legal determinations about the "usual residence" of an individual without treating his physical presence in a particular jurisdiction (or lack thereof) as dispositive. *See Franklin*, 505 U.S. at 804-06.

This well-established framework plainly forecloses Plaintiffs' facial challenge to the Presidential Memorandum. For Plaintiffs to succeed, they must establish that the Constitution requires including *all* illegal aliens in the apportionment base. But that is obviously incorrect. To give just one example, nothing in the Constitution requires that illegal aliens residing in a detention facility after being arrested while crossing the border must be accounted for in the allocation of Representatives (and hence political power). This is fatal to Plaintiffs' Motion.

1. Only "Inhabitants" Who Have Their "Usual Residence" in a State Need Be Included in the Apportionment.

As the Supreme Court has explained, "'[u]sual residence,' was the gloss given the constitutional phrase 'in each State' by the first enumeration Act [of 1790] and has been used by the Census Bureau ever since to allocate persons to their home States." *Franklin*, 505 U.S. at 804. The Act also uses "other words [ ] to describe the required tie to the State: 'usual place of abode,' [and] 'inhabitant[.]'" *Id.* at 804-05. These terms "can mean more than mere physical presence, and [have] been used broadly enough to include some element of allegiance or enduring tie to a place." *Id.*

The settled understanding that only "inhabitants" who have their "usual residence" in the country must be counted stems from the drafting history of the Apportionment Clause. In the draft Constitution submitted to the Committee of Style, the Apportionment Clause required "the Legislature [to] regulate the number of representatives by the number of *inhabitants*." 2 The Records of the Federal Convention of 1787, at 566, 571 (Max Farrand ed., rev. ed. 1966) (emphasis added). The Committee of Style changed the language to provide that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. art. I, § 2, cl. 3. But "the

Committee of Style 'had no authority from the Convention to alter the meaning' of the draft Constitution," *Utah v. Evans*, 536 U.S. 452, 475 (2002), and the Supreme Court has thus found it "abundantly clear" that, under the original Clause, apportionment "should be determined solely by the number of the State's inhabitants," *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964); *see also Franklin*, 505 U.S. at 804-05 (observing that "the first draft" of the Apportionment Clause "used the word 'inhabitant,' which was omitted by the Committee of Style in the final provision").

Historical sources confirm this reading. In *The Federalist*, James Madison repeatedly explained that apportionment under the new Constitution would be based on a jurisdiction's "inhabitants." *See The Federalist* No. 54, at 369 (Jacob E. Cooke ed., 1961) (observing that "the aggregate number of representatives allotted to the several States[] is to be determined by a federal rule founded on the aggregate number of inhabitants"); *The Federalist* No. 56, at 383 (noting that the Constitution guarantees "a representative for every *thirty thousand inhabitants*"); *The Federalist* No. 58, at 391 (noting that the Constitution mandates a "readjust[ment] from time to time [of] the apportionment of representatives to the number of inhabitants"); *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) ("[T]he basis of representation in the House was to include all inhabitants" (emphasis omitted)). Similarly, as the Supreme Court recognized, the first enumeration Act of 1790—titled "an act providing for the enumeration of the inhabitants of the United States"—directed "the marshals of the several districts of the United States" to count "the number of

the inhabitants within their respective districts." Act of Mar. 1, 1790, § 1, 1 Stat. 101, 101; *see Franklin*, 505 U.S. at 803-05 (relying on the Census Act of 1790 to apply the Apportionment Clause).

This understanding of "usual residence" and "inhabitant" was enshrined in the constitutional text and incorporated by historical practice when the Fourteenth Amendment's Apportionment Clause was ratified almost 80 years later. According to Representative Roscoe Conkling, a member of the committee that drafted the Fourteenth Amendment, the operative Apportionment Clause's streamlined language—requiring apportionment based on "the whole number of persons in each State"—was meant to fully include former slaves in the apportionment base and otherwise "adhere[] to the Constitution as it is." Cong. Globe, 39th Cong., 1st. Sess. 359 (1866). The Amendment's text confirms that understanding: it underscores that a person who possesses sufficient ties to a State will be included by specifying that "the persons *in each State*" must be counted, U.S. Const. amend. XIV, § 2 (emphasis added)—a phrase that the Supreme Court later explained to be equivalent to the term "inhabitant." *Franklin*, 505 U.S. at 804-05. Indeed, the very next sentence of section 2 of the Fourteenth Amendment equates "persons in each State" with "inhabitants" by penalizing in the apportionment any State that denies the right to vote to the "male inhabitants of such State" who would otherwise be eligible to vote (principally by reason of citizenship and age). *Id.* Unsurprisingly, the first census after ratification of the Fourteenth Amendment was conducted in accordance with the same procedures that had been used for the 1850 census, *see* Act of May 6, 1870, ch. 87, § 1, 16 Stat. 118,

118, which, in turn had required "all [States'] inhabitants to be enumerated," Act of May 23, 1850, ch. 11, § 1, 9 Stat. 428, 428; *see also Franklin*, 505 U.S. at 804 ("'Usual residence,' was the gloss given the constitutional phrase 'in each State' by the first enumeration Act [of 1790] and has been used by the Census Bureau ever since to allocate persons to their home States.").

Reading the Apportionment Clause to contemplate apportionment of Representatives based on "inhabitants" (or "usual residents") also helps explain the historical exclusion of certain people from the apportionment base. For example, transient aliens, such as those temporarily residing here for vacation or business, are not included in the apportionment base. *See, e.g.*, *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5,526, 5,533 (2018) (Residence Criteria); Dennis L. Murphy, Note, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969, 980 (1991). That makes sense, as such aliens were not considered "usual residents" or "inhabitants" either at the Founding or the ratification of the Fourteenth Amendment. As contemporaneous sources using the term make clear, to qualify as an "inhabitant," one had to, at a minimum, establish a fixed residence within a jurisdiction and intend to remain there. *See, e.g.*, *Bas v. Steele*, 2 F. Cas. 988, 993 (Washington, Circuit Justice, C.C.D. Pa. 1818) (No. 1088) (concluding that a Spanish subject who had remained in Philadelphia as a merchant for four months before seeking to leave, "was not an inhabitant of this country, as no person is an inhabitant of a place, but

one who acquires a domicil there").[8]

Likewise, foreign diplomats stationed overseas arguably remained "inhabitants" of their native countries rather than of their diplomatic posts. *See Franklin*, 505 U.S. at 805 (confirming that American diplomat stationed overseas could still qualify as an "inhabitant" who is "in" his home State for purposes of

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[8] *See also, e.g, Hylton v. Brown*, 12 F. Cas. 1123, 1129 (Washington, Circuit Justice, C.C.D. Pa. 1806) (No. 6,981) (charging jury while riding circuit that a particular individual "was no more an inhabitant of this state than I am, who spend one-third of each year in this city; or any other person, who comes here to transact a certain piece of business, and then returns to his family"); *Toland v. Sprague*, 23 F. Cas. 1353, 1355 (C.C.E.D. Pa. 1834) (No. 14,076) (distinguishing an "inhabitant" from a "transient passenger"); *United States v. Laverty*, 26 F. Cas. 875, 877 (D. La. 1812) (No. 15,569A) ("An inhabitant is one whose domicile is here, and settled here, with an intention to become a citizen of the country."); *United States v. The Penelope*, 27 F. Cas. 486, 489 (D. Pa. 1806) (No. 16,204) ("[T]he following has always been my definition of the words 'resident,' or 'inhabitant,' which, in my view, mean the same thing. 'An inhabitant, or resident, is a person coming into a place with an intention to establish his domicil, or permanent residence; and in consequence actually resides … .'"); 41 Annals of Cong. 1595 (1824) (referring to "the common acceptation" of "inhabitant" as "the persons whose abode, living, ordinary habitation, or home" is within a particular jurisdiction); Thomas Dyche & William Pardon, *A New General English Dictionary* (16th ed. 1781) ("a person that resides or ordinarily dwells in a place or home"); 1 & 2 Samuel Johnson, *A Dictionary of the English Language s. v.* abode, inhabitant, reside, residence, resident (6th ed. 1785) (a "[d]weller," or one who "lives or resides" in a place, with the terms "reside," "residence," and "resident" defined with reference to an "abode"—*i.e.*, a "continuance in a place"); Noah Webster, *American Dictionary of the English Language* (1828) (defining "inhabitant" as a "dweller; one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor").

"the related context of congressional residence qualifications"); Emer de Vattel, *The Law of Nations*, ch. 19, § 213 (1817) (explaining that diplomats could not qualify as "inhabitants" because "the envoy of a foreign prince has not his settlement at the court where he resides"). And unsurprisingly, foreign diplomatic personnel living on embassy grounds have previously been excluded from the apportionment base. Murphy, *supra*, at 980.

Tourists and diplomats may be "persons" within a State's boundaries at the time of the Enumeration, but no one seriously contends that they must be included in the apportionment base under the Constitution. Physical location does not, in short, necessarily dictate whether one is an "inhabitant" (or "usual resident") of a particular jurisdiction.

2. The Executive Has Significant Discretion to Define Who Qualifies as an "Inhabitant."

Crucially, the term "inhabitant"—and the concept of "usual residence"—is sufficiently ambiguous to give Congress, and by delegation the Executive, significant discretion to define the contours of "inhabitants" for apportionment purposes. That discretion is rooted in the Constitution. Article I provides that apportionment numbers are determined by an "actual Enumeration" performed every 10 years "in such Manner as" Congress "shall by Law direct." U.S. Const. art. I, § 2, cl. 3; *see also id.* amend. XIV, § 5 (giving Congress the power to "enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, including the operative Apportionment Clause). This "text vests Congress with virtually unlimited discretion in conducting the

'actual Enumeration,' [and] … [t]hrough the Census Act, Congress has delegated its broad authority over the census to the Secretary." *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (citations omitted). But the Secretary is not the final word on apportionment, and indeed is not the one responsible for determining the apportionment base. Instead, by statute, the Secretary must report census numbers to the President. *See* 13 U.S.C. § 141(b). And it is the President, then, who "transmit[s] to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives." 2 U.S.C. § 2a(a). In doing so, the President has full "authority to direct the Secretary in making policy judgments that result in 'the decennial census'; he is not expressly required to adhere to the policy decisions reflected in the Secretary's report." *Franklin*, 505 U.S. at 799. So "the Secretary cannot act alone; she must send her results to the President, who makes the calculations and sends the final apportionment to Congress." *Id.* at 800. That "final act" by the President is "not merely ceremonial or ministerial," but remains "important to the integrity of the process." *Id.* Indeed, it is "the President's personal transmittal of the report to Congress" that "settles the apportionment" of Representatives among the States. *Id.* at 799.

Of course, the Executive's decisions in this area must be "consonant with … the text and history of the Constitution," *Franklin*, 505 U.S. at 806, but the term "inhabitants"—and the concept of "usual residence"—

are sufficiently indeterminate to give him significant discretion within constitutional bounds. *See id.* at 804-06 (discussing how the notion of "usual residence" has been applied differently over time). Indeed, Madison himself acknowledged that the word "inhabitant" was "vague" in discussing the House Qualifications Clause. 2 The Records of the Federal Convention of 1787, at 216-17; *cf. Franklin*, 505 U.S. at 805 (in the course of applying the Apportionment Clause, drawing on Madison's interpretation of the "term 'inhabitant'" in "the related context of congressional residence qualifications"). As noted, historical evidence confirms that the term "inhabitant" was understood to require, at a minimum, a fixed residence within a jurisdiction and intent to remain there. *See supra* at 30 n.8. Moreover, Founding-era sources also reflect that, especially with respect to aliens, the term could be understood to further require a sovereign's permission to enter and remain within a given jurisdiction. *See, e.g.*, *The Venus*, 12 U.S. (8 Cranch.) 253, 289 (1814) (Marshall, C.J., concurring in part and dissenting in part) (quoting Vattel for the proposition that "inhabitants, as distinguished from citizens, are strangers who are *permitted* to settle and stay in the country" (emphasis added)); *The Federalist* No. 42, at 285 (Madison) (discussing provision of the Articles of Confederation that required every State "to confer the rights of citizenship in other States … upon any whom *it may allow to become inhabitants* within its jurisdiction" (emphasis added)).

Accordingly, the Executive has wide discretion to make legal determinations about who does and does not qualify as an "inhabitant" for purposes of inclusion in or exclusion from the apportionment base. In *Franklin*, for example, the Supreme Court held that

the Executive Branch could allocate over 900,000 military personnel living overseas to their home States on the basis of the Secretary's judgment that such people "had retained their ties to the States." 505 U.S. at 806. That allocation "altered the relative state populations enough to shift a Representative from Massachusetts to Washington"—and had not been used "until 1970," save for a "one-time exception in 1900." *Id.* at 791-93. Nevertheless, as the Court explained, even though the recent approach was "not dictated by" the Constitution, it was "consonant with [its] text and history" and thus a permissible "judgment" within the Executive Branch's discretion, even where Congress had not expressly authorized this practice. *Id.* at 806. In the course of reaching this judgment, the Court also listed a number of other legal determinations of usual residency that the Executive Branch has permissibly chosen to use over the years—including determinations the Census Bureau has since abandoned. For example, "up until 1950, college students were counted as belonging to the State where their parents resided, not to the State where they attended school," and at the time the case was decided, "[t]hose persons who are institutionalized in out-of-state hospitals or jails for short terms [were] also counted in their home States." *Id.* Under the current Residence Criteria, however, college students who live at school during the academic year and prisoners housed in out-of-state jails, even for the short term, are counted in the State in which those institutions are located. Residence Criteria, 83 Fed. Reg. at 5,534, 5,535.

Plaintiffs have never challenged the Residence Criteria in court. To the contrary, they intervened to defend it *against* challenge in another case. *See*

Alabama v. Dep't of Commerce, No. 18-cv- 772 (N.D. Ala.), Mot. to Intervene, ECF No. 97 at 15 (Aug. 12, 2019). Plaintiffs' ongoing defense of the Residence Criteria suggests that not even they dispute that the Executive has discretion to define "inhabitant" and to determine who meets its strictures. *See Franklin*, 505 U.S. 804-06. Nor can they, given constitutional text, history, and Supreme Court precedent. The Presidential Memorandum is no different insofar as it reflects the Executive Branch's discretionary decision to direct the Secretary in making policy judgments that result in the decennial census. *Franklin*, 505 U.S. at 799.

3. The Apportionment Clause Does Not Require Inclusion of All Illegal Aliens as "Inhabitants" Having a "Usual Residence" in a State.

Plaintiffs maintain that the Presidential Memorandum facially violates the Apportionment Clause because *all* illegal aliens necessarily qualify as "persons in each State," and because the Memorandum contemplates the exclusion of such aliens—in some as-yet unknown number—for apportionment purposes. Put differently, Plaintiffs posit that the Constitution prohibits the exclusion of *any* illegal alien from the apportionment base, and that the Memorandum's announcement of that possibility violates the Apportionment Clause. But none of the constitutional constraints on the Executive's discretion to define the contours of "inhabitants" or "usual residence" require including *all* illegal aliens in the apportionment.

For example, if the Census Bureau finds it feasible to identify unlawfully present aliens who resided in a Customs and Border Patrol (CBP) or Immigration and Customs Enforcement (ICE) facility within a State on census day after being arrested while illegally entering the country, it would be permissible to exclude them. Such individuals—like alien tourists who happen to be staying in the country for a brief period on and around census day—cannot reasonably be said to have established "the required tie to [a] State," *Franklin*, 505 U.S. 804, or to be "inhabitants" under any definition of that term.[9]

Likewise, if feasibly identified, the Executive may exclude aliens who have been detained for illegal entry and paroled into the country pending removal proceedings, or who are subject to final orders of removal.[10] Such aliens do not have enduring ties to

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[9] These populations may be significant. During fiscal year 2019, ICE held in custody an average daily population of 50,165 aliens. U.S. ICE ERO, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report*, at 5 (2019) (ICE ERO Report), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf. And on any given day in the summer of 2019, CBP held in custody between 8,000 and 12,000 detainees. *U.S. Customs and Border Protection – Border Patrol Oversight: Hearing Before the H. Subcomm. on Homeland Security of the Comm. on Appropriations*, 116th Cong. (2019) (testimony of Carla L. Provost, Chief, U.S. Border Patrol), https://docs.house.gov/meetings/AP/AP15/20190724/109834/HHRG-116- AP15-Wstate-ProvostC-20190724.pdf.

[10] ICE's non-detained docket surpassed 3.2 million cases in fiscal year 2019, a population large enough to fill more than four congressional districts under the 2010 apportionment. ICE ERO Report at 10; Kristin D. Burnett, *Congressional Apportionment*, U.S. Census Bureau (Nov. 2011), https://www.census.gov/

any State sufficient to become "inhabitants" with their "usual residence" in the United States. The government has either allowed them into the country solely conditionally while it is deciding whether they should be removed, or has conclusively determined that they must be removed from the country. In *Kaplan v. Tod*, 267 U.S. 228 (1925), for instance, the Supreme Court addressed the case of an alien minor who had been denied entry at Ellis Island in 1914 but could not be returned to Russia during the First World War and was therefore paroled into the country to live with her father in 1915. When the case reached the Supreme Court almost ten years later in 1925, it turned entirely on the question whether the alien minor had been "dwelling in the United States" or had "begun to reside permanently" in the United States for purposes of federal immigration statutes, which would have conferred derivative citizenship on her upon her father's naturalization in 1920. *Id.* at 230. The Court held that, during her parole, she "never has been dwelling within the United States" and "[s]till more clearly she never has begun to reside permanently in the United States." *Id.* As the Court explained, she "could not lawfully have landed in the United States" because she fell within an inadmissible category of aliens, and "until she legally landed [she] 'could not have dwelt within the United States.'" *Id.* (quoting *Zartarian v. Billings*, 204 U.S. 170, 175 (1907)). In the Court's view, she was in "the same" position as an alien "held at Ellis Island for deportation." *Id.* at 230;

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prod/cen2010/briefs/c2010br-08.pdf. The non-detained docket includes aliens who are both pre- and post-final order of removal, and who have been released on parole, bond, an order of recognizance, an order of supervision, or who are in process for repatriation. ICE ERO Report at 10.

see also, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (holding that parole cannot affect an alien's status and does not place an alien "legally 'within the United States'"). Indeed, the Supreme Court recently reaffirmed that "aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are 'treated' for due process purposes 'as if stopped at the border,'" and that the same principle applies to those detained "shortly after unlawful entry." *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020).

Plaintiffs emphasize that Framers of both the original Apportionment Clause and the Fourteenth Amendment intended to include aliens in the apportionment base. Dkt. 77, at 16; *see id.* at 13-17. But Plaintiffs' historical evidence about the treatment of aliens does not and cannot resolve the distinct question whether *illegal* aliens must be included—for the simple reason that there were no federal laws restricting immigration (and hence no illegal aliens) until 1875. *See Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). And Plaintiffs provide no evidence to support the proposition that by employing the concepts of "inhabitants" and "usual residence," the Framers of either the original Constitution or Fourteenth Amendment were understood to have bound future generations to allocate political power on the basis of aliens living in the country in violation of federal law. To the contrary, as the Supreme Court has explained, the Framers understood the "fundamental proposition[]" that the "power to admit or exclude aliens is a sovereign prerogative."

Thuraissigiam, slip op. at 35.[11] This "ancient principle[] of the international law of nation-states" is necessary to the sovereign's rights to define the polity ("the people") that make up the nation and to preserve itself, as both the Supreme Court and 19th-century international law scholars recognized.[12] It is

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[11] *See also, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

[12] *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *see, e.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self- preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.") (citing Vattel and Phillimore); Vattel, *The Law of Nations*, bk. 2, §§ 94, 100 (explaining that the sovereign's authority to "forbid the entrance of his territory either to foreigners in general, or in particular cases," "flow[ed] from the rights of domain and sovereignty"); 1 Robert Phillimore, *Commentaries Upon International Law*, ch. 10, § CCXIX (1854) (similar); *see also, e.g.*, *Bernal v. Fainter*, 467 U.S. 216, 221 (1984) ("The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self- definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community."); *Chae Chan Ping*, 130 U.S. at 603–04 (recognizing that a sovereign's power to "exclude aliens from its territory" is "an incident of every independent nation" and is "part of its independence," and "[i]f it could not exclude aliens it would be to that extent subject to the control of another power"); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that

fundamentally antithetical to those elementary principles to say, as Plaintiffs do, that illegal aliens can arrogate to themselves the right to redistribute "political power" within this polity by flouting the sovereign power of the United States to define who can enter and become part of the polity. Pls.' Br. 10, 41, 51. Rejecting Plaintiffs' approach is certainly "consonant with" with the terms and history of the Fourteenth Amendment. *Franklin*, 505 U.S. at 806.

If anything, the debates over the Fourteenth Amendment on which Plaintiffs rely indicate that the rationale the Framers offered for including aliens in the apportionment base do not apply to illegal aliens. Specifically, various legislators made clear that unnaturalized aliens should be included in the apportionment base precisely because the law provided them with a direct pathway to citizenship—mainly, an oath of loyalty and five years of residence in the United States, *see* Act of Apr. 14, 1802, 2 Stat. 153. As Representative Conkling pointed out, "[t]he political disability of aliens was not for this purpose counted against them, *because it was certain to be temporary*, and they were admitted at once into the basis of apportionment." Cong. Globe, 39th Cong., 1st Sess., at 356 (1866) (emphasis added); *see also, e.g.*, *id.* at 3035 (Senator Henderson explaining that "[t]he road to the ballot is open to the foreigner; it is not permanently barred"). Indeed, the five-year residency requirement meant that aliens could "acquire [the vote] in the current decade"—and thus unnaturalized aliens could be voting citizens before the next apportionment. *Id.* at 354 (Representative Kelley). And even an opponent of the inclusion of aliens in the

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sovereignty to the same extent in that power which could impose such restriction.").

apportionment agreed that unnaturalized aliens were on "a short period of probation—five years; and in most of the states the great body of them are promptly admitted to citizenship." *Id.* at 2987 (Sen. Sherman). That rationale plainly does not extend to illegal aliens, who generally are prohibited by law from becoming citizens and are subject to removal. 8 U.S.C. §§ 1182(a)(9), 1227(a), 1255(a) & (c), 1427(a).

Plaintiffs are also wrong in arguing that *Plyler v. Doe*, 457 U.S. 202 (1982), requires the inclusion of illegal aliens in the apportionment base. Dkt 77, at 12. *Plyler* held only that illegal aliens are "persons within the jurisdiction" of a State for purposes of the Equal Protection Clause, 457 U.S. at 210, which is inapposite here. In contrast to the Apportionment Clause, the Equal Protection Clause has never been understood to be limited to "inhabitants" or "usual residents" of a State. That is why no one seriously contends that alien tourists visiting the United States should be included in the apportionment base, even though they are undoubtedly "persons" protected by the Equal Protection Clause. *See also Mathews v. Diaz*, 426 U.S. 67, 78 (1976) ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.").

Indeed, Plaintiffs' reading of *Plyler*—that *all* illegal aliens must be included in the apportionment—is at odds with history and precedent. Likewise, Plaintiffs' reliance on a redistricting decision, *Evenwel v. Abbott*, for the proposition that "the basis of representation in the House was to include all inhabitants," 136 S. Ct. 1120, 1127 (2016); Pls.' Br. 14,

does not dispose of this case as Plaintiffs contend, but rather begs the central question here as to the limits on how "inhabitant" may be defined. Nothing in the terms "inhabitants" or "usual residence" suggests that this concept covers all illegal aliens. Rather, as noted above, the Supreme Court has observed that the term "'[u]sual residence' … has been used broadly enough to include some element of allegiance or enduring tie to a place." *Franklin* 505 U.S. at 804. In addition, the Founding generation was aware that the term "inhabitant" could be understood to require that an alien be given *permission* to settle and stay in a jurisdiction according to the definition provided by Vattel, whom the Supreme Court has extolled as the "founding era's foremost expert on the law of nations." *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1493 (2019); *see* 1 Vattel*, The Law of Nations* ch. 19, § 213 (defining "inhabitants, as distinguished from citizens," as "foreigners, who are permitted to settle and stay in the country").[13] And in *Kaplan*, the Supreme Court held that an alien who had not effected a lawful entry into the country could not be characterized as "dwelling" in the country under the latest version of a naturalization law dating from 1790 that had conditioned derivative citizenship for certain aliens on their "dwelling" in the United States—a concept linked with "inhabitants" since the Founding Era. 267 U.S. at 230; *see* Act of Mar. 26, 1790, § 1, 1

[13] As the Supreme Court has observed: "The international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel. In 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of Vattel's Law of Nations and remarked that the book 'has been continually in the hands of the members of our Congress now sitting.'" *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 463 n.12 (1978) (ellipsis and citations omitted omitted).

Stat. 103, 104. Illegal aliens, however, are necessarily limited in claiming that they have "enduring ties" to, or are "dwelling" in, this country, because as a matter of law they may be removed from the country at any time. *See also Gonzalez v. Holder*, 771 F.3d 238, 245 (5th Cir. 2014) (applying *Kaplan* to an alien who "entered the United States at the age of seven, albeit illegally, and … remained in the country" for 16 years); *U.S. ex rel. De Rienzo v. Rodgers*, 185 F. 334, 338 (3d Cir. 1911) (explaining that an alien "cannot begin" to "reside permanently" in the United States "if he belongs to a class of aliens debarred from entry into the country by the act to regulate the immigration of aliens into the United States").

Ultimately, however, it is neither necessary nor appropriate for this Court to resolve whether any particular category of illegal aliens must be deemed "inhabitants" for purposes of the apportionment. In order to prevail on this facial challenge to the Presidential Memorandum, Plaintiffs must establish that there is *no* category of illegal aliens that may be lawfully excluded from the apportionment. *See, e.g.*, *Deshawn E v. Safir*, 156 F.3d 340, 347 (2d Cir. 1998) ("A facial challenge will only succeed if there is no set of circumstances under which the challenged practices would be constitutional."). Plaintiffs have not, and indeed cannot, make that showing. Rather than facing that question, Plaintiffs divert attention by asking the Court to decide a much different question—and more than is necessary to resolve this case—by seeking a holding that the Apportionment Clause would prohibit the exclusion of all categories of aliens. That question is not properly presented here. The Presidential Memorandum states that it will be the policy of the United States "to exclude from the

apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the *maximum extent feasible and consistent with the discretion delegated to the executive branch*." 85 Fed. Reg. at 44,679 (emphasis added). And Plaintiffs have rushed to Court before the Census Bureau has determined which illegal aliens it may be "feasible" to exclude, before the Census Bureau has reported any numbers to the Secretary, before the Secretary has reported any numbers to the President, and before the President has reported any numbers to Congress. Accordingly, this Court need not and should not resolve whether the Apportionment Clause necessarily *excludes* or *includes* any particular category of illegal aliens from the apportionment base. Rather, for Plaintiffs to prevail, they must establish that there is *no* category of illegal aliens that could ever be excluded. They cannot do so.

E. Plaintiffs Have Failed to State an *Ultra Vires* or "Separation of Powers" Claim

Plaintiffs posit that "[b]y requiring the exclusion of undocumented immigrants from the statutory phrases 'total population' and 'whole number of persons in each State,' the Memorandum directs the President and the Secretary of Commerce to perform unlawful, *ultra vires* actions." Pls.' Br. at 29. NGO Plaintiffs also allege that the President has violated the Constitution's separation-of- powers principle because Congress "delegated authority over the census to the *Commerce Secretary*, not the *President*." *See* NGO Pls.' FAC ¶¶ 222–36. However characterized, these claims fail. Like every other census and apportionment conducted under 13 U.S.C

§ 141 and 2 U.S.C. § 2a, the Memorandum fully complies with powers delegated by Congress under this statutory scheme.

Nothing in the statutory language of "total population," 13 U.S.C. § 141(b), or "whole number of persons in each State," 2 U.S.C. § 2a(a), requires counting every person physically present on Census Day, even if they lack "usual residence" in the United States.[14] It is, of course, true that "the word 'person' in § 2a makes no distinction based on citizenship or immigration status." Pls.' Br. at 29. And no one disputes that aliens (legal or illegal) are "persons." *Cf. Plyler v. Doe*, 457 U.S. 202 (1982). But § 2a does not reference only "persons"; it tracks the Fourteenth Amendment's text mandating apportionment based on the "whole number of persons *in each State*." 2 U.S.C. § 2a(a) (emphasis added). So while Plaintiffs argue that Congress is "presumed to legislate with familiarity of the legal backdrop for its legislation," Pls.' Br. at 30 (quoting *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 114 (2d Cir. 2017)), that legal backdrop only *supports* the exclusion of individuals from apportionment if they do not have a "usual residence" in the United States. *Franklin*, 505 U.S. at 804; *accord* Pls.' Br. at 30 (arguing that when "Congress used the materially

[14] Everyone seems to agree that the Executive may lawfully *exclude* individuals from the enumeration and apportionment if they do not have a "usual residence" or "enduring tie" to a State. *See* Section III.E, *supra*; Pls.' Br. at 23 ("[T]emporary visitors are not included in the apportionment base precisely because the United States is not their 'usual residence.'"); Br. of *Amici Curiae* Historians at 11, ECF No. 105-1 ("The rationale for excluding [ ] limited categories of noncitizens is clear and entirely consistent with the Framers' intent, and longstanding census practice, to count all persons *residing* in the United States.").

same language in a statute it . . . intended for [the language] to retain its established meaning" (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018)); *id.* at 32 (contending that "2 U.S.C. § 2a, has always been understood to include people who *reside* in a particular State" (emphasis added)). That is why no apportionment conducted under the Census Act has included literally everyone physically present in the country. *See* Br. of *Amici Curiae* Historians at 10 ("This 'usual residence rule' is consistent with the Framers' repeated emphasis on counting 'inhabitants' on United States soil . . . and has remained the guiding principle for census-taking for 230 years."). Just as the Memorandum does not violate the Constitution merely by contemplating the exclusion of some as-yet-unknown number of illegal aliens for lack of "usual residence," neither does it violate the identical language of § 2a.[15] *See* Section III.E, *supra*.

Nor does it matter that the President is making an independent choice in the apportionment process. While the apportionment calculation itself—feeding numbers into a mathematical formula known as the "method of equal proportions"—is "admittedly ministerial," there is nothing "ministerial" about the President's role in obtaining the numbers used in that formula. *Franklin*, 505 U.S. at 799 (explaining that

[15] This "usual residence" approach is consistent with the approach taken in the Census Bureau's 2018 Residence Criteria, which Plaintiffs are currently defending in other litigation and touting here. *See* Section III.E, *supra*; Pls.' Br. at 31–32. As with every census, the Census Bureau always planned to exclude some people from the 2020 Census without a "usual residence" in a particular State. *See Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018).

"the admittedly ministerial nature of the apportionment calculation itself does not answer the question [of] whether the apportionment is foreordained by the time the Secretary gives her report to the President"). To the contrary, "§ 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in 'the decennial census.'" *Id.*[16] And that is exactly what the President has done here: direct the Secretary to report two sets of numbers, of which the President will choose one to plug into the "method of equal proportions. *See* 2 U.S.C. § 2a(a); 85 Fed. Reg. at 44,680.

Plaintiffs' position is incompatible with the Supreme Court's view of the President's role as more than "merely ceremonial or ministerial." *Compare* Pls.' Br. 32, 36–37 *with Franklin*, 505 U.S. at 789. "[I]t is the President's personal transmittal of the report to Congress" that "settles the apportionment" of Representatives, making the President "important to

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[16] Other courts since *Franklin* have likewise understood that § 2a allows the President to perform a significant role beyond the mere "ministerial" calculation leading to reapportionment. *See Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 860 (4th Cir. 2002) (likening an EPA report to the Secretary's § 141(b) report because it "is advisory and does not trigger the mandatory creation of legal rules, rights, or responsibilities," allowing the President "to embrace or disregard" the Secretary's report); *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993) (characterizing the Commerce Secretary's report to the President a "moving target" because "the President has statutory discretion to exercise supervisory power over the agency's action); *Alabama v. Dep't of Commerce*, 396 F. Supp. 3d 1044, 1055 (N.D. Ala. 2019) (noting that in fulfilling his responsibilities under § 2a, "the President is not necessarily bound to follow the Secretary's tabulation").

the integrity of the process." *Franklin*, 505 U.S. at 799–800. Plaintiffs' attempt to reduce the President to mere statistician cannot be squared with the Supreme Court's holding that § 2a contemplates his exercise of substantial discretion.[17]

Plaintiffs also seek to contravene Supreme Court precedent (and 230 years of history) by arguing that the numbers used for apportionment must be derived solely from individual responses to the census questionnaire. *See* Pls.' Br. at 33–36. But the census has *never* tallied the total number of "usual residents" based only on questionnaire responses. In fact, for the first 170 years of American census taking, no census questionnaire existed because all enumeration was done in person. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 520 (S.D.N.Y.) (Furman, J.), *aff'd in part, rev'd in part and remanded,* 139 S. Ct. 2551 (2019). And for the 2020 Census, individuals have been, and will be, enumerated through (1) census-questionnaire responses online, by mail, or by phone; (2) in-person visits by enumerators; (3) "proxy"

[17] Plaintiffs also seem to suggest that that the Memorandum is unlawful merely because the President has directed the Secretary to provide information about illegal aliens. *See, e.g.*, Pls.' Br. 29, 38. But that contention also fails. Article II empowers the President to supervise the conduct of subordinate officials like the Secretary, *see* U.S. Const., art. 2, § 1, and the Opinions Clause further empowers the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," *id.*, art. 2, § 2, cl. 2. In *Franklin*, even the dissenting Justices acknowledged that § 2a "does not purport to limit the President's 'accustomed supervisory powers' over the Secretary of Commerce." 505 U.S. at 813 n.11 (Stevens, J., dissenting). So Plaintiffs cannot preclude the President from obtaining information from the Secretary, nor the Secretary from providing it.

responses given by those such as a neighbor or landlord; (4) high- quality administrative records from other federal agencies; and, as a last resort, (5) filling gaps in enumeration data by imputing other data from the same area. *Id.* at 521. In the citizenship-question litigation, Plaintiffs elicited extensive testimony on each of those enumeration methods, but never suggested that any of them violated the Census Act. *See generally id.* at 572–626. Indeed, the Supreme Court has *specifically approved* the use of purported "non-census data"—like administrative records and imputation—in apportionment without remotely hinting that either one was unlawful. *Compare* Pls.' Br. at 35–36 (taking issue with the hypothetical use of administrative records from other federal agencies) *with Franklin*, 505 U.S. at 794–96, 803–06 (approving the Census Bureau's use of "home of record" information from Defense Department personnel files for apportionment) *and Utah v. Evans*, 536 U.S. 452, 457–59, 473–79 (2002) (approving the Census Bureau's use of "hot-deck imputation" for apportionment).

In any event, it is entirely premature for Plaintiffs to surmise that "the President will necessarily have to rely on information that is not contained within the census" if he is going to exclude some as- yet-unknown number of illegal aliens from apportionment. Pls.' Br. at 35. As discussed above, it is not yet known what numbers the Secretary will transmit to the President pursuant to the Presidential Memorandum. *See supra* at 8. And Plaintiffs cannot assume that those numbers will be derived from purported "non-census data.".

Put simply, Plaintiffs' attempt to manufacture an *ultra vires* or separation-of-powers claim detached

from their Apportionment Clause claim is unavailing. By delegation of the Census Act, the Executive stands in the shoes of Congress and may properly exclude individuals from apportionment for lack of "usual residence"—just as he has done in every other apportionment calculated under the Census Act.

F. Plaintiffs' Demands for Relief Against the President Must Be Dismissed

Plaintiffs ask this court to enjoin the President from implementing the policy in the Presidential Memorandum, to issue a writ of mandamus to that effect, and to declare his policy decision unlawful. *See* Gov't Pls.' Am. Compl. at 45 (Prayer for Relief ¶¶ 1-4, 7); NGO Pls.' Am. Compl. at 88 (Request for Relief ¶¶ (i)-(iv), (vi), (vii)). As the Supreme Court has long recognized, however, federal courts cannot exercise injunctive authority over the President's discretionary policy judgments. *See Mississippi v. Johnson*, 4 Wall 475, 501 (1867) (the judicial branch has "no jurisdiction of a bill to enjoin the President in the performance of his official duties"). This limitation reflects the respect due to the President's "unique position in the constitutional scheme." *See Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27, 749-50 (1982) (declining to assume that implied damages "cause[s] of action run[] against the President"). In *Franklin*, the Supreme Court reaffirmed this constitutional principle. *See* 505 U.S. at 802 (noting that "grant of injunctive relief against the President [] is extraordinary, and should have raised judicial eyebrows"). Plaintiffs may contend that their injunctive claims fit within a narrow exception that the Supreme Court potentially left open for injunctive claims that seek to direct the President to perform

"ministerial" functions. *See Franklin*, 505 U.S. at 802-03 (noting that *Mississippi v. Johnson* "left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty"); *see also Mississippi v. Johnson*, 4 Wall at 500 (defining "ministerial duty" as "one in respect to which nothing is left to discretion").

Franklin, however, forecloses that argument in this case. Specifically, the Supreme Court recognized that under 2 U.S.C. § 2a, "the Secretary [of Commerce] cannot act alone"; instead, the President has the "authority to direct the Secretary in making policy judgments." *Franklin*, 505 U.S. at 799-800. This "clear[ly]" demonstrates Congress's belief that "it was important to involve a constitutional officer," *i.e.*, the President, "in the apportionment process." *Id.* at 799. The President's role and "duties" in the congressional apportionment process, therefore, "are not merely ceremonial or ministerial." *Id.* at 800.

Put simply, even if *Franklin* and *Mississippi v. Johnson* could be read to allow injunctive claims seeking performance of purely ministerial functions, that possible exception has no application here—because the President's implementation of the Presidential Memorandum is part of his duties under 2 U.S.C. § 2a, which "are not merely ceremonial or ministerial." Instead, *Franklin* applies squarely to Plaintiffs' injunctive claims against the President, and requires the dismissal of those claims. 505 U.S. at 802-03.

Moreover, and at a minimum, even if injunctive relief against the President in the performance of his statutory duties were theoretically available, *Franklin* makes clear that it "would require an

express statement by Congress" authorizing such relief. *Franklin*, 505 U.S. at 801. Plaintiffs have identified no such "express statement" and none exists.

Finally, although declaratory relief claims against the President may be viable under existing Second Circuit law, *see Knight First Amendment Inst. v. Trump*, 928 F.3d 226 (2d Cir. 2018), other courts have questioned the appropriateness of such claims. For example, the D.C. Circuit, following *Franklin*, has determined, "declaratory relief" against the President for his non-ministerial conduct "is unavailable." *Newdow v, Roberts*, 603 F.3d 1002, 1012–13 (D.C. Cir. 2010). This is because "a court— whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions." *Id.* at 1012 (emphasis added) (citing *Mississippi*, 71 U.S. at 499); *see also Doe 2 v. Trump*, 319 F. Supp. 3d 539, 541 (D.D.C. 2018) ("Sound separation-of-power principles counsel the Court against granting [injunctive and declaratory] relief against the President directly."). Thus, "similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment." *Swan v. Clinton*, 100 F.3d at 973, 978 (D.C. Cir. 1996).

IV. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY OR PERMANENT INJUNCTION

If the Court declines to dismiss Plaintiffs' claims, it should nonetheless deny Plaintiffs' request for the extraordinary relief of a permanent or preliminary injunction.

Although Plaintiffs seek partial summary judgment on their Apportionment Clause and *ultra vires* claims, they do not specify what remedy they wish to accompany that judgment. Presumably, however, Plaintiffs would have this Court enter, at minimum, a permanent injunction prohibiting Defendants "from excluding undocumented immigrants from the apportionment base following the 2020 Census, or taking any action to implement or further such a policy." NY FAC at 45, ¶ 4; *see* NGO FAC at 88, ¶¶ 3-4. Unlike the motion-to-dismiss context in which Plaintiffs' well-pleaded allegations are accepted as true, *Chamberlain Estate of Chamberlain v. City of White Plains*, 960 F.3d 100, 105 (2d Cir. 2020), the "extraordinary remedy" of an injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *City of Newburgh v. Sarna*, 690 F. Supp. 2d 136, 169 (S.D.N.Y. 2010) (contrasting the standing inquiry on a motion to dismiss with the "heavy burden of clearly establishing the 'actual and imminent' threat of irreparable harm" for an injunction). To obtain permanent injunctive relief, Plaintiffs bear the burden of demonstrating (1) that they have suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the parties, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

While Plaintiffs appear to understand that these factors are required to obtain a *preliminary*

injunction, Pls.' Br. at 40, they fail to acknowledge that these same factors must be met to obtain permanent relief as well. Insofar as Plaintiffs believe they are entitled to any form of injunctive relief without satisfying other factors, they are incorrect. *Winter*, 555 U.S. at 32 ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."); *Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254, 272 (2d2011); *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006). As explained above, Plaintiffs' Apportionment Clause and *ultra vires* claims lack merit and their request for partial summary judgment and an injunction should be rejected for that reason alone. *Winter*, 555 U.S. at 32–33. Even if these claims were meritorious, however, Plaintiffs could not satisfy the remaining factors, so they would not be entitled to either preliminary or permanent injunctive relief.

A. Plaintiffs Cannot Establish Any Imminent and Irreparable Harm

Most significantly, Plaintiffs fail to establish that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20; *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." (internal quotes and citations omitted; emphasis in original)). To establish a likelihood of irreparable harm, a plaintiff

"must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (internal quotation marks omitted). Because a preliminary injunction "is one of the most drastic tools in the arsenal of judicial remedies," *id.*, Plaintiffs' burden to show irreparable harm is necessarily higher than what is required to establish standing. *See, e.g.*, *Mazurek*, 520 U.S. at 972. Here, Plaintiffs fail this test at every step—and further fail to establish that the remaining injunction factors tilt in their favor.

1. Plaintiffs Cannot Establish Any Irreparable Apportionment Injury

Because Plaintiffs rushed to Court before the Secretary has implemented the Memorandum— and before any census enumeration has even been completed—Plaintiffs cannot show any imminent threat of apportionment injury.

As detailed above, it is currently unknown what numbers the Secretary may ultimately transmit to the President. *See supra* at 8; Abowd Decl. ¶ 15. Plaintiffs' expert declarations posit only that the *wholesale* exclusion of illegal aliens may cause certain states to lose a Congressional seat. *See* Pls.' Br. at 49–50; *see generally* Warshaw Decl. But those experts do not—and cannot—predict what apportionment injury any state might suffer from some hypothetical smaller exclusion, assuming a state suffers any injury at all. Given that the Secretary of Commerce has not yet transmitted his report to the President, and the

President has not yet transmitted any numbers to Congress, any effort to predict the ultimate effect of the Memorandum on apportionment, or the resulting "political power of Plaintiffs' constituents," Pls.' Br. at 41, is entirely speculative.

More fundamentally, any purported apportionment injury that Plaintiffs could suffer is, as a legal matter, not irreparable. The Supreme Court has regularly decided census cases that, like this one, contest the relative apportionment of representatives post-apportionment, because an erroneous or invalid apportionment number can be remedied after the fact.[18] *See, e.g., Utah*, 536 U.S. at 462 (holding that post-apportionment redress is possible if the apportionment calculation contains an error); *see also Franklin*, 505 U.S. at 803 (finding that a post-apportionment order against the Secretary would provide redress for plaintiffs); *Dep't of Commerce v. Montana*, 503 U.S. 445-46 (1992); *Wisconsin v. City of New York*, 517 U.S. 1 (1996). Indeed, in *Wisconsin*, it was not until *six years* after the 1990 census that the Court resolved an apportionment dispute based on those results. This case is not different. As this Court noted in requesting the appointment of a three-judge panel pursuant to 28 U.S.C. § 2284, "the Presidential Memorandum does not purport to change the conduct of the census itself[;] [i]nstead, it relates the

[18] The only census cases decided by the Supreme Court pre-apportionment involved challenges to the mechanics of conducting the census, which could not be undone post-apportionment. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (challenge to a citizenship question on the 2020 Census); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (challenge to the use of statistical sampling in the census).

calculation of the apportionment base used to determine the number of representatives to which each state is entitled." ECF 68 at 2. Accordingly, this Court could order adequate relief after apportionment when any injury to Plaintiffs is known with certainty, assuming there is any at all. Indeed, the very fact that the Memorandum calls for the Secretary to report two numbers—one arrived at after the Census Bureau applies its Residency Criteria, and another reflecting the number of illegal aliens that the Secretary is able to identify—makes clear that a post-apportionment remedy would be easy to craft.

2. Plaintiffs' Allegations of Enumeration Injury Do Not Withstand Scrutiny

Plaintiffs' alternative efforts to link the Memorandum to some ongoing enumeration injury fare no better. As explained by Associate Director Fontenot, the Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations. *See* Fontenot Decl. ¶¶ 7, 12; *see generally* Census Bureau, *Review of 2020 Operational Plan Schedule*, Aug. 17, 2020, https://2020census.gov/content/dam/2020census/materials/news/2020-operational-plan-schedule-review.pdf ("Operational Plan") Those operations include a variety of protocols specifically designed over the course of the past decade to ensure that hard-to-count and minority communities— some of the core constituencies for which Plaintiffs advocate—are accurately reflected in the census. *See generally* Fontenot Decl. ¶¶ 11, 12; Operational Plan at 2-11 (describing non-response follow-up, and other efforts to achieve "acceptable level of accuracy and completeness, with a goal of resolving at least 99% of

Housing Units in every state, comparable with previous censuses").[19] Plaintiffs speculate that, notwithstanding these protocols, the Memorandum "and Defendants' corresponding public statements" will render the enumeration less accurate—purportedly by deterring immigrant communities from participating. Pls. Br. at 42, 47. But these claims suffer from at least three fundamental flaws, each of which seriously undermines the causation Plaintiffs are trying to establish.

a. Plaintiff's Theory of Harm Relies on Attenuated Events Involving the Independent Actions of Third-Parties

First, as discussed in the standing section, Plaintiffs' theory for why the Memorandum may depress response rates relies on a highly attenuated chain of events. Plaintiffs' expert, Dr. Barreto, opines that immigrant communities are less likely to respond to the census after the Memorandum because of how that Memorandum is discussed in the media and by community activists. Barreto Decl. ¶¶ 15-16, 32. But those independent actors' messages are the product of their own interpretation, and often at odds with the plain terms of the Memorandum. *See, e.g.*, Torres Decl. ¶ 18., ECF No. 76.47 (stating that CASA de

[19] *See also 2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU)*, Apr. 16, 2018, https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan.pdf; *see also 2020 Census Research and Testing Management Plan*, Dec. 28, 2015, https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/research-testing-plan.pdf, at 7.

Maryland, Inc. "was approached by a number of media outlets, including CNN, to represent the reaction of our community . . . [and] conveyed how harmful the action is and our commitment to ensuring that our members are fully counted."); Barreto Decl. ¶ 33 (listing media messages characterizing the Memorandum as something "intended to promote fear"); *id.* ¶ 46 (noting that aliens "may not do the full research to realize they can still fill out the Census safely, *because they hear the news which is connecting* the July 21 [Memorandum] to Trump's longstanding desire to increase deportation of undocumented immigrants" (emphasis added)). It makes little sense to attribute whatever harm is caused by those independent actors' messaging to the Memorandum itself, particularly if their messages convey the incorrect impression that the Memorandum increases the "risk of [individuals'] information being linked to immigration records and [those individuals] facing immigration enforcement." Barreto Decl. ¶¶ 62, Pls. Br. at 43 (citing various declarations speculating that the Memorandum is likely to create fear of immigration enforcement). Given the strong privacy protections for census response data, any suggestion that the Secretary's compliance with the Memorandum will somehow facilitate immigration enforcement is flatly wrong. *See generally* 13 U.S.C. § 9 (providing that personal information collected by the Census Bureau cannot be used against respondents by any government agency or court); *id.* § 214 (setting forth penalty for wrongful disclosure of information).

b. Plaintiffs' Theory of Harm Is Limitless

Second, setting aside the role of independent actors, Plaintiffs' theory of harm proves too much.

Plaintiffs' core claim is that the Memorandum will depress aliens' participation in the census by allegedly "send[ing] a clear message that this community does not count and should be left out of the democratic process." Pls. Br. at 42; *see, e.g.*, Barreto Decl. ¶ 14; Choi Decl. ¶¶ 16-18 (Ex. 14); Torres Decl. ¶ 19 (Ex. 47). But the same line of reasoning could apply to almost any government action or statement that Plaintiffs find disagreeable. As Plaintiffs themselves acknowledged during the initial status conference with the Court, their theory would recognize harm sufficient for standing (and presumably for a preliminary injunction) based on a President's mere statements suggesting that he is exploring new legislation that would permit the Census Bureau to share data with immigration enforcement agencies. *See, e.g.*, Conference Tr. 34:13–35:6. That makes little sense.

The transmission of a general policy message—like the kind Plaintiffs claim the Memorandum sends—cannot suffice to show that irreparable harm is imminent or likely. *Winter*, 555 U.S. at 12, 20. The Supreme Court has repeatedly rejected efforts to conjure irreparable injury from a hypothetical series of events that could theoretically cause a plaintiff injury. *See, e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Rizzo v. Goode*, 423 U.S. 362, 372–73 (1976). Indeed, it has explicitly noted that allegations of "fear[]" of future harm must be assessed for reasonableness: "[i]t is the *reality* of the threat of" future harm that is relevant, "not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8 (emphasis added). Where, as here, fear is based on a series of conjectures and subjective misinterpretations—tethered not to something the

government has actually done, but to some different policy the government might (or might not) pursue in the future—such fear cannot form the basis for irreparable harm. *See id.* at 107. Merely harboring an objection to the President's expression of a policy preference falls far short of the standard for injunctive relief.

c. The Alleged Harm is at Odds with Existing Evidence

Third, and finally, Plaintiffs' claims that the Memorandum is likely to decrease response rates is simply inconsistent with empirical evidence. Plaintiffs go to great lengths to analogize the Memorandum to a citizenship question on a census questionnaire. *See, e.g.*, Pls. Br. at 42; Barreto Decl. ¶¶ 14, 18, 24, 28, 57, 68, 86. But, as noted above, a randomized control trial published by the Census Bureau after the Supreme Court issued its opinion in the citizenship question litigation found *no* statistically-significant depression of response rates for households that received a test questionnaire containing a citizenship question. *See* Abowd Decl. ¶ 13; *see also 2019 Census Test Report,* Census Bureau (Jan. 3, 2020), https://www2.census.gov/programs-surveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf (Census Test Report). As explained by Dr. Abowd, this test contained a sample of 480,000 housing units, and was "capable of detecting response differences as small as 0.5 percentage points." *See* Abowd Decl.¶ 13. And while some narrow subgroups did exhibit statistically-significant lower self-response rates, Census Test Report at x, the Census Bureau concluded that "[c]urrent plans for staffing for Nonresponse Followup would have sufficiently accounted for subgroup

differences seen in this test." *Id.* This result was contrary to the prediction of experts who previously testified during the citizenship-question litigation, and some of whose declarations Plaintiffs again submit nw. *See generally* Abowd Decl. ¶ 13; *see, e.g.*, Barreto Decl. ¶ 68. As Dr. Abowd reports, this finding illustrates the benefit of a "randomized controlled design," which properly isolates the independent variable (there, the citizenship question) and measures its effects. Abowd Decl. ¶ 13.

Plaintiffs cannot reasonably contend that the Memorandum would have a greater effect on response rates than did the citizenship question. Unlike a question on a census questionnaire, the Memorandum does not call for respondents to submit any information, and it changes nothing about the enumeration process. *See* 85 Fed. Reg. at 44,679 (directing the Secretary to make use of existing information). Indeed, neither Dr. Barreto nor any other declarant proffered by Plaintiffs identifies a rigorous survey or statistical study measuring whether this kind of internal Government action, which seeks nothing of respondents and has no connection to immigration enforcement, has any effect on response rates within immigrant communities. *See generally* Barreto Decl. ¶¶ 39-86. And nothing Plaintiffs submit purports to statistically measure the effect of the Memorandum itself on response rates. *See generally* Barreto Decl. ¶¶ 39-86; Thompson Decl. ¶¶ 21–23 (offering an opinion about the effect of the Memorandum without relying on a source of data).

Under these circumstances, Plaintiffs cannot be said to establish anything more than the abstract "possibility of irreparable injury." *Nken*, 556 U.S. at 434. But, as the Supreme Court has emphasized, the

"'possibility' standard is too lenient" a basis upon which to issue the drastic remedy of a preliminary injunction. *Winter*, 555 U.S. at 22. Given that irreparable harm "is the single most important prerequisite for the issuance of a preliminary injunction," *Faiveley Transport. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009), Plaintiffs' failure to establish anything more than the theoretical possibility of harm is sufficient basis to deny the injunction they seek.

B. The Remaining Factors Weigh Against an Injunction

On the other side of the ledger, the harm to the government and to the public interest from an injunction would be great, and immediate. *See Nken*, 556 U.S. at 435 (explaining that harm to opposing party and weighing the public interest "merge" when relief is sought against the government). In particular, an injunction would impede the Executive's historic discretion in conducting both the census and the apportionment, contrary to Congressional intent. *See generally Franklin*, 505 U.S. at 796-800. Plaintiffs discount these interests, arguing that the Government cannot have an interest in enforcing "an unconstitutional law," Pls. Br. at 51, but that argument only holds if Plaintiffs are correct on the merits of their argument—which, as explained above, they are not.

In any event, Plaintiffs' conception of the balance and hardship and public interest collapses those two parts of the traditional four-part injunction test into the very first prong: merits. As the Supreme Court has emphasized, however, that should not be done. *See Winter*, 555 U.S. at 32. The public interest

prong is a stand-alone requirement that must be met separately, and cannot be short- circuited at plaintiffs' whim. *Id.*

Plaintiffs vaguely suggest that enjoining the Memorandum would allegedly remedy "Defendants' misinformation." Pls. Br. 52. But the only misinformation Plaintiffs have identified in this case is the misinterpretation of the Memorandum by the various activists and news sources that their expert, Dr. Barreto, and their other declarants describe in their declarations. *See* Barreto Decl. ¶¶ 66-69 (Ex. 56); Choi Decl. ¶ 24-25 (Ex. 14); Seon Decl. ¶ 22 (Ex. 43); Torres Decl. ¶ 24 (Ex. 47). Plaintiffs have never identified one piece of "misinformation" that the Defendants disseminated about the Memorandum. Any attempt to remedy misinformation would therefore require an injunction against some other entity. The public interest may favor that injunction, but it does not favor an injunction against Defendants here.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss and dismiss these consolidated actions. In the event the Court declines to grant Defendants' motion to dismiss, Plaintiffs' motion for partial summary judgment or preliminary injunction should be denied.

Dated: New York, New York

August 19, 2020

Respectfully submitted,

ETHAN P. DAVIS
Acting Assistant Attorney General

AUDREY STRAUSS
Acting United States Attorney for
the Southern District of New York

DAVID MORRELL
Deputy Assistant Attorney General

ALEXANDER K. HAAS
Branch Director

DIANE KELLEHER
BRAD ROSENBERG
Assistant Branch Directors

/s/ Elliott M. Davis
DANIEL D. MAULER (VA Bar No. 73190)
ELLIOTT M. DAVIS (NY Reg. No. 4596755)
Trial Attorneys
Civil Division, Federal Programs Branch
U.S. Department of Justice
1100 L St. NW
Washington, DC 20005
Phone: (202) 353-5639
Fax: (202) 616-8470
E-mail: elliott.m.davis@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CV-5770 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS,

-v-

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS.

20-CV-5871 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS,

-v-

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS.

FILED: August 19, 2020

DECLARATION OF ALBERT E. FONTENOT, JR.

I, Albert E. Fontenot, Jr., make the following Declaration pursuant to 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I am the Associate Director for Decennial

Census Programs, in which capacity I serve as adviser to the director and deputy director on decennial programs. In this role, I provide counsel as to the scope, quality, management and methodology of the decennial programs; provide executive and professional leadership to the divisions and central offices of the Decennial Census Programs Directorate; and participate with other executives in the formulation and implementation of broad policies, which govern the diverse programs of the Census Bureau. I have served in this capacity since November 12, 2017.

2. The following statements are based on my personal knowledge or on information supplied to me in the course of my professional responsibilities. These statements are provided in support of the Defendants' opposition to the Plaintiffs' motion for partial summary judgment or in the alternative for a preliminary injunction.

3. Since March 2020, the Census Bureau has been required to make a number of adjustments to its plans for field data collection for the decennial census as a result of the COVID-19 pandemic, and in order to comply with the statutory deadline of December 31, 2020 to deliver the apportionment count.

4. A statutory deadline under 13 U.S.C. § 141(b) requires that the tabulation of total population by States as required for the apportionment of Representatives in Congress among the several States shall be completed within nine months after the official start of the census and reported by the Secretary to the President of the United States. That date is December 31, 2020.

5. To meet that deadline in light of the delays caused by the Covid-19 pandemic, the Census Bureau, (as reflected in the Census Bureau Director's August 3, 2020 Statement), has updated its operations plan. Specifically, the Census Bureau intends to improve the speed of the count without sacrificing completeness. As part of its revised plan, the Census Bureau will conduct additional training sessions to increase the number of enumerators in the field Additionally we will be providing monetary awards to existing enumerators in recognition of those who maximize hours worked, as well as retention bonuses for those enumerators who serve for multiple weeks. The Census Bureau will also keep phone and tablet computer devices for enumeration in use for the maximum time possible.

The Census Bureau will end field data collection by September 30, 2020. Self-response options will also close on that date to permit the commencement of data processing. Under the revised plan, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities. Once the Census Bureau has the data from self-response and field data collection in our secure systems, the Bureau plans to review the data for completeness and accuracy, streamline processing of the data, and prioritize apportionment counts to meet the statutory deadline.

6. Between the time field operations are completed and the statutory deadline, the Census Bureau must engage in post-data collection processing in order to produce the Census Unedited File (CUF), which will then be used to produce the apportionment

numbers to be delivered to the Secretary.

7. As of August 18, 2020, over 94 million households, 64 percent of all households in the Nation, have self responded to the 2020 Census. The initial Non-Response Followup field work has begun and combined with the self response numbers approximately 71 percent of all the households in the nation have been enumerated. Building on our successful and innovative internet response option, the dedicated women and men of the Census Bureau, including our temporary workforce deploying in communities across the country in recent and upcoming weeks, will work diligently to achieve an accurate count.

8. The Census Bureau has responded to the shortened calendar period for Non-Response Follow-Up (NRFU) operations by taking steps to increase and enhance the ability of its employees in the field to work as efficiently as possible, all in an effort to put in as many hours of work, spread across the total workforce, into field operations as would have been done under the original time frame. We have aimed to improve the speed of our count by continuing to maintain an optimal number of active field enumerators by conducting additional training sessions, providing awards to enumerators in recognition of those who maximize hours worked and retention awards to those who continue on staff for successive weeks. Additionally, we are keeping phone and tablet computer devices for enumeration in use for the maximum time possible.

9. As the Director stated on August 3, 2020, under the revised plan discussed above, the Census Bureau

intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities.

10. The Census Bureau will continue to protect and keep confidential respondents' private and personally-identifying information, as is required by law under Title 13.

11. The Census Bureau will continue to comply with the Census Bureau's 2018 Residence Criteria, *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525 (February 8, 2018), which, as in past decennial censuses, requires each person to be counted in their usual place of residence, as defined in the Residence Criteria.

12. The Presidential Memorandum issued on July 21, 2020, *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, has had no impact on the design of field operations for decennial census, or on the Census Bureau's commitment to count each person in their usual place of residence, as defined in the Residence Criteria.

Albert E Fontenot Digitally signed by Albert E Fontenot
Date: 2020.08.19 16:26:38 -04'00'

Albert E. Fontenot, Jr.
Associate Director
Decennial Census Programs
United States Department of Commerce
Bureau of the Census

August 3, 2020

BY ECF

The Honorable Jesse M. Furman
United States District Judge
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *State of New York v. Trump*, No. 20 Civ. 5770 (JMF)
New York Immigration Coalition v. Trump, No. 20 Civ. 5781 (JMF)

Dear Judge Furman:

This Office represents Defendants in the above-captioned matter. We write respectfully on behalf of all parties, to provide the parties' views on the issues set forth in the Court's July 28, 2020, order and to propose a briefing schedule in this matter. *See* ECF Nos. 24, 32. We summarize below the answers to the issues identified by the Court.

1) whether and to what extent the two cases should be consolidated (pursuant to Rule 42 of the Federal Rules of Civil Procedure) or otherwise coordinated, *see, e.g.*, 18- CV2921 (JMF), ECF No. 322 (Sept. 14, 2018) (formally consolidating 18-CV-2921 (JMF) and 18-CV-5025 (JMF));

The parties agree that 20 Civ. 5770 and 20 Civ. 5781 should be consolidated pursuant to Fed. R. Civ. P. 42(a)(2).

2) the status and relevance to these cases of *State of Alabama v. U.S. Department of Commerce*, 18-cv-00772 (RDP) (N.D. Ala.); *Common Cause v. Trump*, 20-CV-2023 (D.D.C.); *Haitian-Americans United, Inc. v. Trump*, 20-CV-11421 (D. Mass.); and *City of San Jose v. Trump*, 20-CV-5167 (N.D. Cal.), and whether or to what extent the Court should coordinate or communicate with the judges presiding over those cases;

Plaintiffs: Plaintiffs are aware of five lawsuits that have been filed to date that challenge the Presidential Memorandum at issue in this lawsuit (in addition to the two actions before this Court), and are aware from public filings that a sixth such challenge is likely forthcoming:

- *California v. Trump*, 20-CV-5169 (Judge Chen) (N.D. Cal. filed July 28, 2020). No scheduling order has yet been entered. The defendants have not filed notices of appearance in this action.
- *City of San Jose v. Trump*, 20-CV-5167 (Judge Koh) (N.D. Cal. filed July 27, 2020). No scheduling order has yet been entered. On July 29, the plaintiffs in *California v. Trump* filed a motion to relate that case to *City of San Jose v. Trump*. On July 31, the *City of San Jose* plaintiffs filed their assent to that request. The defendants have not yet responded to that motion on the docket or filed notices of appearance in this action.
- *Common Cause v. Trump*, 20-CV-2023 (Judge Cooper) (D.D.C. filed July 23,

2020). No scheduling order has yet been entered. The defendants have not filed notices of appearance in this action.

- *Haitian-Americans United, Inc. v. Trump*, 20-CV-11421 (Judge Woodlock) (D. Mass. filed July 27, 2020). No scheduling order has yet been entered. The defendants have not filed notices of appearance in this action.
- *Useche v. Trump*, 20-CV-2225 (Judge Xinis) (D. Md. filed July 31, 2020). No scheduling order has yet been entered. The defendants have not filed notices of appearance in this action.
- *La Unión del Pueblo Entero v. Ross*, 19-CV-2710 (Judge Xinis) (D. Md. filed Sept. 13, 2019). *LUPE v. Ross* is a challenge to Executive Order 13,880, *Collecting Information About Citizenship Status in Connection with the Decennial Census*, and Secretary Ross's directive to the Census Bureau to collect and produce Citizenship Voting Age Population (CVAP) information that states may use in redistricting. Am. Complaint ¶¶ 1-5, 88-117 (alleging claims for relief under the Administrative Procedure Act, the Fifth Amendment due process clause, and 42 U.S.C. § 1985). At a July 22, 2020 hearing on the defendants' motion to dismiss, the Court denied the motion as moot and without prejudice, granted the plaintiffs' request for leave to amend their complaint to challenge the Presidential

Memorandum, and directed the plaintiffs to file their Second Amended Complaint by August 12, 2020. *See* Order, 19-CV-2710, ECF No. 95 (D. Md. July 22, 2020).

These actions do not affect this Court's ability to adjudicate this case.[1]

2. In *State of Alabama v. U.S. Department of Commerce*, 18-CV-00772 (RDP) (N.D. Ala. filed May 21, 2018), plaintiffs the State of Alabama and Congressman Mo Brooks ("Alabama") sued the Commerce Department, the Secretary of Commerce, the Census Bureau, and the Director of the Census Bureau, challenging the *Final 2020 Census Residence Criteria and Residence Situations* (the "Residence Rule"), 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018), on constitutional and APA grounds. *See* First Am. Compl. for Declaratory Relief, 18-CV-772, ECF No. 112 (N.D. Ala. filed Sept. 10, 2019). The Residence Rule is used to "determine where people are counted during each decennial census." 83 Fed. Reg. at 5526. As relevant to Alabama's challenge, the Residence Rule requires that citizens of foreign countries living in the United States be counted "at the U.S. residence where they live and sleep most of the time," without regard for their immigration status. *Id.* at 5533 (Section C.3); *see also id.* at 5530. Three separate groups of intervenors have intervened as defendants in the

[1] Defendants are currently operating under instructions from the Attorney General to "remind courts of the utility of multiple lower court decisions on a contested legal issue." Memorandum from the Attorney General, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* 4 (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download.

Alabama action.[2]

On June 5, 2019, the district court denied the defendants' motion to dismiss. *Alabama v. U.S. Dep't of Commerce*, 396 F. Supp. 3d 1044 (N.D. Ala. 2019). The case is currently in discovery on jurisdictional issues. *See* ECF No. 147 (second amended scheduling order). Jurisdictional discovery is due to conclude by September 23, 2020, and dispositive motions are due by October 21, 2020.[3] *See id.*

On July 21, 2020, the defendants notified the district court of the Presidential Memorandum at issue in this case. ECF No. 152. The district court directed the parties to file simultaneous briefs by August 3, 2020 regarding "the effect, if any, that the President's June 21, 2020 Memorandum may have on the claims asserted in this case," and to respond to the other parties' initial filings by August 10, 2020. ECF

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[2] The "Martinez Intervenors" are individual voters and the nonprofit organization Chicanos Por La Causa. The "Local Government Intervenors" are five local governments. The "State and Other Intervenors" are 16 states, 9 cities and counties, and the United States Conference of Mayors. Of the 26 "State and Other Intervenors" in the *Alabama* action, 25 are among the 39 plaintiffs before this Court in *New York v. Trump*, 20-CV-5770.

[3] The Martinez Intervenors in the *Alabama* action have asserted a cross-claim arguing that "[i]f Defendants were to decide to exclude undocumented immigrants from the enumeration reported to Congress for the purpose of apportioning Representatives and electors to the Electoral College," it would violate Article I and Section 2 of the Fourteenth Amendment. *See* Martinez Intervenors' Cross-Claim Against Defendants ¶¶ 50, 54-58, 18-CV-772, ECF No. 119 (N.D. Ala. Oct. 1, 2019). None of the Plaintiffs in *NYIC v. Trump*, 20-CV-5781, are parties to the *Alabama* action; and none of the Plaintiffs in *New York v. Trump*, 20-CV-5770, joined the Martinez Intervenors' cross-claim in the *Alabama* action.

No. 153. As of the time this joint letter was finalized, the parties in the *Alabama* action had not filed these notices.

3. Plaintiffs do not currently believe any coordination with any of these other cases is necessary. No case has yet set a scheduling order to brief the merits of any challenge to the Presidential Memorandum at issue here. To the extent fact discovery becomes necessary in this litigation, Plaintiffs anticipate working with plaintiffs' counsel in the other cases to propose coordination procedures to minimize duplicative discovery and reduce the burden on Defendants, as the parties agreed to and the Court ordered in the citizenship question litigation. *See* 18-CV- 2921, ECF Nos. 221, 224. Plaintiffs do not oppose communication between this Court and the judges presiding over the other cases.

Defendants: Defendants believe that to a significant degree these cases cover largely the same issue, *i.e.*, the validity of the July 21, 2020, Presidential Memorandum ("PM"). Defendants encourage the Court to communicate and coordinate with the judges presiding over the other cases.

3) whether there is a date by which the issues in these cases need to be resolved and, if so, what that date is;

Plaintiffs: To redress Plaintiffs' apportionment harms, this dispute must be finally resolved by the end of 2020. Under 2 U.S.C. § 2a, the President must transmit to Congress a statement showing both (i) "the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population" and (ii) "the number of Representatives to which each State would be entitled" by "the first day,

or within one week thereafter, of the first regular session" of Congress, which will take place in the first few days of January 2021. *Id.* § 2a(a). Each State is then "entitled . . . to the number of Representatives shown in the statement" for the next Congress. *Id.* § 2a(b). The issues in this case thus must be resolved *at latest* before the President transmits his statement and affects the States' apportionment.

Given the near certainty of an appeal, this Court will likely have to issue a decision several months earlier. We believe a decision by early September 2020 would build in sufficient time for appellate review, based on the expedited appeal schedule that followed this Court's earlier ruling on defendants' attempt to add a citizenship question to the census. In that litigation, this Court issued its decision on January 15, 2019; the Supreme Court granted a writ of certiorari before judgment on February 15; the case was fully briefed and argued by April 23; and the Supreme Court issued its decision on June 27. We believe that the 98 days between this Court's prior ruling and oral argument could serve as a benchmark here for the amount of time it will take for any appeal in this litigation to be fully submitted and resolved on expedited appeal.

2. The harms that Plaintiffs are facing to the ongoing enumeration will also require expedited resolution. As Plaintiffs have alleged, Defendants' actions are already deterring participation in the ongoing decennial census and undermining the Census Bureau's efforts to count immigrants and their families. Those harms must be stopped as soon as possible, so that the Census Bureau has time to complete an accurate enumeration without the impediments created by defendants' actions.

"[W]ait[ing] until the census has been conducted to consider the issues presented here . . . would result in extreme—possibly irremediable—hardship" to the completion of the Enumeration. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999).

Unfortunately, Defendants' own actions have sharply limited the amount of time in which this Court can grant meaningful relief to redress these harms. Defendants chose to wait more than a year after the conclusion of the citizenship question litigation, and on the eve of the commencement of Non-Response Follow-Up operations, to issue the Memorandum. And although the Bureau had announced in April that it would conduct Non-Response Follow-Up (NRFU) operations through October 31, recent press reports indicate that the Bureau will now end NRFU by September 30. *See* Hansi Lo Wang, *Census Door Knocking Cut a Month Short Amid Pressure to Finish Count*, NPR (July 30, 2020), https://www.npr.org/2020/07/30/896656747/when-does-census-counting-end-bureau-sends-alarming-mixed-signals. In order to preserve some amount of time for NRFU operations to be conducted without the deterrent effect of Defendants' recent actions, including the Presidential Memorandum, Plaintiffs respectfully request a ruling from this Court by as early in September as possible.

Defendants: There is no extreme time urgency to deciding this matter. More specifically, there is no need to resolve this lawsuit before the submission of the enumeration numbers to the President. Unlike in the citizenship question cases, Plaintiffs are not challenging some procedure that will be used in the actual census, but an apportionment number that will

be chosen by the President after the census is complete. And their requested relief has nothing to do with any census procedures.

The July 21, 2020, PM at issue in this litigation asks the Secretary to send the President two options: (1) enumeration under the Residence Criteria, 83 Fed. Reg. 5525 (Feb. 8, 2018), and (2) enumeration excluding undocumented immigrants. The PM requested the second option to the "maximum extent feasible" and to "the extent practicable." The Census Bureau is still evaluating the usability of administrative records pertaining to citizenship status in connection with the decennial Census and formulating a methodology for potentially excluding undocumented immigrants. As stated in the *New York Immigration Coalition*, *et al.*'s Complaint in 20 Civ. 5781, the Government recently represented in other litigation that it currently "lack[s] . . . accurate estimates of the resident undocumented population" on a state-by-state basis. Therefore, it is far from clear the extent to which it will be feasible for the Secretary to report an enumeration excluding undocumented immigrants. In addition, if the Secretary reports a number excluding some undocumented immigrants and if the President chose that number, the effect on the number of representatives for any state is currently unknown and speculative. Further, there is no support for Plaintiffs' assertion that the PM will have any adverse effect on responses to the Census, which in any event, is nearly complete.

Indeed, the default is that census and apportionment cases are decided post- apportionment when census enumeration procedures are not at issue. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 79-91 (1992); *Dep't of Commerce v. Montana*, 503 U.S.

445-46 (1992); *Utah v. Evans*, 536 U.S. 452, 458 (2002); *Wisconsin v. City of New York*, 517 U.S. 1 (1996).

In the instant litigation, a decision would be optimal with sufficient time to reach the Supreme Court—and, if necessary, for relief to be effectuated—before the 2022 elections. Therefore, if the Court decided the case soon after the President sent the enumeration and apportionment to Congress in January 2021 (or later, if Congress responds to the Census Bureau's request for an extension to complete the 2020 Census), that should provide more than enough time for any relief the Court ordered to be effectuated. In the event the Court reversed any decision to exclude undocumented immigrants, the relief could simply involve apportionment based on enumeration under the Residence Criteria—the first option that the Secretary will have already reported to the President.

4) whether Plaintiffs anticipate moving for preliminary relief and, if so, when and on what grounds;

Plaintiffs intend to file a motion for partial summary judgment or, in the alternative, for preliminary injunctive relief on August 7. The motion will address plaintiffs' claims under Article I and Section 2 of the Fourteenth Amendment; the equal protection guarantee of the Fifth Amendment's due process clause; and the Census Act, potentially among other claims.

5) whether Defendants anticipate moving to dismiss one or both cases and, if so, on what grounds;

Defendants anticipate moving to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The bases for the motion may include lack of ripeness, standing, and final agency action; failure to state certain claims; and that a claim may not properly be brought against the President.

6) whether there are threshold issues — such as standing, ripeness, or (for claims under the Administrative Procedure Act) the existence of final agency action — that should be addressed and, if so, when and how they should be raised and addressed;

Plaintiffs: This Court's prior ruling on plaintiffs' standing in the earlier litigation involving the citizenship question, which the Supreme Court affirmed, resolves Plaintiffs' standing to bring this related challenge. In particular, exclusion of undocumented immigrants from the apportionment base will cause Plaintiffs or the jurisdictions in which Plaintiffs operate to lose seats in the House of Representatives. Such a loss "undoubtedly satisfies the injury-in- fact requirement of Article III standing." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 626 (S.D.N.Y. 2019) (quotation marks omitted); *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999) (holding that the plaintiffs demonstrated standing for purposes of summary judgment by submitting an expert affidavit showing that "it is a virtual certainty that Indiana will lose a seat . . . under the Department's Plan"). In addition, Defendants' announcement of

their decision to exclude undocumented immigrants from the apportionment count will deter immigrants and their families from responding to the decennial census. This Court previously found that an undercount due to similar deterrent effect will cause "a loss of funding from federal programs" that is "a classic form of Article III injury in fact." *Id.* at 608. And the nongovernmental plaintiffs here will suffer further injury from being forced "to divert organizational resources away from their core missions and towards combating the negative effects" of defendants' actions. *Id.* at 616.

All of these injuries are traceable to Defendants' recent actions and redressable by a favorable ruling from this Court. There is no question that the exclusion of undocumented immigrants from the apportionment base will *directly* affect the apportionment (which the Presidential Memorandum itself both acknowledges and intends, *see* 85 Fed. Reg. at 44,680). Moreover, this Court previously found—and the Supreme Court agreed—that the predictable effects of defendants' actions on the accuracy of the ongoing enumeration are sufficient to establish traceability. *New York*, 351 F. Supp. 3d at 619-25. And all of these injuries will plainly be redressed by a favorable ruling that requires defendants to do what the Constitution mandates: "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2.

2. This Court also need not address ripeness for Plaintiffs' claims under Article I and Section 2 of the Fourteenth Amendment because these constitutional claims are plainly ripe for review. The Presidential Memorandum makes clear that the decision to exclude undocumented immigrants from

the apportionment base has already been made: the Memorandum not only announces that policy but directs the Secretary of Commerce to help "carry out the policy" by providing a count of the number of undocumented immigrants in each State. *See Glavin v. Clinton*, 19 F. Supp. 2d 543, 547-48 (E.D. Va. 1998) ("Given the finality of the Department's decision to utilize statistical sampling as a means to determining the population for the purposes of congressional apportionment in Census 2000, it is clear that ripeness concerns have no application in the instant case.").

Although the President's statement to Congress will not be submitted until early January 2021, it is well-settled that ripeness can be satisfied if future injury is "certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quotation marks omitted). "[T]he threat of vote dilution" from an improper apportionment "is concrete and actual or imminent, not conjectural or hypothetical And it is certainly not necessary for this Court to wait until the census has been conducted to consider the issues presented here." *U.S. House of Representatives*, 525 U.S. at 332. No further factual or administrative development is necessary before this Court can resolve the purely legal issue of whether Defendants' decision and actions violate Article I and Section 2 of the Fourteenth Amendment. *See NRDC v. U.S. E.P.A.*, 859 F.2d 156, 168 (D.C. Cir. 1988) ("Given the purely legal character of the claim and the apparent certainty that it will arise in the future, we think the institutional concerns underlying ripeness militate in favor of immediate resolution.").

More importantly, "time is of the essence," and "[d]elayed review would cause hardship to Plaintiffs." *New York*, 351 F. Supp. 3d at 502. Defendants' actions are currently impairing the Census Bureau's ability to conduct an accurate enumeration, and Defendants' sudden and unilateral decision to shorten the time for NRFU operations by a month makes it even more pressing for this Court to rule. Time is also of the essence because waiting until Defendants actually alter the apportionment in January 2021 by excluding undocumented immigrants will only create confusion and disruption, particularly because Plaintiffs will begin the lengthy and complex redistricting process soon after the apportionment and cannot meaningfully engage in that process without knowing how many seats they will have in the House of Representatives. There is no reason to invite such chaos when Defendants' decision to exclude undocumented immigrants from the apportionment base is "certain to occur by a clearly determinable time in the near (if not immediate) future." *Chem. Waste Mgmt., Inc. v. EPA*, 869 F.2d 1526, 1534 (D.C. Cir. 1989). "[T]he hardship to the parties of withholding court consideration" thus weighs heavily in favor of deeming this dispute to be ripe. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148- 49 (1977).

3. To the extent the Court concludes that briefing is needed to address any ripeness or standing issues related to Plaintiffs' claims under Article I and Section 2 of the Fourteenth Amendment, the parties should address those issues simultaneously with the briefing of Plaintiffs' forthcoming motion for partial summary judgment and a preliminary injunction (as Plaintiffs propose in response to Question 8 below). Addressing these questions in separate, antecedent

briefing on a motion to dismiss would delay adjudication in a way that would severely prejudice Plaintiffs and the public.

Defendants: In Defendants' view, there are threshold issues that need to be addressed pertaining to standing, ripeness, and the existence of final agency action under the Administrative Procedure Act. As noted above, Defendants propose raising these issues in a motion dismiss and would also raise them in opposition to Plaintiffs' summary judgment and preliminary injunction motion.

7) what effect, if any, the record in *State of New York v. U.S. Department of Commerce*, 18-CV-2921 (JMF), should have on these cases, including but not limited to whether the record, either now or later and either in whole or in part, should be deemed to be part of the record in these cases (e.g., with respect to standing);

Plaintiffs: Plaintiffs believe the record in *State of New York v. U.S. Department of Commerce*, 18-CV-2921 (JMF), should be deemed to be part of the record in these cases. The factual record regarding the plaintiffs' injury in 18-CV-2921 largely or entirely resolves standing in these actions, to the extent Defendants raise it. The factual record regarding the decision to add a citizenship question to the census bears on Plaintiffs' allegations here that the decision to exclude undocumented immigrants from the apportionment count is connected to and motivated by the same factors as the decision to add a citizenship question. *New York* Am. Compl. ¶¶ 87- 107, 20-CV-5770, ECF No. 34; *NYIC* Compl. ¶¶ 10-11, 113-29, 135, 20-CV-5781, ECF No. 1.

And the factual record that the Court considered in 18-CV-2921 as part of its decision to impose sanctions on the defendants following entry of final judgment bears on the NYIC Plaintiffs' allegations here that Defendants' intent is to minimize Hispanic political power by excluding them from the census through any means available. *NYIC* Compl. ¶¶ 115-17, 20-CV-5781, ECF No. 1.

Courts routinely take judicial notice of the evidence in the record of a prior case between the same parties. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 157 & n.6 (1969) ("[W]e may properly take judicial notice of the record in that litigation between the same parties who are now before us.") (citing *Nat'l Fire Ins. Co. v. Thompson*, 281 U.S. 331, 336 (1930)). Doing so will facilitate the litigation of this time-sensitive matter and will cause no prejudice to Defendants, who vigorously litigated these factual issues through a bench trial less than two years ago. *Cf. Shuttlesworth*, 394 U.S. at 157 ("The petitioner here was one of the petitioners in the *Walker* case, in which, just two Terms ago, we had before us a record showing many of the 'surrounding relevant circumstances' of the Good Friday march.") (citing *Walker v. City of Birmingham*, 388 U.S. 307 (1967)).

During the parties' meet-and-confer for the preparation of this joint letter, Defendants took the position that the record from 18-CV-2921 should not be deemed part of the record in these cases because, according to Defendants, these cases are not related. The President's public remarks on multiple occasions show otherwise. On July 11, 2019, two weeks after the Supreme Court affirmed this Court's decision in 18-CV-2921, the President issued an Executive Order to

"ensure that accurate citizenship data is compiled in connection with the census," and announced at a Rose Garden press conference that the Executive Order showed he was not "backing down on our effort to determine the citizenship status of the United States population." *New York* Am. Compl. ¶¶ 94-97, 20-CV-5770, ECF No. 34; *see also* NYIC Compl. ¶¶ 121-22, 20-CV-5781,

ECF No. 1. And in issuing the Presidential Memorandum at issue here, the President stated: "Last summer in the Rose Garden, I told the American people that I would not back down in my effort to determine the citizenship status of the United States population. Today, I am following through on that commitment by directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census." Statement from the President Regarding Apportionment (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/; *see also New York* Am. Compl. ¶¶ 98, 106-07, 20-CV-5770, ECF No. 34; *NYIC* Compl. ¶ 11, 20-CV-5781, ECF No. 1.

Defendants: The record in *State of New York v. U.S. Department of Commerce*, 18-CV- 2921 (JMF), should not be deemed to be part of the record in the instant litigations. The record in *State of New York v. U.S. Department of Commerce*, 18-CV-2921 (JMF), a closed case that concerned the Secretary of Commerce's decision to add a citizenship question on the 2020 Census, should have no effect on this case. These two new lawsuits present challenges distinct from the issues that were raised and litigated in the closed case. In short, these new cases raise constitutional claims regarding the President's July

21, 2020, memorandum on how to conduct apportionment following the 2020 census—they do not concern the 2020 Census questionnaire or the procedures for conducting the 2020 Census. Accordingly, the new cases will require the Court to resolve different factual questions and legal issues.

The present litigations concern a different decision by a different decisionmaker for different stated reason than the citizenship-question case. The citizenship-question litigation concerned the Secretary of Commerce's March 2018 decision to add a citizenship question on the 2020 Census, and the litigation occurred before the 2020 Census commenced. It concerned how the citizenship-question would affect the accuracy of the enumeration. The Secretary was the only one with statutory authority to include a citizenship question on the census questionnaire. 13 U.S.C. § 141.

By contrast, this case concerns the President's July 2020 memorandum on how to use census data for apportionment, which was issued after the 2020 Census was already nearly two- thirds complete. The PM asks the Secretary to report two numbers: (1) the enumeration based on total population, and (2) the enumeration excluding undocumented individuals "to the extent practicable." The Census Bureau is conducting a complete enumeration of the total population and nothing in the PM alters that counting process. The President, not the Secretary of Commerce, is the only one with statutory authority to settle apportionment. *See Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992) (holding that "it is the President's personal transmittal of the report to Congress that settles the apportionment" and that "the President, not the Secretary [of Commerce], takes

the final action that affects the States").

Finally, any relief ordered in this case would be different than the relief ordered in the citizenship-question case. The Court's prior order prohibited the use of a citizenship question on the 2020 Census. Any relief ordered in the new cases would have nothing to do with a citizenship question. *Cf. LUPE v. Ross*, 19 Civ. 2710, 2019 WL 6035604, at *3 (D. Md. Nov. 13, 2019) (in context of finding citizenship case and case challenging Executive Order 13800 unrelated, stating: "Although Plaintiffs contend that the predicate events for these two cases are part of a larger conspiracy, this requires the Court to view the cases at a high level of generality. In actuality, this case would require the Court to evaluate a different administrative record, resolve different factual questions regarding the intent behind [the presidential and secretarial actions at issue], and eventually, if Plaintiffs succeed, order different relief.").

8) (a) whether any of Plaintiffs' claims can be litigated on the basis of stipulated facts and/or without discovery (or with minimal discovery) and without the production of an Administrative Record; (b) if so, whether such claims should be handled on a separate, faster track from claims that would require either or both the production of an Administrative Record or discovery; and (c) if so, the most efficient means to present those claims for resolution by the Court (e.g., a motion for preliminary injunction, a motion for summary judgment, or a bench trial on stipulated facts);

Plaintiffs: Plaintiffs' claims under Article I and Section 2 of the Fourteenth Amendment and the Census Act, and potentially other claims, can be resolved on summary judgment without discovery and without production of an Administrative Record. Discovery and an Administrative Record likewise are not necessary to resolve Plaintiffs' alternative request for preliminary injunctive relief based on their intentional discrimination claims under the equal protection guarantee of the Fifth Amendment's due process clause. Plaintiffs propose that the most efficient means to present those claims for resolution by the Court is on their forthcoming motion for partial summary judgment or, in the alternative, for preliminary injunction.

Given the exigencies presented by this case, Plaintiffs propose the following briefing schedule for this motion: Plaintiffs shall file their motion by August 7, 2020. Defendants shall file any opposition by August 17, 2020. Plaintiffs shall file their reply by August 24, 2020.

Plaintiffs understand that Defendants intend to move to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Plaintiffs propose that Defendants' motion shall be briefed on the same schedule as Plaintiffs' motion for summary judgment or preliminary injunction—that is, Defendants shall file any motion to dismiss by August 7, 2020; Plaintiffs shall file their opposition by August 17, 2020; and Defendants shall file their reply by August 24, 2020.

Defendants: Defendants believe that this case should be dismissed on jurisdictional grounds. There is currently no administrative record because there is no final agency action and this case does not involve

the Administrative Procedure Act. The only action that has been taken was action by the President directing the Secretary of Commerce concerning information that should be provided to the President in a report due at the end of this year. If the Court were to decide the case after apportionment, there will be no administrative record because the President is not an agency under the Administrative Procedure Act. Cross-motions for summary judgment could be filed soon after apportionment is reported to Congress.

Defendants propose the following briefing schedule:

- Plaintiffs' motion: August 7, 2020
- Defendant's opposition/motion to dismiss: August 28, 2020
- Plaintiffs' reply: September 4, 2020
- Defendants' reply: September 11, 2020

For the reasons described in response to question 3, Defendants believe that this schedule is reasonable. Specifically, given that the arguments made in each parties' affirmative briefs will likely be similar to the arguments made in their responsive briefs Defendants' proposal for staggered briefing with a total of 4 briefs is more efficient than Plaintiffs' proposal of 6 briefs and would help the Court and the parties to avoid a significant amount of repetitive and redundant briefing.

Further, Defendants are unable, as Plaintiffs propose, to file a motion to dismiss by Friday. Plaintiffs' proposal is particularly unreasonable given that Plaintiffs just amended their complaint this morning. In addition, Defendants think it is illogical to afford only 10 days for responsive briefs, while

giving 7 days for reply briefs, as Plaintiffs propose.

9) to the extent that discovery is appropriate for any of Plaintiffs' claims, the nature and extent of such discovery — including whether there is any anticipated need for motion practice (e.g., with respect to depositions of high-ranking officials) — and how such discovery should be handled in light of the COVID-19 pandemic

Plaintiffs: Because Plaintiffs believe these cases can be resolved on their forthcoming motion for partial summary judgment, Plaintiffs believe a discovery schedule is premature at this point. To the extent the Court does not resolve these matters on Plaintiffs' forthcoming motion, discovery will likely be necessary on (at least) Plaintiffs' intentional discrimination claims, and Plaintiffs propose that the parties confer and present a discovery schedule to the Court at that point if necessary. With respect to depositions of high-ranking officials, because the operative test requires showing either that "the official has unique first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means," *Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013), Plaintiffs believe this question should be addressed following additional fact development if necessary.

Defendants: While Defendants do not agree that any discovery will be necessary, the parties agree that the issue of what, if any, discovery will be needed should be deferred until after the Court decides the parties' motions.

10) any other information that the parties believe may assist the Court in advancing the case to resolution, including, but not limited to, a description of any dispositive issue or novel issue raised by the case; and

Plaintiffs: Plaintiffs bring the Court's attention to the Three-Judge Court Act, which provides that "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). Plaintiffs do not believe § 2284(a) applies—and these cases are properly adjudicated by a single district judge—because these cases do not present challenges to any apportionment of congressional districts; instead, Plaintiffs challenge the unlawful decision to exclude undocumented immigrants from the population count to be used for the apportionment of Representatives in Congress. *See id.*; *see also Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 577-78 (D.D.C. 1980) (three-judge court) ("[W]e have concluded that the issue is most likely one for a single district judge," because "[h]ere the challenge is to census practices which will produce data on which the apportionment of House of Representative members to states will be based, not to any state action reapportioning congressional districts.").

The Second Circuit has held that 28 U.S.C. § 2284 is jurisdictional, and that "[w]hen a single district court judge improperly adjudicates a case required to be heard by a three-judge court, a court of appeals normally lacks jurisdiction over the merits and is limited to deciding whether the district court

erred by not referring the case to a three-judge court." *Karlson v. Paterson*, 542 F.3d 281, 286-87 (2d Cir. 2008). Plaintiffs therefore raise this question for the Court's attention in the event the Court would like further briefing on this question now.

Defendants: It would be novel for a Court to decide an apportionment case before the Census has been completed or before apportionment has occurred. In establishing a briefing schedule, Defendants respectfully suggest that the Court should also consider that Defendants will need to coordinate the review of their papers through different Government components, and should allow sufficient time to permit that process to occur.

Plaintiffs allege constitutional violations relating to the apportionment of congressional districts. *See* NYS Am. Compl. ¶ 4 (asserting that the PM is "open disregard" of a "constitutional mandate to base apportionment on the 'whole number of persons in each State'"); *see also id.* ¶¶ 56-80 (discussing the constitutional apportionment requirement for congressional districts). Accordingly, to the extent that this case proceeds beyond the jurisdictional and justiciability questions to the merits, Defendants anticipate requesting the convening of a the three-judge court pursuant to 28 U.S.C. § 2284. *Id.* (providing that that a three-judge court "*shall* be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts.") (emphasis added); *see Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) (recognizing that a "three-judge court is not required where the district court lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts"). Section 2284(b)(3) also prohibits a

single judge from alone deciding a preliminary injunction motion, which could affect the timing of the schedule proposed below, in the event Defendants' threshold jurisdictional arguments are rejected.

Respectfully submitted,

AUDREY STRAUSS
Acting United States Attorney for the
Southern District of New York

By: /s/ Allison M. Rovner
JEFFREY OESTERICHER
ALLISON M. ROVNER
Assistant United States Attorneys
86 Chambers Street, Third Floor
New York, New York 10007
Tel.: (212) 637-2695/2691
Email: Jeffrey.Oestericher@usdoj.gov
Allison.Rovner@usdoj.gov

cc: Counsel of Record (by ECF)